

Written Testimony of

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before the

The Senate Committee on Homeland Security and Government Affairs
Subcommittee on Regulatory Affairs and Federal Management

on

“Examining the Use of Regulatory Guidance, Part II”

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Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Amit Narang, Regulatory Policy Advocate at Public Citizen. Public Citizen is a national public interest organization with more than 400,000 members and supporters. For 45 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 75 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and today I speak only on behalf of Public Citizen.

Over the last century, and up to the present, regulations have made our country stronger, better, safer, cleaner, healthier and more fair and just. Regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, saving hundreds of thousands of lives; protected children's brain development by phasing out leaded gasoline; saved consumers billions by facilitating price-lowering generic competition for pharmaceuticals; reduced toxic emissions into the air and water; empowered disabled persons by giving them improved access to public facilities and workplace opportunities; guaranteed a minimum wage, ended child labor and established limits on the length of the work week; saved the lives of thousands of workers every year; protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques; ensured financial system stability (at least when appropriate rules were in place and enforced); made toys safer; saved tens of thousands of lives by making our cars safer; and much, much more.

Guidance documents have played an essential role in ensuring that Americans receive the benefits of these and other regulatory protections. As discussed more fully later in this testimony, agencies have relied on guidance documents to supplement critical public protections in a wide variety of areas by clarifying the technical details of regulations and their applications to particular situations. It is thus important to maintain the efficient and effective use of guidance documents as an essential tool in helping agencies protect the public.

The first section of this testimony gives an overview of the variety of agency actions that come under the umbrella term "guidance documents," points out the many ways in which guidance documents have benefitted the public and particularly regulated entities seeking clarity in areas of regulatory uncertainty, and disputes the notion that agencies are using guidance documents to circumvent the rulemaking process by referencing empirical evidence that tested and determined those allegations to be unfounded. The second section of the

testimony examines attempts to align the guidance process more closely with the notice and comment rulemaking process and finds that such reforms would harm the public by removing the flexibility and efficiency of the guidance process and imposing the delays and inefficiencies of the notice and comment rulemaking process onto guidance documents. This section relies on the findings of a new and ground-breaking report by Public Citizen that studied tens of thousands of rulemakings over the past twenty years and concluded that delays in the rulemaking process are significant and tied to accumulating procedural and analytical requirements imposed by Congress. The delays and inefficiencies are most acute for “economically significant” rules that provide the most benefits in terms of protecting the public. Thus, the report’s empirical findings confirm the many and familiar anecdotes of public health and safety, environmental, and financial reform rules that are taking far too long to complete.

I. What Are Guidance Documents?

The term “guidance documents” does not appear anywhere in the Administrative Procedure Act (APA) but has generally come to be understood as encompassing a wide variety of agency actions that are not considered to be binding rules which typically undergo notice and public comment and abide by the requirements of the APA. Examples of such actions include general agency interpretations of existing legislative rules, statements outlining how an agency intends to regulate an evolving policy area, training manuals written for internal agency staff, compliance guides directed to the general public, advisory opinions tailored to individual case facts, and memoranda from agency leaders providing direction to agency staff members. Thus, agencies use guidance documents not just to manage internal operations but also to communicate essential information to outside parties.

In certain circumstances, agencies do have the discretion to implement congressional mandates or clarify ambiguities in rulemakings through the use of guidance documents. In other circumstances, agencies are only authorized to implement congressional mandates through use of notice and comment rulemaking. The distinction between guidance documents and notice and comment rules is cemented in the APA which explicitly exempts interpretive rules, general statements of policy, and other agency actions that comprise guidance documents.¹

When agencies have the authority to do so, agencies may opt to issue guidance documents rather than notice and comment rules because doing so allows agencies to communicate its views on agency interpretations and policies to both regulated entities and the public in a significantly more efficient and expeditious manner than under notice and comment rulemaking.² Thus, guidance documents allow agencies to avoid devoting scarce time and resources to unnecessary rulemaking. On the other hand, guidance documents are not legally binding on the public which then restricts enforcement of potential non-compliance with

¹ 5 U.S.C. § 553.

² Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 Mo. L. Rev. 695 (2007).

guidance documents.³ Therefore, agencies must weigh the efficiency advantages that are inherent in guidance documents against the lack of legally binding effect when deciding to adopt guidance documents as opposed to notice and comment rules.

A. Guidance Documents Benefit the Public

The enormous variety of guidance documents across agencies makes it difficult to encapsulate the impacts and effects of guidance documents in a broad manner without significant nuance and context. Yet, there is no doubt that guidance documents provide Americans with enormous benefits similar to public health and safety regulations that undergo notice and comment. Below is a small and non-exhaustive sampling of guidance documents from different agencies that make clear how vital guidance documents are to protecting the public:

- **Opioid and Infectious Disease Guidance:** The Centers for Disease Control (CDC) recently issued guidance directing physicians to limit the prescription of opioid pain medication in an effort to combat the serious and growing epidemic of addiction to opioid pain medication that has resulted in fatal overdoses involving pain medication and illegal hard drugs in many parts of the country.⁴ The CDC has also recently issued Zika virus guidance that clarifies the dangerous health impacts of the Zika virus, particularly for pregnant women, and provides guidance for how to avoid contracting the virus.⁵ The CDC had issued similar guidance for the Ebola virus last year.
- **Lead Guidance:** The Environmental Protection Agency (EPA) has issued numerous guidance documents related to the prevention of lead poisoning among the public and particularly children.⁶ These include guidance to homeowners about the dangers of lead in paint and the options for lead abatement and guidance to real estate developers on how to conduct renovations in a safe manner to avoid lead poisoning as well as information on the presence of lead that should be disclosed to prospective homebuyers. EPA has also issued important guidance on the harmful presence of lead in drinking water including information on protecting schools and child care facilities from lead contamination as well as simple and clear fact sheets on the EPA's revisions to its regulations controlling lead in water.
- **Food Safety Guidance:** the Food and Drug Administration (FDA) has used guidance documents extensively to ensure the safety of foods sold in the U.S. and prevent tainted food outbreaks.⁷ Specifically, the FDA has provided clarity on what does and does not constitute "adulterated" foods and how to produce and transport food in a

³ Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-Should Federal Agencies Use Them To Bind The Public?*, 41 DUKE L.J. 1311, 13-14 (1992).

⁴ <http://www.cdc.gov/drugoverdose/prescribing/guideline.html>

⁵ <http://www.cdc.gov/zika/pdfs/clinicianppt.pdf>

⁶ <https://www.epa.gov/lead/lead-policy-and-guidance>

⁷ <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/>

safe manner that avoids contamination. Examples of such guidance include the prevention of salmonella in eggs which leads to food poisoning and best manufacturing practices for infant formula to ensure its safety and quality.⁸

- **Airline Safety:** The Federal Aviation Administration (FAA) has used guidance documents to ensure both the safety of airplanes by clarifying manufacturing and operational requirements as well as the safety of passengers by prohibiting passengers from bringing dangerous items onto airplanes.⁹
- **Oil and Pipeline Safety Guidance:** The Federal Railroad Administration (FRA) and the Pipeline Hazardous Materials and Safety Administration (PHMSA) jointly issued safety alerts in 2014 warning of the dangers of transporting volatile crude oil by rail and clarifying the need for companies transporting crude oil by rail to notify local authorities when crude oil trains were passing through their jurisdictions and the nature of the crude oil cargo being transported.¹⁰ These actions were taken amidst ongoing crude oil train derailments and explosions and came well before the finalization of regulations that imposed new oil train safety standards.
- **Wage and Hour Guidance:** the Department of Labor (DOL) provides guidance for employees regarding their rights under various labor laws and employers regarding their responsibilities under the law. This guidance is specific to industry sectors and includes guidance on prohibited employment for children and employee rights and benefits under the Family Medical Leave Act.¹¹
- **Sexual Assault Guidance:** The Department of Education's Office of Civil Rights (OCR) has issued guidance documents to address the growing problem of sexual harassment and assault on college campuses.¹² Title IX of the Education Amendments of 1972 empowers OCR to prohibit sex discrimination in federally funded educational institutions. OCR has routinely issued technical clarification and guidance to provide educational institutions with clarity of their obligations to students under title IX. Those include "equitable" proceedings with respect to allegations of sexual harassment or assault and findings under a clear preponderance of the evidence standard.

Agencies have also relied on guidance documents to protect the right of minorities and other vulnerable populations that have historically been subject to discrimination. The following are examples of guidance documents that have promoted racial, gender, and sexual orientation equality:

⁸ <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm384451.htm>

⁹ https://www.faa.gov/regulations_policies/

¹⁰ <https://www.transportation.gov/briefing-room/emergency-order>

¹¹ <https://www.dol.gov/whd/fact-sheets-index.htm>

¹² <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

- **Employment Discrimination Guidance:** the Equal Employment Opportunity Commission (EEOC) issues only guidance interpreting title VII of the Civil Rights Act of 1964 because it is barred by Congress from issuing substantive regulations which implement title VII.¹³ Thus, guidance documents are crucial to the EEOC’s mission of preventing discrimination in hiring practices and in the workplace.¹⁴
- **Disability Discrimination Guidance:** The Department of Justice (DOJ) has issued guidance related to the Americans with Disabilities Act (ADA) in order to clarify the rights of persons with disabilities and to prevent discrimination against such persons based on their disabilities. In 2010, DOJ issued comprehensive guidance that provided standards for state and local governments to ensure disabled access to public facilities, such as wheelchair access.¹⁵
- **Sexual Orientation Discrimination Guidance:** A number of agencies, including the EEOC, the Department of Education (DOE), and the Department of Housing and Urban Development, issue guidance to prevent discrimination in education, housing, and employment based on sexual orientation. Most recently, the DOJ and DOE jointly issued guidance under title IX of the Education Amendments of 1972¹⁶ requesting that public education institutions, including higher education institutions, allow transgendered students to use restroom facilities of their preference in order to protect both the personal safety and the civil rights of transgendered students.¹⁷ DOE has also released guidance that aids educational institutions in combatting bullying on the basis of sexual orientation.¹⁸

B. Guidance Documents Benefit Business

One of the primary purposes of guidance documents is to address regulatory uncertainty among businesses as to an agency’s interpretation and application of a specific law or regulation. Often times, businesses explicitly request such guidance and rely on an agency’s ability to quickly and fully provide such guidance. Within this category, there are certain guidance documents that are issued exclusively for the benefit of businesses and other regulated entities. Any “one-size-fits-all” changes to the guidance document process will make it harder for agencies to issue the following types of guidance documents that are designed to benefit business and industry stakeholders:

- **No Action Letters:** Many agencies use No Action Letters (NAL) to clarify for businesses whether a particular activity violates an agency’s regulation. In other words, these letters provide a “safe harbor” for businesses by ensuring that businesses

¹³ 42 USC § 2000e-12

¹⁴ https://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm

¹⁵ <https://www.ada.gov/regs2010/2010ADASTandards/Guidance2010ADASTandards.htm>

¹⁶ 20 U.S.C. §§ 1681–1688 (1972).

¹⁷ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

¹⁸ <http://www.ed.gov/news/press-releases/bullying-students-disabilities-addressed-guidance-america%E2%80%99s-schools>

will not be punished when engaging in an activity that could potentially run afoul of a regulation. The Securities and Exchange Commission (SEC) issues many NALs and is the prototypical example. NALs are usually directly requested by businesses that have a strong interest in agencies responding to their requests on an expedited basis. Courts have held that SEC NALs are essentially guidance documents that are exempt from notice and comment requirements.¹⁹ While NALs are directed at individual parties or businesses, the SEC and other agencies make the NALs publicly available on their website and thus NALs have the effect of encouraging other businesses to take advantage of the “safe harbor” to engage in the same activity. In this way, NALs are used to set broad policy without notice and comment. Recently, the Consumer Financial Protection Bureau (CFPB) instituted a NAL process in order to allow innovative and consumer-friendly financial products to be marketed without the possibility of an adverse CFPB enforcement action.²⁰ CFPB decided that NALs would not be subject to notice and comment because that would “unnecessarily discourage NAL applications and delay the NAL process.”²¹

- **Small Business Compliance Guides:** Congress has required agencies to issue guidance to reduce compliance costs for businesses, and small businesses in particular.²² Agencies routinely issue “compliance guides” when finalizing a regulation in order to provide regulated parties with a clear and easy to understand manual for how to comply with the new regulation. While these guides have proven helpful for businesses, there is a lack of awareness that such compliance guides exist in the first place due to a lack of agency resources to promote awareness of compliance guides.

C. Guidance Documents Are Not Being Abused

Allegations of agencies using guidance documents to flout rulemaking are soundly rejected by the available empirical evidence. The leading study is a 2010 study by Connor Raso in the *Yale Law Journal*²³ examining whether federal agencies improperly issue guidance documents instead of legally binding notice and comment rules on a widespread basis. Raso tested this by identifying situations where agencies would in theory have a strong incentive to issue guidance rather than notice and comment rules such as at the end of presidential terms when agencies do not have enough time to complete notice and comment rulemaking or whether agencies issued more guidance documents under divided government in order to avoid congressional scrutiny. The study found no evidence that suggests agencies use guidance documents strategically to make important policy decisions outside the notice and comment process.

¹⁹ *N.Y.C. Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 13-14 (2d Cir. 1995).

²⁰ http://files.consumerfinance.gov/f/201602_cfpb_no-action-letter-policy.pdf

²¹ *Id.* at 14.

²² Small Business Regulatory Enforcement Fairness Act of 1996 § 212.

²³ Connor Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 *Yale L.J.* 782 (2010).

II. The Dangers of Guidance Document Reforms

While the available empirical evidence demonstrates that there is no abuse of guidance documents in order to evade the notice and comment rulemaking process, it is impossible to ignore the strong incentive agencies have to avoid what has become an increasingly inefficient and dysfunctional rulemaking process across regulatory sectors and at virtually every agency. If the Committee believes that agencies should be taking action through notice and comment rulemaking rather than through guidance documents, the solution is to make the notice comment process more efficient and streamlined rather than forcing guidance documents into the notice and comment framework reserved for rulemaking. Turning guidance documents essentially into rules subject to notice and comment as well as other procedural requirements will do nothing to cure the delays and inefficiencies inherent in the current regulatory process. It will only expand those delays to a more agency actions that are designed to address regulatory uncertainty in an expedited manner.

A. Rulemaking Delays Are Widespread and Getting Worse

There are certainly no dearth of examples and anecdotes showing how long it takes for federal agencies to issue new rules, particularly those rules that provide the biggest benefits to the public in term of health, safety, and financial security. The anecdotes touch virtually every regulatory sector and every agency. Recent examples of long-delayed rules that failed to protect Americans quickly enough include new oil train safety standards, new safety standards for blowout preventers on offshore oil rigs to prevent the next BP Gulf Oil Spill, major new food safety regulations that overhaul our food safety system to prevent rather than just respond to tainted food outbreaks, Wall Street reforms that have yet to be finalized almost 8 years after the financial crash, new pipeline safety standards to prevent pipeline leaks and spills, new energy efficiency standards that save consumers money, new workplace safety protections against known carcinogens like silica dust, and new measures to put money back in the pockets of Americans like the fiduciary rule and the overtime rule. Yet, there has been a notable lack of empirical analysis to identify both the length of these delays and the extent of the delays across different agencies. This week, Public Citizen unveiled a ground-breaking report aimed at filling this void.

The report, entitled *Unsafe Delays*²⁴ and attached at the end of this testimony, examines regulatory delays by collecting and analyzing one of the most comprehensive data sets of rulemaking actions to date. Our report gathered data on all rules listed in the Unified Agenda over the last twenty years, from the first Unified Agenda available electronically in 1995 to the most recent Unified Agenda published last month. In total, we studied a total of 24,311 rulemakings, of which 18,146 were actually completed. The picture of delay that emerges from the report is troubling and serves as an important baseline when considering proposals to turn the process for issuing guidance documents into one that has traditionally been reserved exclusively for rulemaking.

²⁴ <http://www.citizen.org/unsafedelaysreport>

Overall, we found that the rules that are most important to protecting the environment as well as the public's health, safety, and financial security were also the rules that took the longest to finalize and encountered the most delays in the regulatory process. On the other hand, routine or technical rules that were not considered "significant," which comprised the clear majority of all rulemakings, encountered few delays and were usually finalized in a fairly efficient manner. In other words, the "economically significant" rules that were subject to the most procedural requirements in the rulemaking process were also the rules with the greatest delays.

It may not be surprising that rules which must go through more steps in the rulemaking process will take longer, but what is striking and worrisome is the extent of the delay we found. Overall, the average length of rulemakings for all economically significant rules is 2.4 years, 41 percent longer than the overall age for all rules (1.7) years. Economically Significant rules that required a Regulatory Flexibility Analysis (RFA) took on average 2.5 years to complete. However, Economically Significant rules that began with an Advanced Notice of Proposed Rulemaking (ANPRM) took on average 4.4 years to complete, almost twice as long as Economically Significant rules without ANPRMs. Finally, Economically Significant rules that included both ANPRMs and RFA analyses took almost five years to complete on average. Hence, the inclusion of major additional procedural requirements leads to substantial additional delay in the rulemaking process.

The report also found that the agencies charged with protecting the health and well-being of the public and our environment are the agencies with the greatest rulemaking delays. For example the DOL takes 5.4 years on average to complete Economically Significant rules and a whopping 9.1 years if those Economically Significant rules include a RFA analysis. The sub-agency within DOL charged with protecting worker safety, the Occupational Safety and Health Administration (OSHA), experienced the worst delays with Economically Significant rulemakings taking an astounding 12.5 years on average and 15 years if a RFA analysis was required.

Other agencies that took the longest to complete Economically Significant rules on average were the Department of Energy (5 years), The Environmental Protection Agency (3.8 years), and the Department of Homeland Security (3.4 years). We also found that important sub-agencies within larger agencies are more prone to substantial rulemaking delays for Economically Significant rules. For example, two EPA sub-agencies, the office of Solid Waste and Emergency response and the Water office, both take longer than 5 years on average to complete Economically Significant rulemakings. Other sub-agencies with noteworthy delays for Economically Significant rules include the DHS Transportation Security Administration (5.7 years), the USDA Food and Nutrition Service (5.4 years), the DOE Energy Efficiency and Renewable Energy (5.1 years), DOL's Employee Benefits Security Administration (4.4 years), and HHS Food and Drug Administration (3.5 years).

The clear takeaway from our comprehensive empirical research is that many agencies are simply unable to complete Economically Significant rulemakings over the course of one presidential term. Unfortunately, the data in our report also shows that the trend is going in

the wrong direction with increasing rather than decreasing delays. We found that the George W. Bush and Obama Administrations experienced similar rulemaking lengths for their first five years. Beginning in the sixth year of the Obama Administration, completed Economically Significant rulemakings became substantially longer than in the corresponding year in the Bush Administration. Over the last three years, the average length of rulemakings has increased steadily from 3.2 years in 2014 to 3.4 years in 2015 and now 3.8 years this year. In short, the rulemaking delays have reached new heights over the last few years. The data for other types of rules also reflects an increase in rulemaking lengths over the last few years. It has become clear that our current problems with regulatory delay are getting worse.

B. Guidance Document Reforms Will Lead To More Delays

The report's findings are directly relevant to proposals which seek to reform the guidance document process to not only include notice and comment but also other procedural requirements that align guidance documents more closely with economically significant rules. For example, the Regulatory Accountability Act (RAA)²⁵ creates a "one-size-fits-all" approach for "major" guidance documents²⁶ which would be a newly created category of guidance documents modeled after the Bush Executive Order²⁷ in 2007 which itself created a "significant" guidance category for the first time before it was repealed by the Obama Administration. The RAA would require agencies to conduct a full-blown cost-benefit analysis for major guidance and subject this guidance to OIRA review, even for independent agencies whose rules are currently not reviewed by OIRA. The now-repealed Bush EO went further by defining "significant" guidance documents in a way that is virtually indistinguishable from Economically Significant rules. The EO then required notice and comment as well as OIRA review for all "significant" guidance documents.

Our study indicates that proposals to make the process for adopting guidance documents much more similar to the process for adopting Economically Significant rules will surely result in a substantial increase in delays when issuing guidance documents. These proposals are unwise and should not be adopted.

III. Conclusion: Strengthening the System of Regulatory Protections to Strengthen America

There is much to celebrate in our nation's system of regulatory protections. It has tamed marketplace abuses and advanced the values we hold most dear: freedom, safety, security, justice, competition and sustainability. Guidance documents have played an important role in securing these benefits for the public.

Proposals to reform guidance documents threaten to undermine the progress we have made. The clear effect of such reforms would be to add even more delays to a regulatory process that is plagued by inefficiency and dysfunction. Congress should be looking for ways the

²⁵ Regulatory Accountability Act of 2015, S. 2006 (2015).

²⁶ Regulatory Accountability Act of 2015, S. 2006 § 5 (2015).

²⁷ Exec. Order No. 13, 422, 3 C.F.R. 191 (2007).

build upon the successes of our regulatory system, not seeking to weaken the system by introducing more delays.



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Unsafe Delays

An Empirical Analysis Shows That Federal Rulemakings
To Protect the Public Are Taking Longer Than Ever

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About Public Citizen

Public Citizen is a national non-profit organization with more than 400,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, worker safety, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.



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Introduction

When Congress passes a law, it often delegates authority to federal agencies to write rules to carry out the law's intent. For instance, the Occupational Safety and Health Act of 1970 stipulated a purpose "to assure safe and healthful working conditions for working men and women" in part by "authorizing the enforcement of the standards developed under the Act."²⁸

The law established the Occupational Safety and Health Administration (OSHA) and delegated to OSHA the responsibility to create standards (also known as rules or regulations) to enforce the law. OSHA has subsequently created hundreds of rules to address specific risks to workers. According to a 2016 AFL-CIO report, more than 532,000 lives have been saved by OSHA's work since the 1970 passage of the Occupational Safety and health Act.²⁹

The federal government has taken several steps over the past four decades intended to ensure that the public is alerted to rulemakings early in the process. An executive order issued by President Jimmy Carter in 1978 required agencies to publish agendas at least twice a year outlining regulations under development or review.³⁰ Since 1983, the government has published a semiannual "Unified Agenda" of federal regulatory and deregulatory actions that compiles individual agencies' ongoing and recently completed rulemakings.³¹ Unified Agendas are available online dating back to 1995.³²

As the Unified Agendas have increased transparency into agencies' intended rulemakings, the time to actually *complete* the rules has grown longer and longer. For instance, in OSHA's early years, it completed numerous important lifesaving rules in less than a year.³³ In a dramatic reversal, since

²⁸ The Occupational Safety and Health Act, 29 U.S.C. § 651(2)(b) (1970).

²⁹ AFL-CIO, DEATH ON THE JOB: A NATIONAL AND STATE-BY-STATE PROFILE OF WORKER SAFETY AND HEALTH IN THE UNITED STATES (April 2016), <http://bit.ly/28SjVKQ>.

³⁰ Executive Order 12044 (March 23, 1978), <http://bit.ly/1Xd59EM>.

³¹ CURTIS COPELAND, CONGRESSIONAL RESEARCH SERVICE, THE UNIFIED AGENDA: IMPLICATIONS FOR RULEMAKING TRANSPARENCY AND PARTICIPATION (July 20, 2009), at 14, <http://bit.ly/20LQxK1>. See, <http://www.reginfo.gov/public/>. Note: In 2012, only one Unified Agenda was published.

³² See, <http://www.reginfo.gov/public/>. Note: The majority of rulemakings categorized as "routine/frequent" or "informational/administrative" (which may make up as many as 70 percent of all rulemakings) are not included in the Unified Agenda. Examples include the U.S. Coast Guard establishing timetables for operation of drawbridges. See, CURTIS COPELAND, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, CONGRESSIONAL REVIEW ACT: MANY RECENT FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS (July 15, 2014), <http://1.usa.gov/28N7bo8>.

³³ See, e.g., JUSTIN FELDMAN, PUBLIC CITIZEN, OSHA INACTION: ONEROUS REQUIREMENTS IMPOSED ON OSHA PREVENT THE AGENCY FROM ISSUING LIFESAVING RULES, at 4 (October 2011), <http://bit.ly/1RxW1er>.

1996, it has taken OSHA an average of 12 years to produce a single Economically Significant rule, according to this report. When OSHA's rulemakings have included a Regulatory Flexibility Analysis, which involves an intensive analysis of the potential effects of rules on small businesses, the average grows to 15 years.³⁴ These rulemakings are often challenged in court and, thus, can be prolonged even further.

Such delays can carry dire costs. In 2011, Public Citizen analyzed government estimates on the would-be safety benefits of five ongoing OSHA rulemakings that had languished between four and 31 years. Prompt finalization of those rules would have prevented more than 100,000 serious injuries and hundreds of fatalities, according to the analysis.³⁵

The obvious reason that the rulemaking process has become so elongated is that many steps have been added to it, due to congressional mandates and other pressures. Despite the ever-growing time it takes to create new rules, critics of regulation continue to allege that regulations are rushed through the process without adequate vetting or scrutiny. To address these alleged concerns, many members of Congress have lately put forth bills to add even more steps to the regulatory process.³⁶

The intent of many of these bills is allegedly to produce a more efficient regulatory process. But, until now, there has been a lack empirical data on the effects of steps that have already been added to the process.

This report analyzes data from 20-plus years of the federal government's semi-annual Unified Agendas to determine the consequences of individual variables on the length of rulemakings, trends in the speed of rulemakings, as well as the comparative efficiency of federal agencies in their rulemaking.

³⁴ GOVERNMENT ACCOUNTABILITY OFFICE, WORKPLACE SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA'S STANDARD SETTING (Introduction) (April 2012), <http://1.usa.gov/1sgfrqj>.

³⁵ JUSTIN FELDMAN, PUBLIC CITIZEN, OSHA INACTION ONEROUS REQUIREMENTS IMPOSED ON OSHA PREVENT THE AGENCY FROM ISSUING LIFESAVING RULES (October 2011), <http://bit.ly/1RxWler>.

³⁶ See e.g. The Early Participation In Regulations Act of 2015, S. 1820, 114th Cong. (2015), The Regulatory Accountability Act of 2015, Section 3(c), H.R. 185 (2015) and Regulations from the Executive in Need of Scrutiny Act of 2015 H.R.427, 114th Cong. (2015).

Executive Summary

Over the past four decades, numerous steps have been added to the rulemaking process. As these steps have been added, the length of time to create rules has grown. The following are examples of steps or definitions that add substantial delay to the rulemaking process:

- Rules identified as **Economically Significant**, which are determined to have an effect on the economy of \$100 million or more in a single year, must undergo cost-benefit analysis and may face multiple reviews by the Office of Information and Regulatory Affairs (OIRA).³⁷ Rules identified as **Other Significant** do not meet the \$100 million threshold but are considered Significant by OIRA and also can be subject to these heightened reviews.
- A **Regulatory Flexibility Analysis (RFA)** requires agencies to conduct an intensive analysis of the potential effects of rules that pose a “significant economic impact on a substantial number of small entities.” For a rule that is found to pose a significant economic impact, the agency must quantify the number of small businesses that might be affected, the costs to comply with rule, outline possible alternatives to the rule, and fulfill numerous other requirements.³⁸
- Some agencies are required to include an additional phase at the beginning of the rulemaking process called the “advance notice” phase. This includes issuance of an **Advance Notice of Proposed Rulemaking (ANPRM)**.

Addition of Procedural Requirements Lengthens Rulemakings

We found that rules deemed to be of the highest importance (based on the priority assigned and number of requirements attached) take the longest to complete – sometimes longer than one presidential term.

Rules deemed Economically Significant have taken 2.4 years, 41 percent longer than the overall average (1.7 years).

Rules deemed Economically Significant for which a Regulatory Flexibility Analysis was required took 2.5 years.

Inclusion of an Advance Notice of Proposed Rulemaking step in a rulemaking increases the time to finish an Economically Significant rule to 4.4 years – 100 percent longer than rules of the same priority without one.

Economically Significant rulemakings that included both an Advance Notice of Proposed Rulemaking and a Regulatory Flexibility Analysis took almost five years to complete on average.

³⁷ Executive Order 12866 (Sept. 30, 1993), <http://1.usa.gov/22wdW3D>. See also, NEGAH MOUZOON, PUBLIC CITIZEN, PUBLIC SAFEGUARDS PAST DUE: MISSED DEADLINES LEAVE PUBLIC UNPROTECTED, at 6 (June 2012), <http://bit.ly/22xTf7H>.

³⁸ Public Law 96-354 (1980), <http://1.usa.gov/1TVdM2t>.

Rulemakings Are at Record Lengths

Until recently, the time it took to complete a rule was similar regardless of presidential administration. But over the past few years, rulemaking lengths have become longer, with completed rules in President Obama's second term experiencing unprecedented rulemaking lengths.

Beginning in the sixth year of the Obama administration, completed Economically Significant rulemakings that began during his presidency took substantially longer than they did the sixth year in the Bush administration. And since then, the difference in the average rulemaking lengths between administrations has increased, with Obama's most recent rulemakings showing the greatest discrepancy.

Economically Significant rules completed in 2015 took an average of 3.4 years, 42 percent longer than average.

Economically significant rules completed in the first half of 2016 have taken the longest on record: an average of 3.8 years, 58 percent longer than average. This means that the time to complete an Economically Significant rule is now taking close to an entire presidential administration.

Rulemaking Lengths Vary Greatly by Agency

Department of Labor (DOL) completed Economically Significant rulemakings have taken 5.4 years – 125 percent longer than the overall average.

The DOL's completed Economically Significant rules involving a Regulatory Flexibility Analysis took 9.1 years – 117 percent longer than DOL rules with no requirement.

The Occupational Safety and Health Administration (OSHA), a sub agency of the DOL that is charged with protecting the nation's 130 million workers, has begun and completed only five Economically Significant rules since 1996.

OSHA's completed Economically Significant rulemakings begun since 1996 have taken an average of 12.5 years – 421 percent longer than the average length of all completed Economically Significant rulemakings. The three Economically Significant rules it has completed in this time period that involved a Regulatory Flexibility Analysis took an average of 15 years.

An OSHA rule to protect workers from excess exposure to silica dust was recently completed after at least 19 years of work. OSHA estimated that the rule will annually prevent at least 579 fatalities and 1,585 cases of moderate-to-severe silicosis.

Completed Economically Significant rules of the Environmental Protection Agency (EPA) had an average rulemaking length of 3.8 years – 58 percent longer than average.

Many Rulemakings Are Long Overdue

Based on our finding that Economically Significant rules take an average of 2.4 years to complete, we have categorized ongoing rulemakings that have taken longer than 2.5 years as Overdue. Overdue rulemakings account for 46 percent of all incomplete rulemakings listed on the spring 2016 Unified Agenda and have an average current rulemaking length of 6.3 years.

Twenty-four percent of overdue rulemakings first appeared on the Unified Agenda prior to President Obama taking office.

Many Overdue rulemakings are being worked on by agencies focused on public health and safety. For example, the Food and Drug Administration has 33 Overdue rules; the National Highway Traffic Safety Administration has 23; the Consumer Product Safety Commission has 20; Air and Radiation, within the EPA, has 20; and OSHA has 17.

Methodology

This study is primarily based on data published in the federal government's Unified Agenda of rulemakings, which has been published twice annually in every year but one since 1996.

Each rule in the Unified Agenda is assigned a Regulatory Identification Number (RIN), which is usually unique to that rulemaking. Some rulemakings are associated with more than one RIN because they are duplicates or were previously reported with another RIN. Duplicate and previously reported rules are not included in this analysis.

This study uses data within the Rule Stage and Action fields in the Unified Agenda to determine the length of a rulemaking.³⁹

Rule Stage includes Completed Actions, Final Rule, Prerule, Proposed and Long-Term Actions.

Actions are more granular than rule stages. Categories include, but are not limited to, Advance Notice of Proposed Rulemaking (ANPRM), Notice of Proposed Rulemaking (NPRM), Final Action, Final Rule, Interim Final Rule, and Withdrawn. Rules listed as Withdrawn are not included in this study.

Determination of the completion of a rulemaking: A rulemaking is treated as completed when it appears in the Unified Agenda and two conditions are met: 1) The Rule Stage is reported as Completed Actions; and 2) the Action field incorporates the word "Final." The majority of completed rules are described as a Final Action, Final Rule, or Interim Final Rule, but there are a small number of rules that are described slightly differently but still incorporate the word "Final."

Determination of the length of a rulemaking for completed rules: A completed rulemaking is treated as commencing three months prior to when it first appears in the Unified Agenda. For our research, spring Unified Agendas were dated April 1 and fall Unified Agendas were dated October 1. Work on rulemakings appearing on the Unified Agenda for the first time must have commenced sometime in the six months prior to that Unified Agenda's publication if they were reported correctly. Because there is no reported start date for the beginning of a rulemaking, we chose the midpoint of the possible range.

We believe estimating the beginning of a rulemaking to be three months prior to its first publication on the Unified Agenda is a conservative estimate because many rulemakings likely started much earlier. This is supported by a 2009 Government Accountability Office (GAO) report, which found that "agency staff sometimes worked on certain issues related to the rulemaking years before

³⁹ The Unified Agenda is available at <http://www.reginfo.gov/public/>.

commencement of the actual rulemaking, either as part of earlier, related rulemakings or policy development for the rule.”⁴⁰

A small percentage of completed rules, 6 percent, end up with a negative or zero rulemaking length based on our methodology. Their rulemaking lengths are not included in this analysis. More than 90 percent of the rulemakings with zero or negative rulemaking lengths in this analysis are rulemakings that are not Significant.

We deemed a rulemaking’s end date to be the latest date associated with it in the Unified Agenda’s Action Date field.

Determination of the length of a rulemaking for uncompleted rules: For uncompleted rules, this study attributes one-half year to each instance in which a rule is listed in the Unified Agenda.

Limitations of dataset on lengths of rules: When analyzing the volume of completed rules (Section II), this report counts all completed rules appearing on the Unified Agenda from spring 1996 through spring 2016, regardless of whether the rules began before 1996.

When analyzing the length of rulemakings, this report only analyzes rulemakings that first appeared on the Unified Agenda in spring 1996 or later to ensure the full extent of the rulemaking process can be measured.

⁴⁰ GOVERNMENT ACCOUNTABILITY OFFICE (GAO), FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS, (April, 2009), <http://1.usa.gov/28NMaPa>.

I. Effects of Priority and Statutory Requirements on Rulemaking Length

A. Length of Rulemaking Overview

The average length of rulemakings that have appeared for the first time on the Unified Agendas between spring 1996 and spring 2016 was 2.1 years. Completed rules, which began and finished between 1996 and 2016, had an average rulemaking length of 1.7 years. Uncompleted rules, which include rules that dropped off of the Unified Agenda prior to 2016 without being completed and rules that appeared on the spring 2016 agenda but not as completed rules, had an average rulemaking length of 3.2 years. [Table 1]

Table 1: Number of Rulemakings and Average Length - All Rulemakings Begun and Finished 1996 - 2016

	Number of Rules	Average Rulemaking Length
All Rulemakings	24,311	2.1
Uncompleted	6,165	3.2
Completed	18,146	1.7

As of spring 2016, 75 percent of rules that appeared on the Unified Agenda between spring 1996 and spring 2016 have been completed. As mentioned in the methodology section, these rules meet two conditions: 1) The Rule Stage is reported as Completed Actions and 2) The listing in the Action field incorporates the word Final.

While the average length of all completed rules is 1.7 years, other variables greatly affect the length of rulemakings.

B. Effects of Significant Versus Nonsignificant Priority on Rulemaking Length

Executive Order 12866, signed by President Bill Clinton in 1993, requires non-independent agencies⁴¹ to determine costs and benefits of rules that are expected to impose annual, aggregate costs of \$100 million or more. The executive order also stipulates that significant rules must be reviewed by the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget (OMB). Although the Executive Order calls on OIRA to complete its reviews in 90 days – with permission to extend to 120 days in unusual circumstances – OIRA reviews often take far longer in practice.⁴²

⁴¹ Non-independent agencies refer those that are headed by a cabinet secretary and other agencies in the executive branch that are directly accountable to the president. Independent agencies, in contrast, are those that are not headed by a cabinet secretary and over which the president's authority to appoint and dismiss agency leaders is limited. Examples are the Securities and Exchange Commission, Federal Communications Commission and Commodity Futures Trading Commission.

⁴² Executive Order 12866 (Sept. 30, 1993), <http://1.usa.gov/22wdW3D>. See also, NEGAH MOUZOON, PUBLIC CITIZEN, PUBLIC SAFEGUARDS PAST DUE: MISSED DEADLINES LEAVE PUBLIC UNPROTECTED, at 6 (June 2012), <http://bit.ly/22xTf7H>.

The Unified Agenda indicates whether each rule is Significant or not in its Priority field. In order of stringency of associated requirements, options in this field are: Economically Significant, Other Significant, Substantive Nonsignificant, Info/Admin/Other, and Routine and Frequent. Rules deemed Other Significant do not meet the threshold for Economically Significant but are considered Significant by the agency under other criteria, such as if they meet requirements for OIRA review under Executive Order 12866 aside from the \$100 million threshold.⁴³

Rules categorized as Economically Significant and Other Significant took 41 and 35 percent longer, respectively, to complete than average. [Table 2] Economically Significant and Other Significant rules account for 4 percent and 21 percent, respectively, of completed rules in our dataset.

The Priority categorization of many rules changes in the course of rulemakings. This analysis identifies a rule’s Priority as the one that was assigned at completion.

Table 2: Number and Average Rulemaking Length of Completed Rules by Final Priority

Completed Rule Priority	Number of Rules	Average Rulemaking Length	+/- From Average	+/- From Average by %
Economically Significant	736	2.4	+0.7	+41%
Other Significant	3,899	2.3	+0.6	+35%
Substantive, Nonsignificant	11,968	1.5	-0.2	-12%
Routine and Frequent	401	1.3	-0.4	-24%
Info./Admin./Other	1,142	0.9	-0.8	-47%
Total	18,146	1.7	--	--

The majority of completed rules (66 percent) were categorized as Substantive, Nonsignificant. They took an average of 1.5 years to complete. These rulemakings tend to be less controversial, and are less likely to involve extra procedural requirements, such as a need for cost-benefit analysis or OIRA review. However, independent agencies – to which Executive Order 12866 does not apply – appear to categorize rules in the Substantive, Nonsignificant category that would otherwise meet the criteria to be deemed Economically Significant.

C. Case Study on OIRA Delay — A Law to Prevent Backover Deaths by Vehicles

⁴³ See, e.g., HOWARD SHELANSKI, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, MEMORANDUM FOR REGULATORY POLICY OFFICERS AT EXECUTIVE DEPARTMENTS AND AGENCIES AND MANAGING AND EXECUTIVE DIRECTORS OF CERTAIN AGENCIES AND COMMISSIONS (Feb. 19, 2016), <http://1.usa.gov/1TIs3xi> and Executive Order 12866 (Sept. 30, 1993), <http://1.usa.gov/22wdW3D>. (Examples of criteria outlined in Executive Order 12866 for a rule to be deemed significant if it does not meet the threshold of Economically Significant are if it would “[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency; [m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or “[r]aise novel legal or policy issues arising out of legal mandates.”)

One night in 2002, Dr. Greg Gulbransen was backing up his SUV when his two-year-old son, Cameron, darted out into the driveway behind the vehicle. Too small to be seen by his father using any of the vehicle's rearview or sideview mirrors, Cameron was struck by the moving car and killed.⁴⁴ This tragedy is not an isolated case; each week, 50 children are injured, two fatally, in "backover" crashes⁴⁵ in which a vehicle moving backwards strikes a person behind the vehicle. Each year, backovers kill an average of 210 people and injure 15,000 more. Most victims are children under the age of five, senior citizens over the age of 75, or persons with disabilities, according to the Department of Transportation (DOT).⁴⁶ Backovers generally occur when the victim is too small to be seen in the rearview mirror of the vehicle or not mobile enough to move out of the way of the vehicle, even if it is moving slowly.

To prevent the injuries and deaths caused by backovers, in 2008 Congress passed the Cameron Gulbransen Kids Transportation Safety Act.⁴⁷ The Gulbransen Act, which was signed into law by President George W. Bush, directed the DOT to revise an existing federal motor vehicle safety standard to expand the area that drivers must be able to see behind their vehicles.⁴⁸ (The law stipulated that this could be done through the use of rear-view cameras or other technologies.) The Gulbransen Act mandated that the DOT issue the final rule within three years of the February 2008 enactment of the law.⁴⁹ The act also allowed the DOT to establish a new deadline for the rulemaking, but only if the otherwise-applicable deadline "cannot be met."⁵⁰

The DOT issued a proposed rule in 2010 calling for the inclusion of rearview cameras in new cars to ensure that drivers could see a certain area behind their car while in reverse gear. The DOT estimated that the proposal would annually prevent between 95 and 112 deaths and between 7,072 and 8,374 injuries.⁵¹

Despite this, the DOT failed to meet the February 2011 deadline.⁵² Instead, DOT repeatedly set new deadlines, which it failed to meet.

In September 2013, Public Citizen filed a petition with the United States Court of Appeals for the Second Circuit on behalf of Dr. Gulbransen and other stakeholders and nonprofits seeking a writ of

⁴⁴ A full account of this history is available from *In Re Dr. Greg Gulbransen: Petition for a Writ of Mandamus*, September 25, 2013, <http://bit.ly/1US1TrE>.

⁴⁵ *Backover Fact Sheet*, KIDS AND CARS, <http://bit.ly/28ZmR8J> (viewed on June 13, 2016).

⁴⁶ *NHTSA Announces Final Rule Requiring Rear Visibility Technology*, NATIONAL HIGHWAY TRANSPORTATION SAFETY ADMINISTRATION, <http://1.usa.gov/1fKTYZA>, (viewed on June 13, 2016).

⁴⁷ Cameron Gulbransen Kids Transportation Safety Act of 2007, (Public Law 110-189, 122 Stat. 639-642), § 4 (February 28, 2008).

⁴⁸ *Id.*

⁴⁹ *Federal Motor Vehicle Safety Standards; Rear Visibility*, 79 FEDERAL REGISTER 19178, 84 (April 7, 2014)(codified at 49 C.F.R. pt. 571).

⁵⁰ *Id.*

⁵¹ *Federal Motor Vehicle Safety Standard, Rearview Mirrors; Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements*, National Highway Traffic Safety Administration, 75 FEDERAL REGISTER 76185 (Dec. 7, 2010), <http://1.usa.gov/1totFWn>.

⁵² *Id.*

mandamus compelling DOT to issue the rule within 90 days.⁵³ On March 31, 2014, one day before the Second Circuit was scheduled to hear arguments in the case, the DOT issued the rear visibility safety standard that the petitioners sought.⁵⁴

In this case, much remains unknown about the cause of the protracted delay. *Reuters* reported that issuance of the rule was delayed by repeated demands from OIRA officials, who even questioned the need for the law. OIRA was “just having us go back and do things over again,” Jim Simons, director of NHTSA’s office of regulatory analysis and evaluation, told *Reuters*. “They were coming up with stuff to make us delay the rule.”⁵⁵

Whatever the cause, that delay likely led to hundreds of avoidable deaths and tens of thousands of injuries.

⁵³ In Re Dr. Greg Gulbransen: Petition for a Writ of Mandamus, (September 25, 2013), <http://bit.ly/1US1TrE>.

⁵⁴ *NHTSA Announces Final Rule Requiring Rear Visibility Technology*, NATIONAL HIGHWAY TRANSPORTATION SAFETY ADMINISTRATION, <http://1.usa.gov/1WMVX9D> (March 21, 2014).

⁵⁵ Scot J. Paltrow, *How a Small White House Agency Stalls Life-Saving Regulations*, REUTERS (Oct. 29, 2015), <http://reut.rs/1VVvHZy>.

D. Effects of a Regulatory Flexibility Analysis on Rulemaking Length

The Regulatory Flexibility Act (RFA) was adopted in 1980 and was substantially amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996. It requires federal agencies to first ascertain whether its rules will substantially affect small businesses and, if so, conduct a full analysis of how the rule will affect them and consider any alternatives to the rule that would minimize those impacts. While actual effects could be beneficial or detrimental, the legislation’s implementation and interpretation has focused only on detrimental impacts.

A RFA requirement existed in 35 percent of completed rules categorized as Economically Significant, 11 percent of those categorized as Other Significant and 10 percent of those categorized as Substantive, Nonsignificant. Completed Economically Significant and Other Significant rules in which a Regulatory Flexibility Act analysis was required took 9 percent longer than like rulemakings in which a RFA was not required. Substantive, Nonsignificant rulemakings took 7 percent longer when a RFA was required. [Table 3]

Table 3: Length of Completed Rulemakings (RM) With RFA Required

Priority	RFA Required			RFA Not Required	
	#	Average RM Length	% Diff in RM Length RFA Required v. Not Required	#	Average RM Length
Economically Significant	259	2.5	+9%	477	2.3
Other Significant	418	2.5	+9%	3,481	2.3
Substantive, Nonsignificant	1,152	1.6	+7%	10, 816	1.5

E. Effects of Inclusion of Advance Notice of Proposed Rulemaking (ANPRM) on Rulemaking Length

At a general level, the rulemaking process typically consists of two phases: the Proposed Rule and Final Rule phases. The exception to this is when agencies include a third phase at the beginning of the rulemaking process called the “advance notice” phase. This includes issuance of an Advance Notice of Proposed Rulemaking (ANPRM), along with a public comment period.

While some agencies, like the Federal Trade Commission (FTC),⁵⁶ are required by statute to issue ANPRMs for many of their rules, most agencies are not obligated to begin their rulemakings with an ANPRM. Nevertheless, agencies may use their discretion to opt for ANPRMs when they believe that it would benefit the rulemaking. For example, if an agency is regulating in a new area or has relatively less expertise, the agency may opt to issue an ANPRM to solicit information from the public and stakeholders. Yet, issuing an ANPRM also results in a tradeoff because including this phase lengthens the rulemaking process significantly and provides more opportunities for opponents of the proposed public protection to object.

⁵⁶ Federal Trade Commission Improvements Act of 1980, 15 U.S.C. 57a(B)(2)(A) (1980). The Consumer Product Safety Commission was required to issue ANPRMs for major rules until 2008. *See Rulemaking*, CONSUMER PRODUCT SAFETY COMMISSION (undated; viewed on June 27, 2016), <http://1.usa.gov/292QYym>.

Multiple pieces of legislation have been introduced in the 114th Congress that attempt to impose a blanket requirement for agencies to issue ANPRMs for all Economically Significant or major rules regardless of statutory deadlines.⁵⁷ If enacted, such bills would guarantee a longer rulemaking process across the federal government.

This study finds that Significant rules for which an ANPRM was conducted have taken 59 to 100 percent longer to complete than rules of the same Priority for which an ANPRM was not conducted. If all agencies were required to issue an ANPRM, the data indicate that Economically Significant completed rulemakings would take 4.4 years on average – 100 percent longer to complete than rules of the same priority without an ANPRM. [Table 4]

Table 4: Length of Completed Rulemakings (RM) With and Without Inclusion of ANPRM

Priority	ANPRM				Non ANPRM			Total	
	#	% of Rules	Average RM Length	% Longer than non-ANPRM	#	% of Rules	Average RM Length	#	Average RM Length
Economically Significant	51	7%	4.4	100%	685	93%	2.2	736	2.4
Other Significant	192	5%	3.5	59%	3,707	95%	2.2	3,899	2.3
Substantive, Nonsignificant	276	2%	3.1	107%	11,692	98%	1.5	11,968	1.5

Significant rules for which *both* an ANPRM and a RFA was conducted have taken more than 100 percent longer than Significant rules with neither requirement. Even the typically uncontroversial Substantive, Nonsignificant rulemakings have taken more than three years to complete when both an ANPRM and RFA analyses are included. [Table 5]

Table 5: Length of Completed Rulemakings (RM) With and Without Inclusion of ANPRM and RFA

Priority	ANPRM					Non ANPRM			
	RFA Required			No RFA Required		RFA Required		No RFA Required	
	#	Average RM Length	% Longer than non-ANPRM non-RFA	#	Average RM Length	#	Average RM Length	#	Average RM Length
Economically Significant	24	4.7	114%	27	4.1	235	2.3	450	2.2
Other Significant	30	4.5	105%	162	3.3	388	2.4	3,319	2.2
Substantive, Nonsignificant	37	3.3	120%	239	3.1	1,115	1.5	10,577	1.5

F. Associations Between Legal Deadlines and Rulemaking Length

⁵⁷ See e.g. The Early Participation In Regulations Act of 2015, S. 1820, 114th Cong. (2015) and The Regulatory Accountability Act of 2015, Section 3(c), H.R. 185 (2015).

Statutory deadlines allow Congress to direct agencies to issue regulations by a certain date. Such deadlines can pertain to the time by which a rule should be finalized, when the Notice of Proposed Rulemaking should be issued, or other actions should take place. Statutory deadlines indicate that Congress wants agencies to prioritize a particular regulatory action, and that it believes that the regulatory action is necessary within an expedited timeframe. Some statutes, such as the Clean Air Act, expressly authorize citizen lawsuits to be brought against the government when rulemaking deadlines are missed. Most statutes, however, do not contain such citizen enforcement mechanisms, and Congress itself does not have legal standing to enforce a missed statutory deadline against an agency.

If a court finds that an agency broke the law by missing a statutory deadline or otherwise unreasonably delaying a regulatory action, it can impose a judicial deadline for completion of a regulatory action. Therefore, statutory deadlines are often converted into judicial deadlines with courts serving as the eventual venue for enforcement of missed statutory deadlines.

In theory, statutory deadlines carry the force of law and should compel agency compliance with deadlines. In practice, agencies often miss these deadlines. A 2015 report by the R Street Institute found that agencies meet statutory deadlines only about half of the time.⁵⁸

We compared the length of rulemakings according to whether they involved a statutory or judicial deadline, or both. Economically Significant rules with statutory deadlines were completed 17 percent faster than those with no deadline. Economically Significant rules with judicial deadlines took 57 percent longer to complete than rules with no legal deadlines. Economically Significant rules with both statutory and judicial deadlines took 178 percent longer than those that lacked either. [Table 6]

Table 6: Length of Rulemakings (RM) With Legal Deadlines

Priority	No Legal Deadline		Statutory Deadline Only			Judicial Deadline Only			Statutory & Judicial		
	#	Average RM Length	#	Average RM Length	% Dif. From No Deadline	#	Average RM Length	% Dif. From No Deadline	#	Average RM Length	% Dif. From No Deadline
Economically Significant	359	2.3	316	1.9	-17%	32	3.6	+57%	29	6.4	+178%
Other Significant	3,080	2.3	616	2.3	0%	164	2.2	-4%	39	3.5	+52%
Substantive, Nonsignificant	10,595	1.5	1,024	1.7	+13%	283	1.9	+27%	66	3.8	+153%

⁵⁸ SCOTT ATHERLEY, R STREET, FEDERAL AGENCY COMPLIANCE WITH CONGRESSIONAL REGULATORY DEADLINES, at 1 (August 2015), <http://bit.ly/1Q10TWf>.

G. Case Study on Missed Legal Deadlines — The Protracted Creation of a Legally Required Standard on Ozone

The greater time to complete rules with judicial deadlines is not likely because of the existence of a judicial deadline. Instead, a judicial deadline is typically imposed in the course of a rulemaking because it is taking so long. This most often occurs with respect to laws that include statutory requirements for standards to be updated.

The Clean Air Act authorizes the public to sue the agency to enforce a missed statutory rulemaking deadline. Legislation currently pending in Congress would restrict the ability of citizens to bring suit against the Environmental Protection Agency (EPA) and other agencies for missing statutory rulemaking deadlines.⁵⁹ A 2014 Government Accountability Office report that examined EPA deadline lawsuits paints a sobering picture of delays and reinforces the need for citizen lawsuits to hold EPA accountable for such delays.⁶⁰

The GAO report focused on one particular office within EPA, the Office of Air and Radiation (OAR). Some of the delays detailed in the report are eye-popping: a rule regulating petroleum refineries was not implemented until 26 years after the congressional deadline;⁶¹ a rule regulating emissions from natural gas processing plants missed its deadline by 19 years.⁶²

The Clean Air Act requires the EPA to assess the effectiveness of National Ambient Air Quality Standards (NAAQS) every five years and to strengthen those standards if EPA scientists determine they are too weak to adequately protect the public.⁶³ The protracted update to the standard for ozone (one of the six pollutants that EPA restricts under the NAAQS) is a telling example of the EPA's struggles in fulfilling this obligation. Ozone is one of the primary components of smog, which is harmful to respiratory and cardiovascular health.

This story begins in 2003, when environmental groups and public health groups sued the EPA for failing to issue an updated ozone standard as required by the Clean Air Act.⁶⁴ Under a settlement to the lawsuit, the EPA committed to a deadline of December 2006 to finalize a new standard.⁶⁵ That deadline was subsequently pushed back to 2008, when the EPA issued a new rule calling for reducing permissible levels from 84 to 75 parts per billion (ppb).⁶⁶

⁵⁹ The Sunshine for Regulatory Decrees and Settlements Act of 2015, H.R. 712, 114th Cong. (2015).

⁶⁰ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-15-34, ENVIRONMENTAL LITIGATION: IMPACT OF DEADLINE SUITS ON EPA'S RULEMAKING IS LIMITED (December 2014), <http://1.usa.gov/1V2gh0n>.

⁶¹ *Id.*, at 11.

⁶² *Id.*

⁶³ GOVERNMENT ACCOUNTABILITY OFFICE, GAO-15-34, ENVIRONMENTAL LITIGATION: IMPACT OF DEADLINE SUITS ON EPA'S RULEMAKING IS LIMITED, at 14 (December 2014), <http://1.usa.gov/1V2gh0n>.

⁶⁴ *American Lung Association. v. Horinko*, No. 03-778 (D.C. District Court) (March 31, 2003).

⁶⁵ Consent Decree re: *American Lung Assoc. v. Horinko*, D.C. District Court No. 03-778 (D.C. District Court) (July 31, 2003).

⁶⁶ National Ambient Air Quality Standards for Ozone, 73 FEDERAL REGISTER 16436 (March 27, 2008).

Public health groups immediately challenged that standard in court as too lenient and industry groups challenged it as too stringent.⁶⁷ Those claiming the standard was too lenient pointed to an EPA advisory committee's recommendation to set permissible limits at 60 to 70 ppb. Those arguing that the standard was too stringent claimed the costs of meeting the standard outweighed the benefits. Ultimately, the court deferred resolving the matter because the newly elected Obama administration committed to re-evaluating the 75 ppb that was issued 2008.⁶⁸

The Obama Administration's EPA informed the court in September 2009 that it expected to issue a new proposed standard in December 2009, with the intent of finalizing it by August 2010. The EPA came close to meeting the first part of this goal when it issued a proposed standard in January 2010. The proposed standard recommended lowering exposures to between 60 and 70 ppb.⁶⁹ Public health and environmental groups encouraged the EPA to adopt 60 ppb.⁷⁰ Industry groups argued that the standard should be left at 75 ppb.⁷¹

The EPA announced in August 2010 that it would not meet the deadline to issue a final standard that it had set for that month, and that it would need another two months to finalize it. But by December 2010, the EPA still had not finalized the standard. It then announced that it needed until at least July 2011 to create the finalized standard in order to give its scientists additional time to study the basis for its recommendation of 60 to 70 ppb.⁷²

On July 26, 2011, the EPA once again announced that it would miss its deadline – this time because the rule was undergoing review at OIRA. Public health groups sued to order the EPA to finalize the ozone standard immediately.⁷³ Industry groups responded by asking the court to refrain from doing so.⁷⁴

A major development came on September 2, 2011, when the Obama administration ordered the EPA to withdraw the proposed ozone standard.⁷⁵ The administration claimed that it would prefer to wait until the next five-year reconsideration of the standard, which was scheduled for 2013.⁷⁶

⁶⁷ The challenges to the standard were consolidated in the D.C. Circuit Court of Appeals as *State of Mississippi v. EPA*, Case No. 08-1200 (D.C. Circuit Dec. 11, 2013).

⁶⁸ *Id.* at 9.

⁶⁹ National Ambient Air Quality Standards for Ozone, 75 FEDERAL REGISTER 2938 (Jan. 19, 2010).

⁷⁰ See e.g., Comments on the U.S. Environmental Protection Agency's Proposed Reconsideration of the National Ambient Air Quality Standards for Ozone, American Lung Association et al, (March 22, 2010), <http://bit.ly/1XucVJT>.

⁷¹ Economic Implications of EPA's Proposed Ozone Standard, MAPI Manufacturer's Alliance (September 2010), <http://bit.ly/1UdZhVq>.

⁷² Declaration of Regina McCarthy, Assistant Administrator for Air and Radiation, *State of Mississippi v. EPA*, No. 08-1200 (D.C. Cir. Dec. 8, 2010)

⁷³ *State of Mississippi v. E.P.A.*, Doc. No. 1322086 (D.C. Cir. Aug. 8, 2011).

⁷⁴ *State of Mississippi v. E.P.A.*, Doc. No. 1323634 (D.C. Cir. Aug. 10, 2011).

⁷⁵ President Barack Obama, *Statement by the President on the National Ambient Air Quality Standards*, THE WHITE HOUSE, (September 2, 2011), <http://1.usa.gov/1PyFApf>.

⁷⁶ *Id.*

The move was widely seen as succumbing to the intense political pressure in opposition to the rule by industry groups and Republicans in Congress.⁷⁷

The EPA's scientific advisory committee completed its review in 2014 and made virtually the same recommendations as it had in 2008, namely that the standard should be set at between 60 and 70 ppb.⁷⁸ The EPA moved to finalize the standard at 70 ppb in fall of 2015.⁷⁹ Not surprisingly, industry groups have challenged the rule in court in order to block it.⁸⁰

Every year of delay in issuing new NAAQS standards has real consequences for the health of our citizens. The EPA estimated that the new standards, over 10 years, will yield economic benefits of \$2.9 billion to \$5.9 billion, prevent 320 to 660 premature deaths, and prevent 230,000 asthma attacks in children.⁸¹

⁷⁷ John M. Broder, *Re-election Strategy Is Tied to a Shift in Smog*, NEW YORK TIMES (Nov. 16, 2011), <http://nyti.ms/1rtDL6W>.

⁷⁸ CLEAN AIR SCIENTIFIC ADVISORY COMMITTEE (CASAC), CASAC REVIEW OF THE EPA'S SECOND DRAFT POLICY ASSESSMENT FOR THE REVIEW OF THE OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS (2014), <http://1.usa.gov/1UgtYyN>.

⁷⁹ *National Ambient Air Quality Standards for Ozone*, 80 FEDERAL REGISTER 65291 (Oct. 26, 2015)

⁸⁰ Devin Henry, *Coal Company Sues Over 'Destructive' EPA Ozone Standards*, THE HILL (Oct. 26, 2015), <http://bit.ly/1UTdtp1>.

⁸¹ EPA's *Final Air Quality Standards for Ground-Level Ozone By The Numbers*, ENVIRONMENTAL PROTECTION AGENCY <http://1.usa.gov/1XZKft5>, (undated; references final action of Oct. 1, 2015).

H. Effects of Changing Priority on Rulemaking Length

Rulemakings that are categorized under multiple Priorities have taken considerably longer to complete, on average, than those that maintain the same priority.

For example, 61 percent of completed Economically Significant rules were assigned that priority from start to finish. They took an average of 1.7 years to complete. But 33 percent of rules categorized as Economically Significant at completion were previously deemed Other Significant. They took an average of 3.6 years to complete. About 10 percent of rules categorized as Economically Significant at completion were categorized as Substantive, Nonsignificant at some point. Those rulemakings also took an average of 3.6 years to complete.

Thus, rules concluding with an Economically Significant priority that previously were assigned other priorities took 112 percent longer to complete than those that were categorized as Economically Significant from start to finish. [Table 7]

Table 7: Length of Completed Rulemakings (RM) With No Changed Priority versus Changed Priority

Priority at Rule's Completion	# of RM That Only Involved This Priority	% of All RM Ending With This Priority	Avg RM Length	Previous Priority Assigned to Rule*								
				Economically Significant			Other Significant			Substantive, Nonsignificant		
				#	Avg RM Length	% Dif	#	Avg RM Length	% Dif	#	Avg RM Length	% Dif
Economically Significant	446	61%	1.7				245	3.6	+112	72	3.6	+112
Other Significant	2,859	73%	1.9	124	3.1	+63				889	3.4	+79
Substantive, Nonsignificant	11,258	94%	1.4	31	3.1	+121	519	3.2	+129			

* A small number of rules were assigned more than one previous priority in the course of rulemaking and are counted more than once under Previous Priorities, above. For instance, a rule categorized as Economically Significant when finalized might previously have been categorized as Other Significant and Substantive Nonsignificant (or under less substantive categories not shown here).

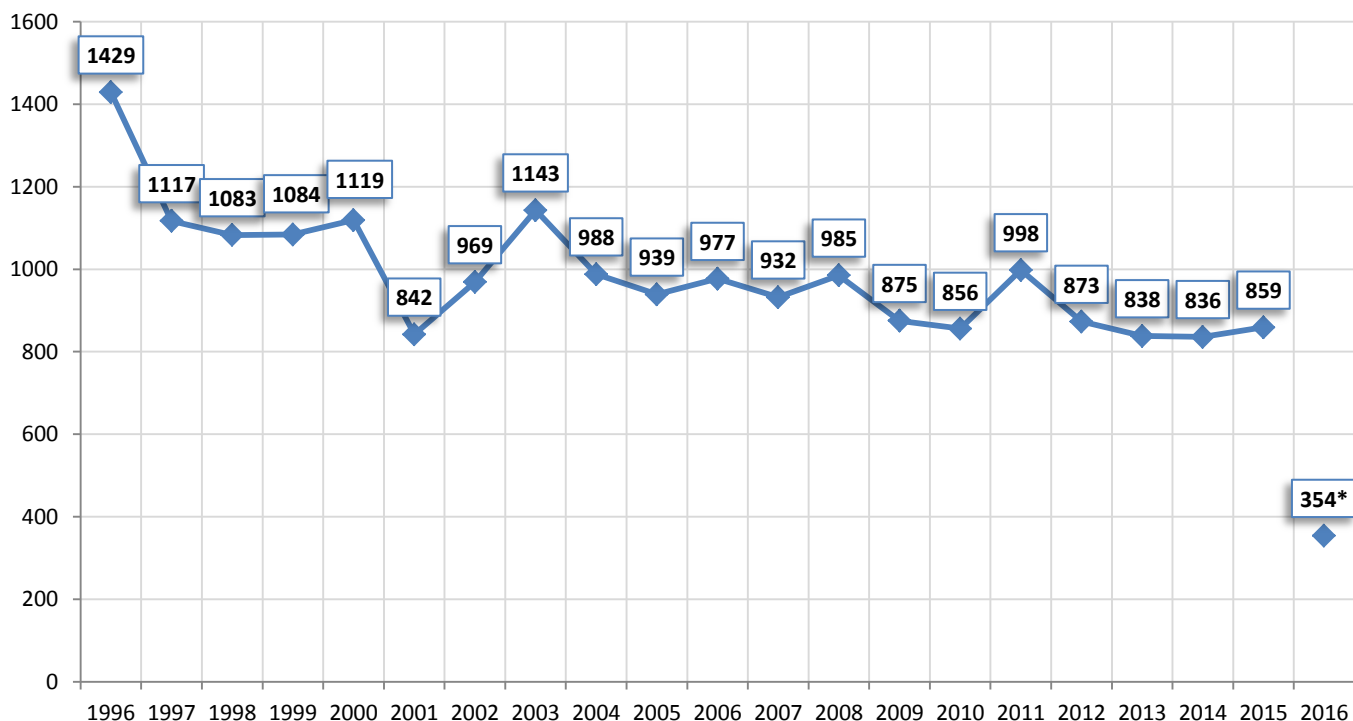
II. Volume of Completed Rules

The number of completed rules has been relatively constant over the time period for which downloadable Unified Agendas are available. However, the number of completed rules categorized as Economically Significant and Other Significant has vacillated significantly year by year. Compared to his predecessor, the total number of completed rules has fallen under President Obama, the number of Economically Significant rules has risen, and the number of Other Significant rules has been about the same.

A. Comparing of the Number of Completed Rules Over the Years

The rate of rulemaking in the federal government has been fairly steady over the past 20 years. The yearly average of completed rules between 1996 and 2015 was 987. The peak year was in 1996, with 1,429 completed rules while the lowest number of completed rules occurred in 2014, with 836. [Figure 1]

Figure 1: Number of Completed Rules Listed in Unified Agenda⁸²



* Includes data in spring Unified Agenda only.

⁸²Note that these figures are limited to completed rulemakings that are listed in the Unified Agenda. The majority of rulemakings categorized as “routine/frequent” or “informational/administrative” (which may make up as many as 70 percent of all rulemakings) are not included in the Unified Agenda. Examples of those not submitted to the Unified Agenda include the U.S. Coast Guard establishing timetables for operation of drawbridges. See, CURTIS COPELAND, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, CONGRESSIONAL REVIEW ACT: MANY RECENT FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS, at 53 (July 15, 2014), <http://1.usa.gov/28N7bo8>.

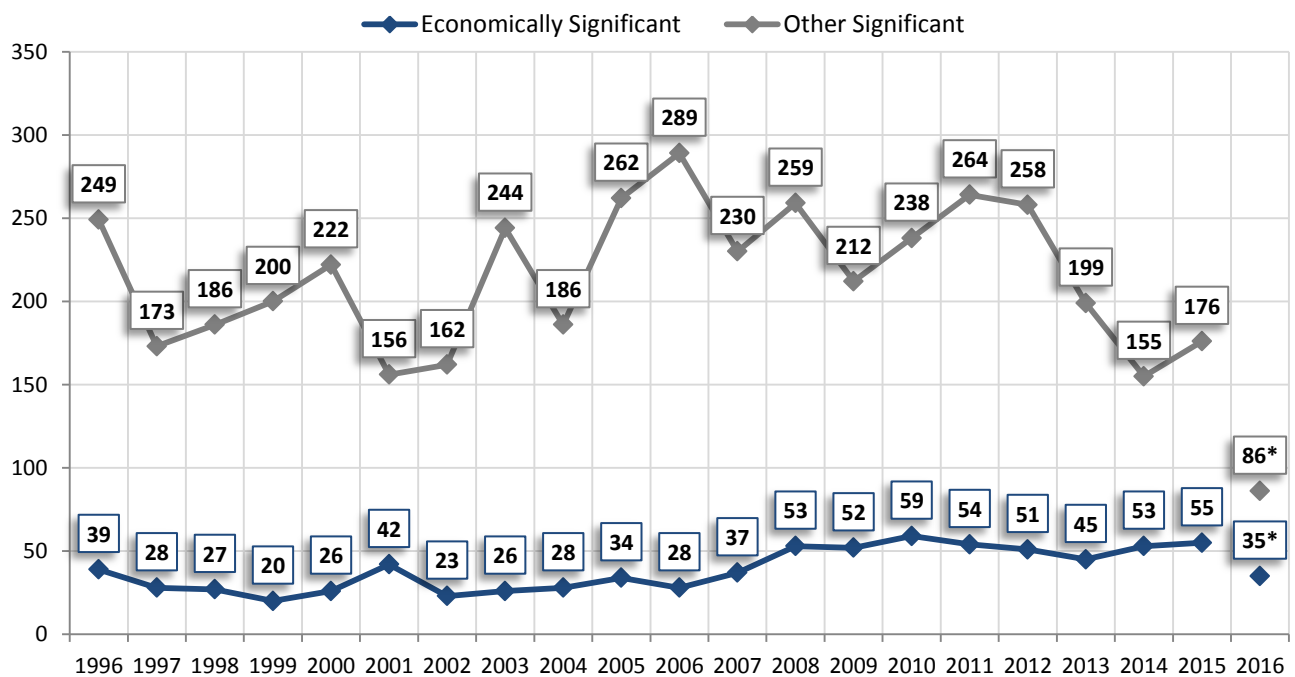
If we restrict our analysis to just the last two administrations, Barack Obama’s administration has completed an average of 10 percent less per year, 876 rules, than the administration of George W. Bush, who completed 970 on average per year. [Table 8]

Table 8: Average and Number of Rules Completed Under Presidents George W. Bush and Barack Obama (through first seven years)

Administration	Yearly Average	Total
Bush 2001-2007	970	6,790
Obama 2009-2015	876	6,135

There is more variation within rules categorized as Economically Significant and Other Significant each year. The number of completed Economically Significant rules has ranged from 20 to 59 annually. The number of completed Other Significant rules has ranged from 155 to 289. The \$100 million threshold for the categorization of Economically Significant is not adjusted for inflation, making it easier to reach with the passage of time. [Figure 2]

Figure 2: Number of Completed Economically Significant and Other Significant Rules by Year



* Includes data in spring Unified Agenda only.

Looking at the first seven years of their presidencies, President Bush’s administration completed an average of 31 Economically Significant and 218 Other Significant rules each year. Under Obama, an average of 53 Economically Significant and 215 Other Significant rules have been completed annually. [Table 9]

Table 9: Yearly Average of Completed Rules

President	Economically Significant		Other Significant	
	Yearly Average	Total	Yearly Average	Total
Bush 2001-2007	31	218	218	1,529
Obama 2009-2015	53	369	215	1,502

B. Presidents Begin to Enact Most of Their Own Agenda in Their Third Year

Most of the completed rules during the first year of a presidency – and especially those reported as completed in the first spring Unified Agenda after a new president is inaugurated – are unlikely to reflect the agenda of the new president.

In order to figure out just how many completed rules begin and finish with a president, we analyzed two separate datasets. The first was data from spring 2001 through fall 2007 (President Bush), the second was data from spring 2009 through fall 2015 (President Obama). A minority of completed rules in the first year of their presidencies had begun under their administrations. Even in the second year of their presidencies, close to 40 percent of all completed rulemakings began before they took office. By year three, both Presidents Bush and Obama were responsible for the vast majority of completed rules. [Figure 3]

Figure 3: Number and Percentage of Completed Rules by Year That Began Under the Same President

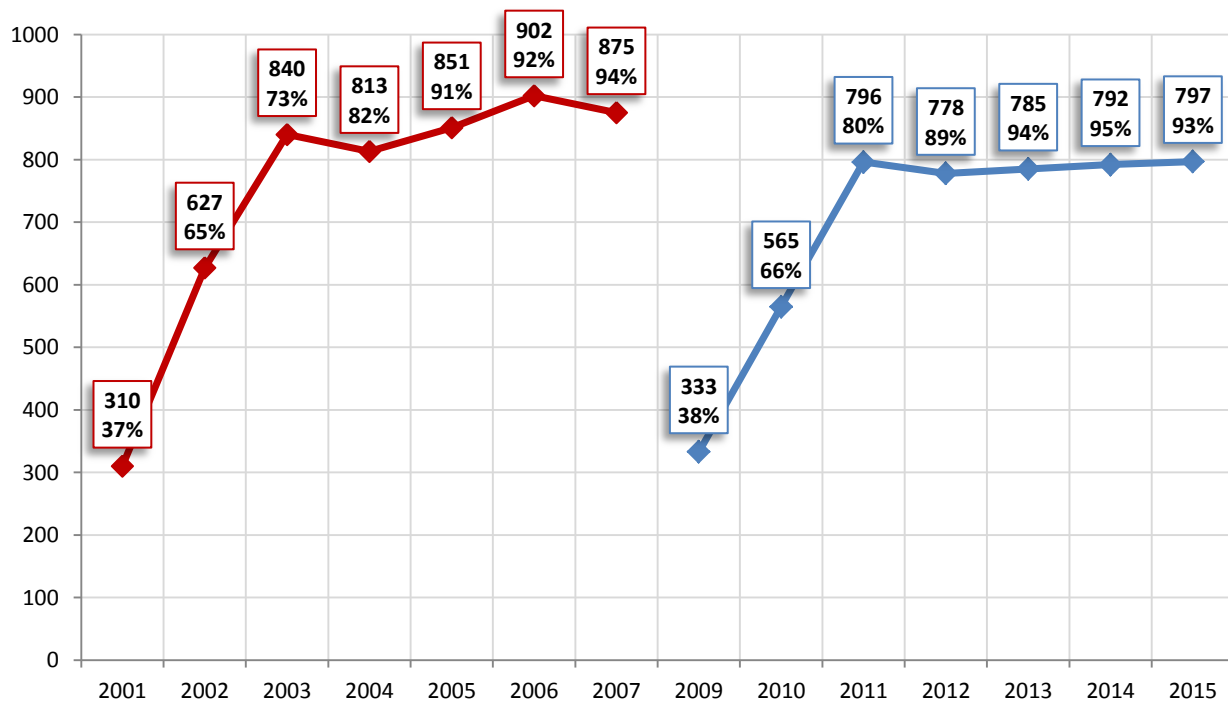
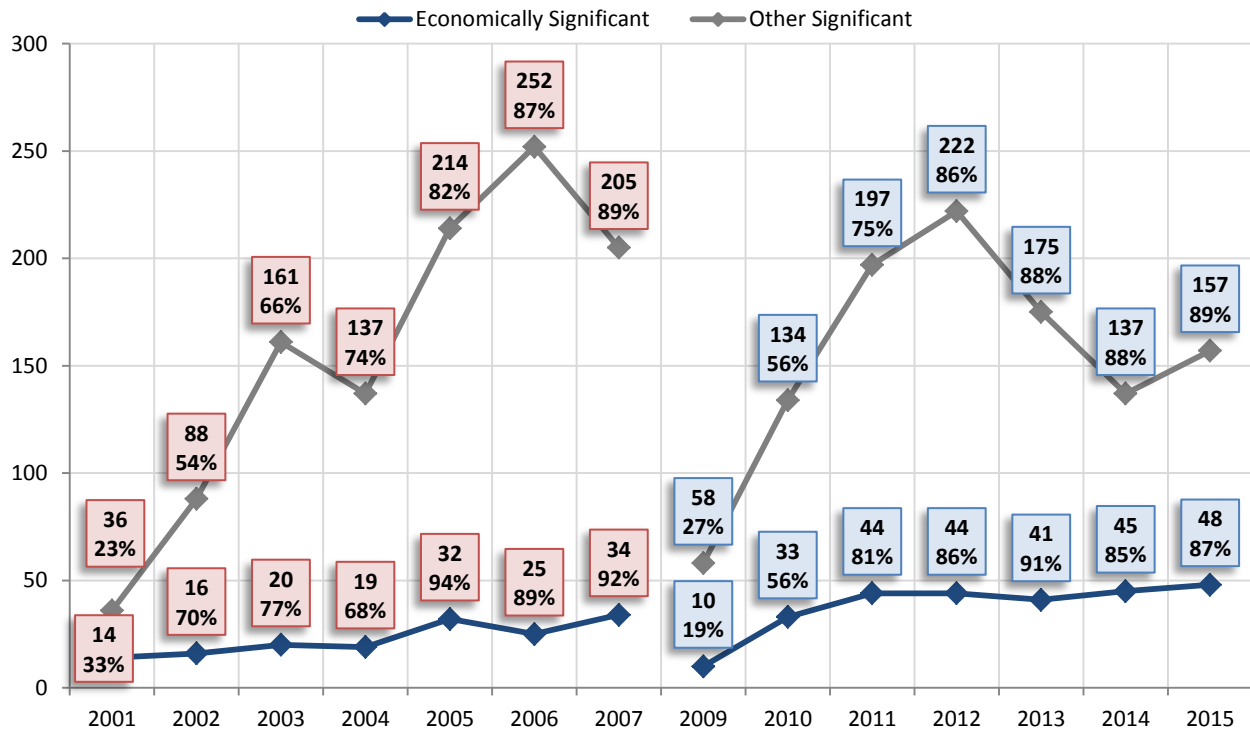


Figure 4, below, uses the same methodology to determine the number of Economically Significant and Other Significant completed rules that began and finished under Presidents Bush or Obama. In the first two years of the Obama presidency, a smaller percentage of completed Economically Significant rules (14 percentage points fewer) had begun during his presidency compared to the corresponding years for Bush.

Figure 4: Number of Completed Economically Significant and Other Significant Rules by Year That Began Under the Same President



President Bush began and completed more aggregate rules and Other Significant rules during the first seven years of his presidency than Obama. But Obama began and completed more Economically Significant rules. [Table 10]

Table 10: Yearly Average of Completed Rules Beginning and Ending in One Administration by Priority

President	All Rules		Economically Significant		Other Significant	
	Yearly Average	Total	Yearly Average	Total	Yearly Average	Total
Bush 2001-2007	745	5,218	23	160	156	1,093
Obama 2009-2015	692	4,846	38	265	154	1,080

III. Rulemaking Length Is Increasing

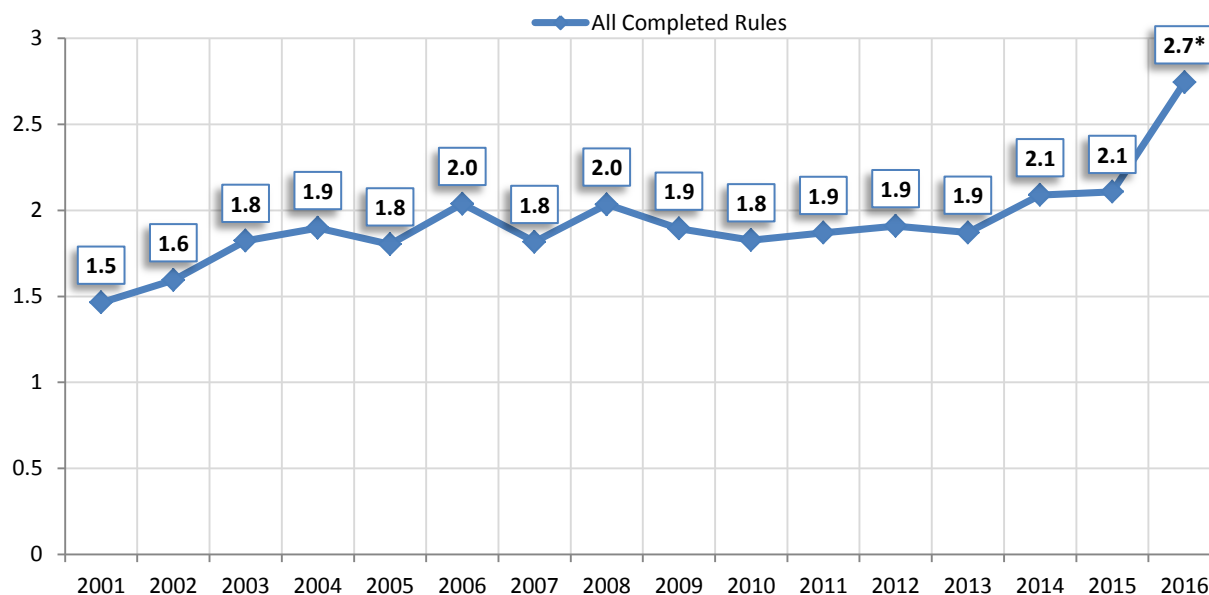
The average time it has taken to finish rules that were completed from 2001 through 2016 has been 1.9 years. The average length of completed rulemakings during the Bush and Obama administrations has been about equal (1.8 years for Bush and 2.0 years for Obama). [Table 11]

Table 11: Average Rulemaking (RM) Length of Completed Rules

President	Average RM Length of Completed Rules
Bush 2001-2008	1.8
Obama 2009-2016	2.0

However, the length of completed rulemakings inched up to 2.7 years in 2016 – 42 percent longer than the yearly average. [Figure 5]

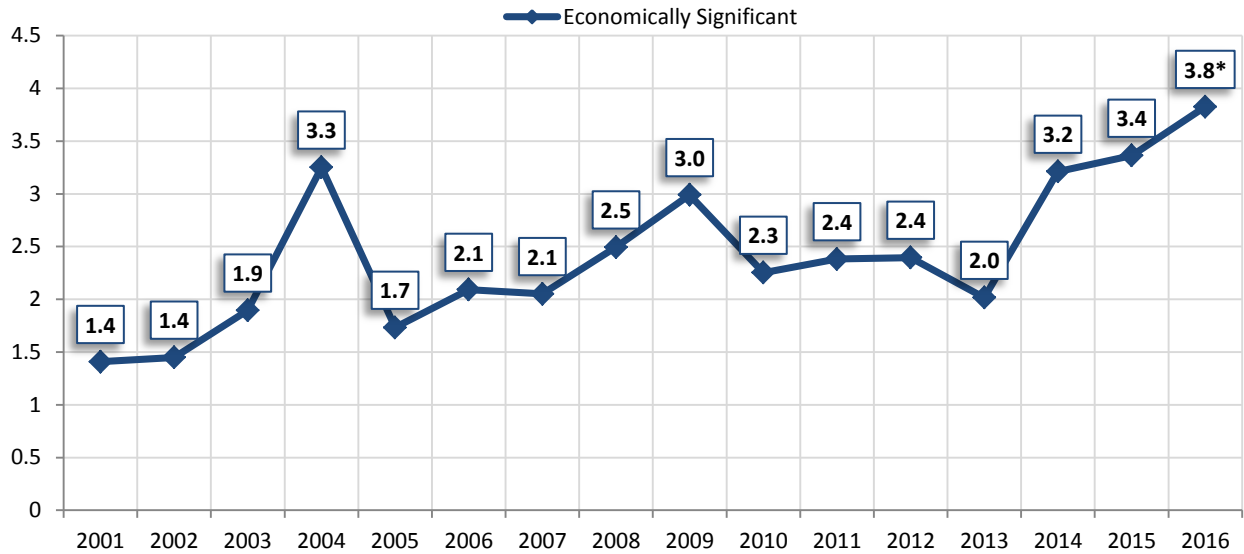
Figure 5: Length of Completed Rulemakings



* Includes data in spring Unified Agenda only.

The trend of increasing lengths of rulemakings is more pronounced when Economically Significant and Other Significant rulemakings are isolated. Economically Significant rules completed under President Bush (2001-2008) took an average of 2.1 years, 16 percent shorter than the 2001-2016 average (2.5). Economically Significant rules completed under President Obama (2009-2016) had an average length of 2.8 years, 12 percent longer than the average. Economically Significant rules completed in 2015 averaged 3.4 years, the longest annual average for completed Economically Significant rules in this analysis. Economically Significant rules completed in 2016 averaged 3.8 years. [Figure 6]

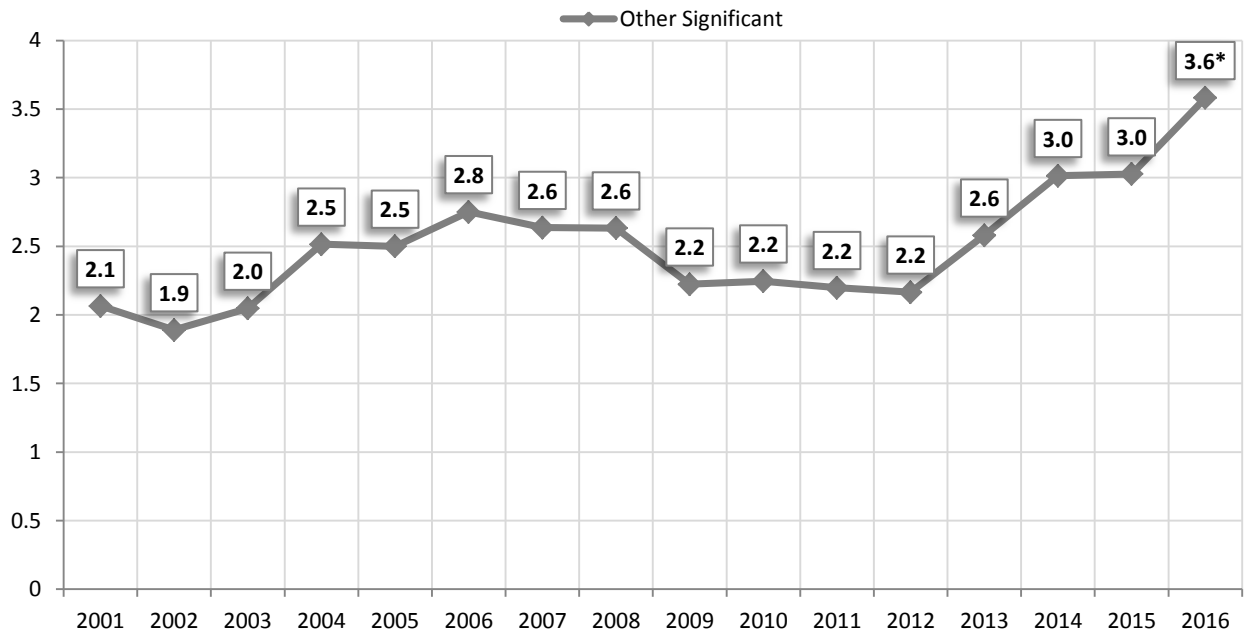
Figure 6: Length of Completed Economically Significant Rules



*Includes data in spring Unified Agenda only.

The average length of Other Significant rulemakings completed in 2014 and 2015 was the longest of any year between 2001 and 2016, at three years – 20 percent longer than the 2001-2016 average (2.5). Similar to the trend for Economically Significant completed rulemakings, Other Significant rulemakings completed in 2016 jumped to 3.6 years in length. [Figure 7]

Figure 7: Length of Completed Other Significant Rules



*Includes data in spring Unified Agenda only.

At this point, completed rules in 2016 are the longest on record, followed by 2015 and 2014.

In theory, it would make sense for Obama-era rules to show slightly longer average lengths because some rulemakings in the Obama era date back further than his predecessor (*i.e.*, in our dataset, the longest potential rulemaking under Bush was about 12 years, 1996 to 2008. The longest potential rulemaking under Obama is about 20 years, 1996 to 2016.) But the extent of increases during the Obama administration indicates something irregular. Table 12 shows the five years with the longest average rulemaking lengths of all completed rulemakings, as well as the longest completed Economically Significant and Other Significant rulemakings. In order to show clear differences in the ranking, the ages had to be rounded to a third decimal point, but the difference is stark in recent years.

Completed Economically Significant rules so far in 2016 took an average of 3.8 years – 58 percent longer than the overall average for Economically Significant completed rules. On average, Significant rules completed in 2016 have taken almost the entire second term of the Obama Administration to complete.

Table 12: Years in Which the Average Completed Rulemakings Were the Longest

A. All Completed Rules		
Year	President	Average Rulemaking Length
2016*	Obama	2.745
2015	Obama	2.111
2014	Obama	2.089
2006	Bush	2.038
2008	Bush	2.034
B. Economically Significant Completed Rules		
Year	President	Average Rulemaking Length
2016*	Obama	3.826
2015	Obama	3.363
2004	Bush	3.251
2014	Obama	3.211
2009	Obama	2.990
C. Other Significant Completed Rules		
Year	President	Average Rulemaking Length
2016*	Obama	3.582
2015	Obama	3.027
2014	Obama	3.014
2006	Bush	2.751
2007	Bush	2.636

*Includes data in spring Unified Agenda only.

As done previously in this analysis, we isolated rulemakings that began and finished under the Bush and Obama administrations. Examining the data this way allows for a more equal comparison.

Table 13 shows that the longer length of rulemakings toward the end of the Obama administration is not due to rulemakings that began prior to his presidency. This finding is most apparent in Economically Significant completed rulemakings. [Table 13B]

When excluding completed rulemakings that began prior to their administrations, the trend of longer rulemaking toward the end of the Obama administration continues to be clear.

Table 13: Years in Which the Average Completed Rulemakings Beginning and Ending Within the Same Administration Were the Longest

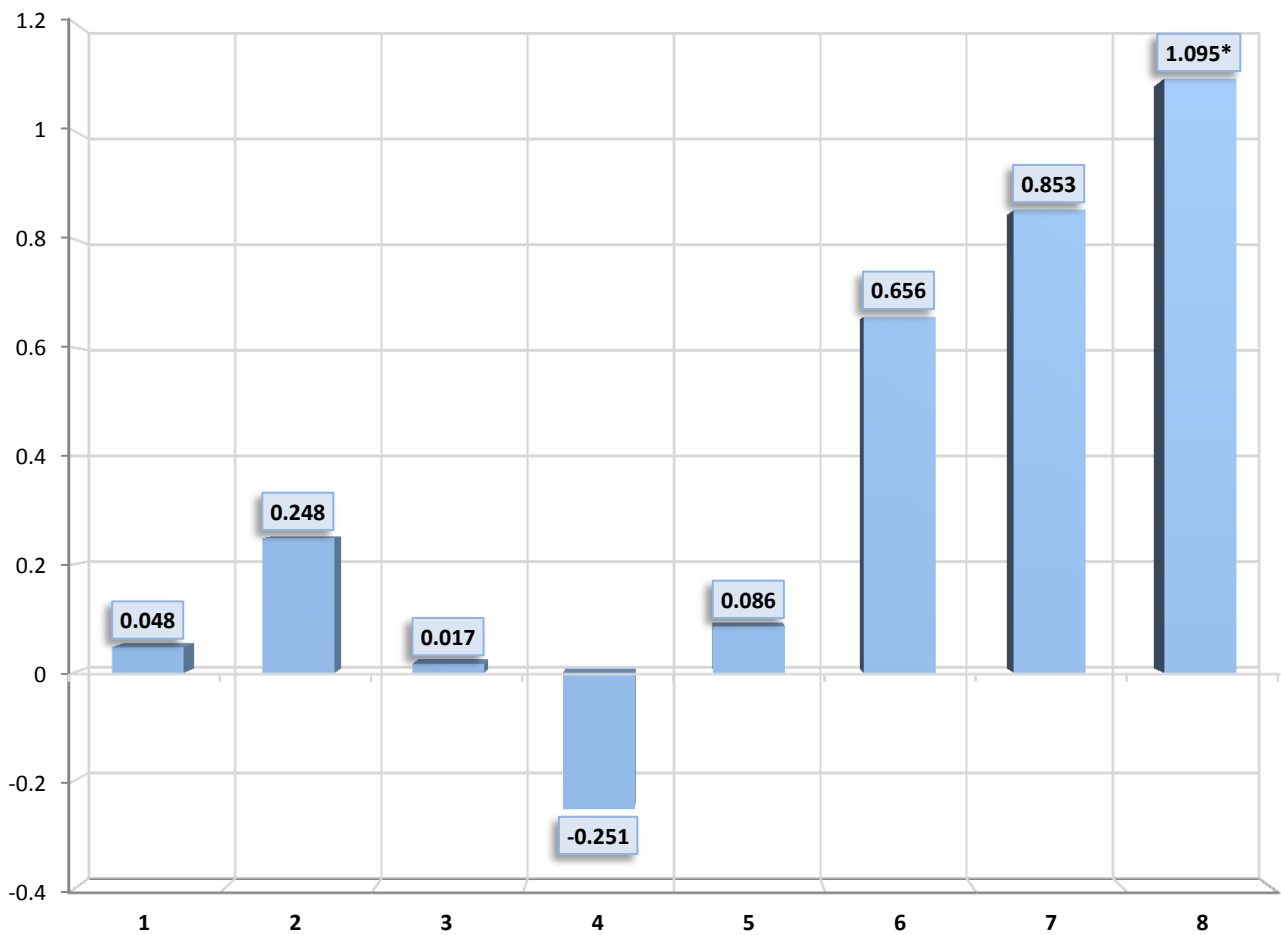
A. All Completed Rules		
Year	President	Average Rulemaking Length
2016*	Obama	2.253
2008	Bush	1.844
2015	Obama	1.750
2014	Obama	1.683
2006	Bush	1.640
B. Economically Significant Completed Rules		
Year	President	Average Rulemaking Length
2016*	Obama	3.250
2015	Obama	2.696
2008	Bush	2.155
2014	Obama	2.141
2007	Bush	1.843
C. Other Significant Completed Rules		
Year	President	Average Rulemaking Length
2016*	Obama	3.077
2008	Bush	2.418
2015	Obama	2.326
2014	Obama	2.223
2007	Bush	2.163

*Includes data in spring Unified Agenda only.

Figure 8 shows the difference in the average rulemaking length between the Obama and Bush administrations by the corresponding year in their administrations. As with Table 14, it only includes rulemakings that began and ended during their administrations.

The Bush and Obama administrations experienced similar rulemaking lengths for their first five years. Beginning in the sixth year of the Obama administration, completed Economically Significant rulemakings became substantially longer than in the corresponding year in the Bush administration. And since then, the difference in the average rulemaking lengths between administrations has increased, with the difference between their average rulemaking lengths in the first half of their final years being the largest – 1.095 years. [Figure 8]

Figure 8: Difference in Length of Obama Completed Economically Significant Rulemakings Compared to Corresponding Bush Administration Year (Rulemakings that Start and Finish Under Their Administration)



*Includes Spring Unified Agenda from Obama Administration only.

IV. Uncompleted Rulemakings

From 1996 to 2016, 25 percent of all rulemakings appearing on the Unified Agenda were uncompleted. Of these, 56 percent, or 3,436 rules, are inactive, meaning the rule was taken off of the Unified Agenda without being completed.

Table 14: Number and Average Rulemaking (RM) Length of Uncompleted Rules

			Number of Rules	Average RM Length
All Uncompleted Rules			6,165	3.2
Inactive	Rule does not appear on the spring 2016 Unified Agenda and never reached the Completed category		3,436	2.8
Incomplete Rulemakings			2,729	3.6
Early Stage*	Incomplete	Rule appears on the spring 2016 Unified Agenda, but first appeared on the Unified Agenda in 2016, 2015, or 2014	1,471	1.2
Overdue*	Incomplete	Rule appears on the spring 2016 Unified Agenda, and also first appeared on the Unified Agenda Prior to 2014	1,258	6.3

* Category created by Public Citizen.

The remaining 44 percent, 2,279 rules, appeared on the spring 2016 Unified Agenda but are incomplete. Public Citizen has segregated these rules into two categories: 1) “Early Stage Rules,” which appeared on the Unified Agenda for the first time in 2014, 2015, or 2016, meaning that they have not been in progress much longer than the average of the longest category of completed rulemakings in this analysis, Economically Significant rules (2.4 years) and 2) Overdue rules, which are rules that first appeared on the Unified Agenda before 2014, meaning that they have been in process at least 2.5 years – higher than the Economically Significant completed rulemaking average.

Rulemakings we have categorized as overdue account for 46 percent of all incomplete rulemakings listed on the spring 2016 Unified Agenda and have an average current rulemaking length of 6.3 years. Twenty-four percent of overdue rules first appeared on the Unified Agenda prior to President Obama taking office.

V. Agency and Sub Agency Analysis

There is a wide variation in the lengths of time that individual cabinet level agencies take to complete rules. Some agencies, like the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), must fulfill additional steps to complete rulemakings. This section will focus on how procedural requirements affect the rulemaking length of Significant rulemakings within agencies.

A. Agency Completed Significant Rulemakings

Completed Economically Significant rulemakings from the Department of Justice (DOJ) have been the longest among cabinet level departments, at 5.5 years – 129 percent longer than the overall average. The DOJ is followed by the Department of Labor (DOL), with an average rulemaking length 125 percent longer than average, the Department of Energy (DOE) (108 percent longer) and the (EPA) (58 percent longer). [Table 15]

Table 15: Number and Average Rulemaking (RM) Length of Completed Rules

Agency	Name	Economically Significant		Other Significant	
		#	Average RM Length	#	Average RM Length
DOJ	Department of Justice	6	5.5	173	3.0
DOL	Department of Labor	27	5.4	172	2.7
DOE	Department of Energy	28	5.0	40	2.8
EPA	Environmental Protection Agency	72	3.8	323	2.9
DHS	Department of Homeland Security	22	3.4	91	2.5
TREAS	Department of the Treasury	15	3.3	70	2.0
DOT	Department of Transportation	56	2.9	252	2.9
HUD	Dept. of Housing and Urban Development	8	2.6	166	2.6
USDA	Department of Agriculture	73	2.1	343	2.5
DOC	Department of Commerce	13	1.9	217	1.6
HHS	Department of Health and Human Services	262	1.7	468	2.2
DOD	Department of Defense	12	1.7	163	2.0
DOI	Department of the Interior	24	1.5	214	2.4
ED	Department of Education	27	0.9	89	1.2
Other*		91	1.5	1,118	2.0
Total		736	2.4	3,899	2.3

*This category, which includes 67 agencies, regards rulemakings for which the field in the Unified Agenda typically devoted to cabinet level agencies is blank and the agency conducting the rulemaking is listed in the Unified Agenda field normally devoted to sub agencies. Most agencies in this category are independent agencies. Two agencies included in this category – the State Department and Veterans Affairs Department – are cabinet level agencies.

B. Effects of a Regulatory Flexibility Analysis on Completed Significant Rules by Agency

Overall, completed Significant rules undergoing a Regulatory Flexibility Analysis took 9 percent longer than rules without the requirement. Nine of the 14 cabinet agencies experienced longer rulemakings for Economically Significant rules requiring a RFA than for rules that did not.

Department of Labor (DOL) completed Economically Significant rules requiring with a RFA were the longest in that category, at 9.1 years – 117 percent longer than DOL rules with no RFA requirement. Along with the DOL, the Department of Justice (DOJ), the Department of Energy (DOE), the Environmental Protection Agency (EPA), the Department of Homeland Security (DHS), and the Department of Transportation (DOT) all had average rulemaking lengths of more than three years for Economically Significant completed rules that required a RFA. [Table 16]

Table 16: Number of Rules and Average Rulemaking Length of Economically and Other Significant

Agency	Economically Significant				Other Significant			
	RFA Required		No RFA Required		RFA Required		No RFA Required	
	#	Avg RM Years	#	Avg RM Years	#	Avg RM Years	#	Avg RM Years
DOL	7	9.1	20	4.2	24	2.4	148	2.7
DOJ	4	8.0	2	0.5	17	2.0	156	3.0
DOE	15	5.3	13	4.7	5	3.5	35	2.7
EPA	17	3.4	55	3.9	5	1.8	318	2.9
DHS	7	3.2	15	3.5	8	6.1	83	2.1
DOT	15	3.2	41	2.8	31	4.0	221	2.7
DOC	8	2.9	5	0.6	63	2.0	154	1.3
USDA	16	2.7	57	1.9	55	3.0	288	2.4
DOD	2	2.3	10	1.5	15	1.3	148	2.0
TREAS	3	2.2	12	3.7	0		70	2.0
HHS	114	1.8	148	1.6	79	2.6	389	2.1
DOI	7	1.4	17	1.5	12	2.1	202	2.4
HUD	1	1.4	7	2.8	2	2.2	164	2.6
ED	5	1.2	22	0.8	4	2.1	85	1.2
Other*	38	1.3	53	1.7	98	2.1	1,020	2.0
Total	259	2.5	477	2.3	418	2.5	3,481	2.3

*This category, which includes 67 agencies, regards rulemakings for which the field in the Unified Agenda typically devoted to cabinet level agencies is blank and the agency conducting the rulemaking is listed in the Unified Agenda field normally devoted to sub agencies. Most agencies in this category are independent agencies. Two agencies included in this category – the State Department and Veterans Affairs Department – are cabinet level agencies.

C. Sub Agency Completed Rulemakings

As might be expected due to smaller sample sizes, sub agencies showed significantly greater variation in average rulemaking length than cabinet level agencies.

Economically Significant completed rules by the Occupational Safety and Health Administration (OSHA) have been the longest rulemakings by far, with an average rulemaking length of 12.5 years – 421 percent longer than average.

The five sub agencies with the longest Economically Significant rulemakings are OSHA, Solid Waste and Emergency Response (SWER), the Transportation Security Administration (TSA), Food and Nutrition Service (FNS), and Energy Efficiency and Renewable Energy (EE). [Table 17]

Many of the agencies with the longest Economically Significant rulemakings are focused on public health and safety.

**Table 17: Number and Average Rulemaking (RM) Length of Completed Rules by Sub Agency
Sub Agencies with Longer Than Average Economically Significant Completed Rulemakings
(5 or more Economically Significant Completed Rules)**

Sub Agency	Name	Agency	Economically Significant		Other Significant	
			#	Average RM Length	#	Average RM Length
OSHA	Occupational Safety and Health Administration	DOL	5	12.5	21	3.7
SWER	Solid Waste and Emergency Response	EPA	6	5.8	48	3.6
TSA	Transportation Security Administration	DHS	5	5.7	16	2.5
FNS	Food and Nutrition Service	USDA	11	5.4	35	4.6
EE	Energy Efficiency and Renewable Energy	DOE	26	5.1	25	2.4
WATER	Water	EPA	8	5.0	33	3.4
FMCSA	Federal Motor Carrier Safety Administration	DOT	7	4.7	25	3.6
EBSA	Employee Benefits Security Administration	DOL	12	4.4	43	2.6
OCC	Comptroller of the Currency	TREAS	9	3.7	9	2.1
FDA	Food and Drug Administration	HHS	26	3.5	98	3.4
AR	Air and Radiation	EPA	56	3.4	199	2.4
FAA	Federal Aviation Administration	DOT	8	3.3	92	2.8
NOAA	National Oceanic and Atmospheric Administration	DOC	7	2.9	96	2.1
NHTSA	National Highway Traffic Safety Administration	DOT	26	2.6	30	2.6

D. Effects of Regulatory Flexibility Analysis on Significant Completed Rules by Sub Agency

Adding a RFA requirement to Economically Significant rulemakings from OSHA lengthens the rulemaking even more, to 15 years, the longest of all sub agencies with three or more completed Economically Significant rules requiring a RFA. OSHA rules are followed by rules from Energy Efficiency and Renewable Energy (EE), with an average of 5.3 years; the Food Safety and Inspection Service (FSIS), with an average of 5.2 years; and the Employee Benefits Security Administration (EBSA), with an average of 4.6 years. [Table 18]

Table 18: Number and Average Rulemaking (RM) Length of Significant Completed Rules Sub Agencies With Longer Than Average Economically Significant Completed Rulemakings With a RFA Requirement versus No RFA (3 or more RFA Economically Significant Completed)

Sub Agency	Name	Agency	Economically Significant				Other Significant			
			RFA Required		No RFA Required		RFA Required		No RFA Required	
			#	Avg RM Length	#	Avg RM Length	#	Avg RM Length	#	Avg RM Length
OSHA	Occupational Safety and Health Administration	DOL	3	15.0	2	8.8	0	0	21	3.7
EE	Energy Efficiency and Renewable Energy	DOE	15	5.3	11	4.9	5	3.5	20	2.2
FSIS	Food Safety and Inspection Service	USDA	3	5.2	1	4.0	7	2.0	22	3.5
EBSA	Employee Benefits Security Administration	DOL	3	4.6	9	4.3	14	3.1	29	2.4
FAA	Federal Aviation Administration	DOT	4	4.2	4	2.7	10	2.3	82	2.9
FMCSA	Federal Motor Carrier Safety Administration	DOT	5	4.0	2	6.3	6	5.2	19	3.1
AR	Air and Radiation	EPA	15	3.5	41	3.4	2	1.4	197	2.4
NOAA	National Oceanic and Atmospheric Administration	DOC	6	3.5	1	0.2	54	2.3	42	1.8
FDA	Food and Drug Administration	HHS	21	3.4	5	3.9	38	3.6	60	3.3
AMS	Agricultural Marketing Service	USDA	3	2.6	2	0.3	8	2.1	4	0.9

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1995 is likely a contributing factor to OSHA's 15 year rulemaking lengths for completed Economically Significant rules requiring a RFA analysis. SBREFA added to requirements outlined in the Regulatory Flexibility Act (RFA) adopted in 1980. It imposed special requirements on OSHA and the Environmental Protection Agency (EPA) to convene panels of small businesses during the rulemaking process.⁸³

⁸³ Public Law 104-121 (1996), <http://1.usa.gov/1sZzV7f>. Also see, e.g., *A Guide to the Regulatory Flexibility Act*, U.S. SMALL BUSINESS ADMINISTRATION (May 1996), <http://1.usa.gov/1Zbijzo>.

E. Incomplete Rules by Agency

In total, 46 percent of incomplete rules are overdue, according to the definition applied in this report. Six of fourteen cabinet level agencies have greater than 46 percent of their incomplete rules categorized as overdue. The Department of Justice (DOJ) has the largest percentage of incomplete rules that were overdue, 73 percent, followed by the Department of Homeland Security (DHS), Treasury (TREAS), the Department of Labor (DOL) and the Department of Interior (DOI).

The agency with the most Overdue rules, 203, is Treasury. Treasury's Overdue rulemakings have an average current rulemaking length of 6.8 years.

The agency with the longest Overdue rulemakings is DHS, with an average current rulemaking length of 8.2 years. DHS is followed by the DOJ (8.1 years), TREAS (6.8 years), the EPA (6.7 years), and the USDA (6.5 years). [Table 19]

Table 19: Number and Average Rulemaking (RM) Length of Incomplete Rulemakings

Agency	Name	Overdue Rules*			Early Stage* (2014-2016) Rules
		#	% of Agency's Incomplete Rules	Average RM Length	#
DOJ	Department of Justice	64	73%	8.1	24
DHS	Department of Homeland Security	78	68%	8.2	36
TREAS	Department of the Treasury	203	56%	6.8	161
DOL	Department of Labor	43	50%	6.0	43
DOI	Department of the Interior	123	50%	4.7	124
DOT	Department of Transportation	90	48%	4.8	99
HHS	Department of Health and Human Services	75	46%	6.2	87
USDA	Department of Agriculture	53	45%	6.5	65
HUD	Department of Housing and Urban Development	17	41%	5.9	24
EPA	Environmental Protection Agency	61	40%	6.7	90
DOE	Department of Energy	32	35%	5.2	59
DOD	Department of Defense	18	26%	4.8	50
DOC	Department of Commerce	43	25%	5.6	127
ED	Department of Education	4	18%	5.3	18
Other**		354	43%	6.5	464
Total		1,258	46%	6.3	1,471

* Category created by Public Citizen.

**This category, which includes 67 agencies, regards rulemakings for which the field in the Unified Agenda typically devoted to cabinet level agencies is blank and the agency conducting the rulemaking is listed in the Unified Agenda field normally devoted to sub agencies. Most agencies in this category are independent agencies. Two agencies included in this category – the State Department and Veterans Affairs Department – are cabinet level agencies.

F. Incomplete Rules by Sub Agency

Many overdue rules are being worked on by agencies focused on public health and safety. The Food and Drug Administration (FDA) has 33 Overdue rules, with an average current rulemaking length of 7.6 years; the Consumer Product Safety Commission (CPSC) has 20, with an average of 7 years; the National Highway Traffic Safety Administration (NHTSA) has 23, with an average of 4.6 years; Air and Radiation (AR) has 20, with an average of 6.3 years; and Occupational Safety and Health Administration (OSHA) has 17, with an average of 6.7 years. [Table 20]

Table 20: Number of Rules and Average Rulemaking (RM) Length of Incomplete Rules by Sub Agency (>15 Incomplete Rules)

Sub Agency	Name	Agency	Overdue Rules*			Early Stage* (2014-2016) Rules
			#	% of Agency's Incomplete Rules	Average RM Length	#
IRS	Internal Revenue Service	TREAS	160	58%	6.9	114
FWS	United States Fish and Wildlife Service	DOI	70	44%	4.6	89
FDA	Food and Drug Administration	HHS	33	58%	7.6	24
NRC	Nuclear Regulatory Commission		31	60%	8.3	21
USCG	U.S. Coast Guard	DHS	30	79%	7.7	8
SEC	Securities and Exchange Commission		30	44%	5.0	38
NOAA	National Oceanic and Atmospheric Administration	DOC	27	24%	5.5	85
SSA	Social Security Administration		23	52%	8.7	21
NHTSA	National Highway Traffic Safety Administration	DOT	23	58%	4.6	17
CPSC	Consumer Product Safety Commission		20	49%	7.0	21
AR	Air and Radiation	EPA	20	29%	6.3	50
EE	Energy Efficiency and Renewable Energy	DOE	19	31%	4.6	43
OSHA	Occupational Safety and Health Administration	DOL	17	49%	6.7	18
USCIS	U.S. Citizenship and Immigration Services	DHS	16	73%	10.0	6
TTB	Alcohol and Tobacco Tax and Trade Bureau	TREAS	16	44%	8.6	20

* Category created by Public Citizen.

G. Department of Labor (DOL) Case Study — the Long Delayed Silica Rule

After about two decades of work, the Occupational Safety and Health Administration (OSHA) in March of this year finally released an updated standard on exposure to silica dust standard.⁸⁴

More than two million workers in the United States are exposed to silica dust, especially construction workers and others who operate jackhammers, cut bricks or use sandblasters. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease.) The rule will reduce the permissible exposure limit for silica to 50 micrograms per cubic meter (from the currently allowed 100) over an eight hour workday. “OSHA estimates that the proposed rule would prevent between 579 and 796 fatalities annually – 375 from non-malignant respiratory disease, 151 from end-stage renal disease, and between 53 and 271 from lung cancer – and an additional 1,585 cases of moderate-to-severe silicosis annually,” OSHA wrote in 2013.⁸⁵

Silica-related disease is not evenly distributed across the U.S. population. As a result, the benefits of the new rule will be felt most strongly among working class communities and communities of color. In Michigan, studies show the incidence of silicosis in African Americans is almost six times greater than that of Caucasians.⁸⁶

OSHA has long acknowledged that its silica dust standard, adopted in 1971, was obsolete. It deemed a rulemaking to update the standard a priority in 1997 and listed the rulemaking on its agenda in 1996. In 2011, OSHA submitted to OIRA a draft proposed rule to reduce exposure levels. Although OIRA is supposed to complete reviews in three months, it took 921 days to complete its review on the proposed silica standard.⁸⁷ The rule then languished at OSHA for another two-and-a-half years before being finalized.⁸⁸

According to the methodology used in this analysis, the rulemaking took about 19 years. The rule is considered Economically Significant and required a Regulatory Flexibility Analysis. Completed rules with the same priority and procedural requirement have had an average rulemaking length of 2.9 years – making the silica rulemaking 555 percent longer than average. Even at the low end of OSHA’s estimates, more than 9,000 fatalities would have been prevented if the rule had been completed within the average timeframe.

⁸⁴ *Occupational Exposure to Respirable Crystalline Silica*, 81 FEDERAL REGISTER 16286 (March 25, 2016), <http://1.usa.gov/28W5RPs>.

⁸⁵ *Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis: Supporting document for the Notice of Proposed Rulemaking for Occupational Exposure to Crystalline Silica*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (2013). <http://1.usa.gov/28TSwx4>.

⁸⁶ KENNETH ROSENMAN AND MARY JO REILLY, MICHIGAN STATE UNIVERSITY, 2012 ANNUAL REPORT: TRACKING SILICOSIS AND OTHER WORK-RELATED LUNG DISEASES IN MICHIGAN, <http://bit.ly/28TSPYC>.

⁸⁷ *A Timeline of Delay and Disease*, CENTER FOR PUBLIC INTEGRITY (June 29, 2015), <http://bit.ly/28YIdmn>.

⁸⁸ *Occupational Exposure to Respirable Crystalline Silica*, 81 FEDERAL REGISTER 16286 (March 25, 2016), <http://1.usa.gov/28W5RPs>.

Conclusion

The rulemaking process takes years, and in many cases, newly elected presidents must act quickly to ensure that rules to enact their agenda are completed before their term ends. The current state of the regulatory process is a slow and inefficient one, and unfortunately if some members of Congress get their way, the process will only become longer.

Multiple pieces of legislation have been introduced in the 114th Congress that would not only increase the number of steps agencies must take when developing new rules, but also greatly increase the number of rules requiring these lengthy new steps. For example, the Regulatory Accountability Act of 2015, passed by the House of Representatives at the very beginning of the 114th Congress, would add as many as 74 new rulemaking requirements onto the existing process for most rules, including imposing a blanket requirement for agencies to issue ANPRMs for all Economically Significant or major rules.⁸⁹

If enacted, these expanded procedures and mandates could cause the regulatory process to slow down further or even grind to a halt. Our analysis shows that if an ANPRM and a RFA analysis are required on Economically Significant, rulemakings take close to five years. Proposals to increase the requirements within an ANPRM and RFA analysis would increase rulemaking lengths even more.

Surprisingly, supporters of these bills claim that they will result in a more streamlined regulatory process.⁹⁰ While increasing regulatory efficiency may be one of the stated aims of the bills, the outcome will certainly be the exact opposite, making the current delays and inefficiencies in the regulatory process even worse. As this study shows, requiring more rules to include ANPRMs or go through RFA analyses will in no way expedite or streamline the rulemaking process for these rules. It will simply extend the current state of rulemaking delays to even more rules.

On average, Occupational Safety and Health Administration completed rules with an Economically Significant priority and a RFA requirement takes 15 years. The Food Safety and Inspection Service rules with a similar priority take over five, and the Federal Motor Carrier Safety Administration and the Federal Aviation Administration rules take close to four. This is unacceptable.

Each year that public safety rules are delayed costs lives. Legislation to further lengthen rulemakings would put more Americans in danger of serious injury or death.

⁸⁹ See *e.g.* The Early Participation In Regulations Act of 2015, S. 1820, 114th Cong. (2015), The Regulatory Accountability Act of 2015, Section 3(c), H.R. 185 (2015) and Regulations from the Executive in Need of Scrutiny Act of 2015, H.R.427, 114th Cong. (2015).

⁹⁰ See, *e.g.*, Rep. Collin Peterson (D-Minn.), Press Release, *Reps. Peterson and Goodlatte Introduce Bill to Rein in Excessive Regulatory Costs* (Jan. 7, 2015), <http://1.usa.gov/29hr8ES>.