

Dear Ms. Hertz:

Thank you for the opportunity to offer input to the new Executive Order governing review by the Office of Information and Regulatory Affairs. Although we would be happy to provide a more extensive treatment of any of the issues raised in these comments, we will be deliberately brief herein. We have three comments, one regarding the pace of review, one regarding the scope of review, and one regarding methods of review.

1. Pace of Review. The agency rulemaking process takes time. Exactly how much time and for what regulations is a matter of some dispute. If the pace of OMB review could be quickened without undermining the accountability and quality of the process, that would be a desirable shift. We first provide some new information about the duration of the rulemaking process, from the issuance of a Notice of Proposed Rulemaking (NPRM) to the issuance of a final rule or agency action. We then make several suggestions for how the review process could be reformed to get rules enacted more quickly.

Current estimates of how long rulemaking takes vary considerably in the literature. We construct some new estimates for your consideration from a database of agency reports in the Unified Agenda of Federal Regulatory and Deregulatory Actions, from fall 1983 to fall 2008.¹ First consider some aggregates. Examining all NPRMs that were issued between 1983 and 2008 that resulted in a final rule or final action, the mean duration is 452.6 days.² But this measure masks important distinctions among rulemakings. Rulemakings involving a statutory or judicial deadline were finished slightly faster than those without a deadline: 437.3 days as compared to 454.5 days. However, these early data cannot distinguish significant rules from nonsignificant rules because such information was not reported systematically in the Unified Agenda prior to 1995.

Examining NPRMs from 1995 to 2008 then, the duration of significant regulatory processes is 503.4 days, on average, whereas the length of more routine rulemakings is 385.3 days, on average.³ For significant actions facing a deadline, the average duration is 487.3 days; for significant actions without a deadline, the mean duration is 508 days. For non-significant actions with a deadline, the average duration is 310.8 days; for non-significant actions without a deadline, the mean duration is 395.1 days. In short, significant actions take longer, and deadlines shorten the rulemaking process, but by modest rather than major degrees. Moreover, it is not clear whether OMB-imposed deadlines would hasten rulemakings further.

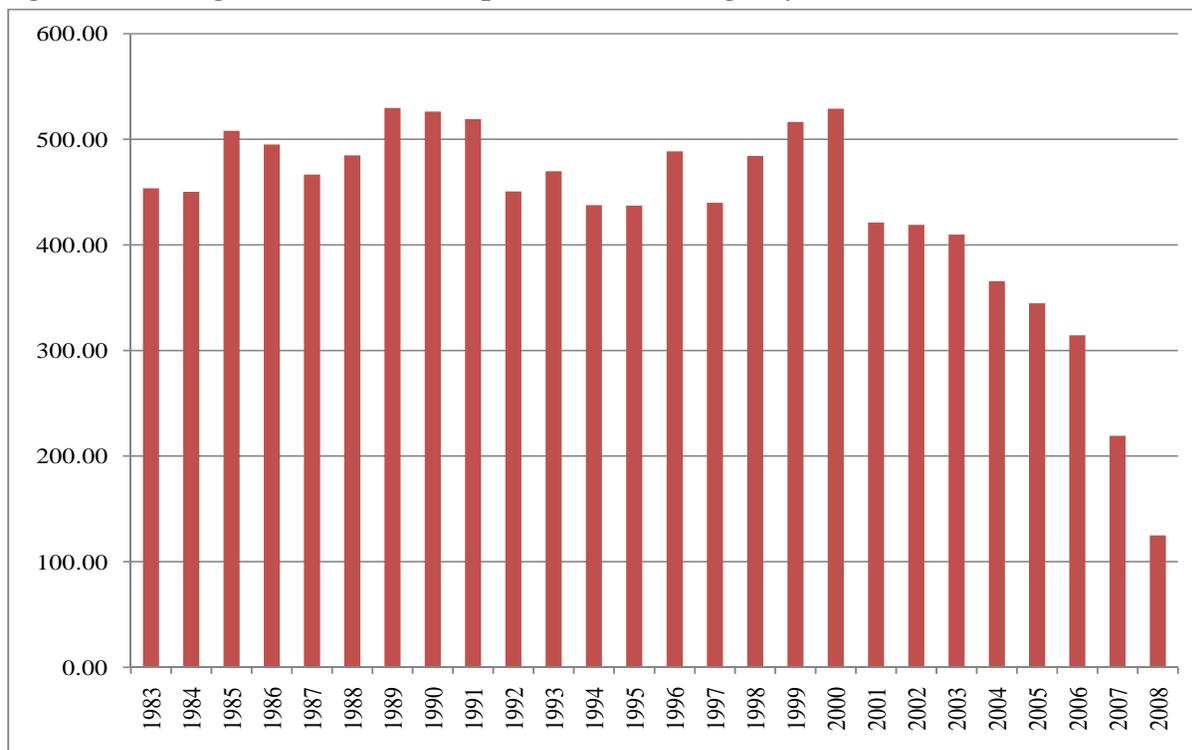
¹ For more information on the database, see Anne Joseph O'Connell, *Cleaning Up and Launching Ahead: What President Obama can learn from previous administrations in establishing his regulatory agenda* (Center for American Progress, January 2009).

² This figure thus excludes NPRMs an agency decided not to complete (by issuing a withdrawal notice in the Federal Register), NPRMs an agency is still reportedly working on, and NPRMs that yielded some other result besides a final rule or final action.

³ Significant rulemakings include actions that are likely to have an effect of at least \$100 million on the economy or other considerable effects. Technically, in the Unified Agenda, this means actions are deemed significant if the Priority Code field is listed as "economically significant" or "other significant" or if the Major field was coded as "yes."

Figure 1 displays the average duration of rulemakings by year of the NPRM, using the entire database.⁴ Figure 2 does the same for significant rulemakings, using reports only from spring 1995 to fall 2008.

Figure 1. Average Duration of Completed Rulemakings, by Year of NPRM, 1983-2008



It is not surprising that the rulemaking process is much shorter in the last two years, as these averages include only finished actions started in those years. Putting those years aside, it still appears that the previous presidential administration had significantly shorter rulemaking proceedings. Even so, excluding NPRMs from 2007 and 2008, it took at least close to a year, on average, to finish a rulemaking after the NPRM is issued in the last administration.⁵

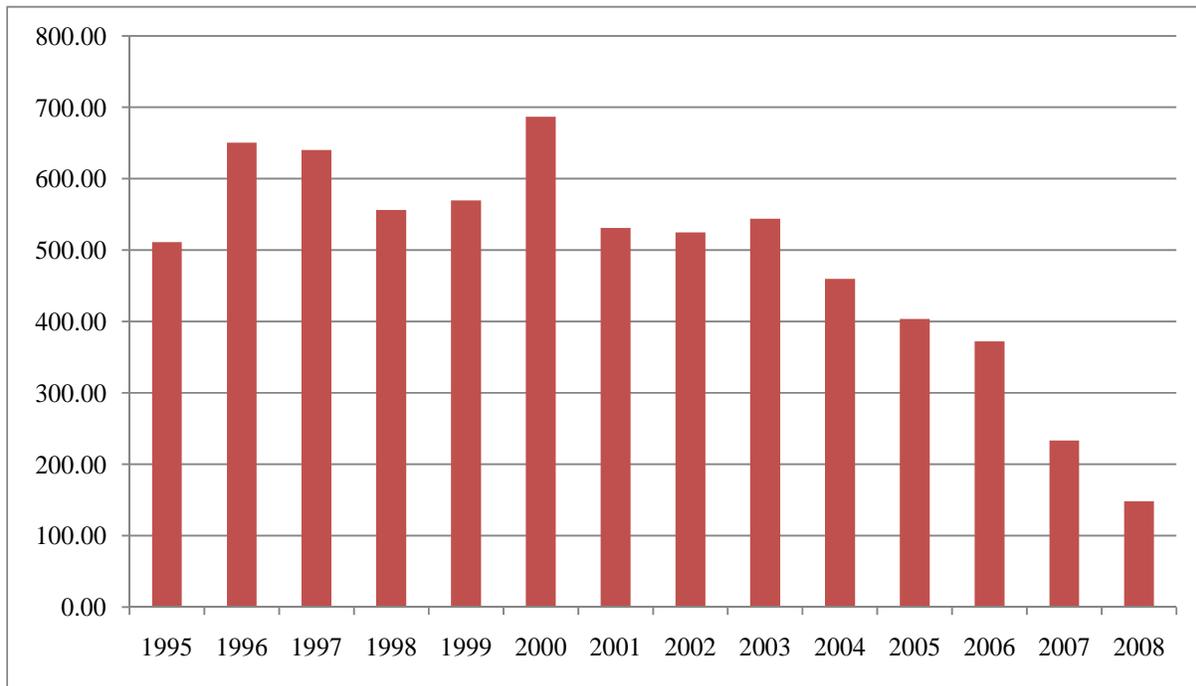
Importantly, these figures incorporate only the OMB review process before a final rule is issued. The OMB also reviews NPRMs before they are published. Other empirical work on the OMB review process and the OMB's own summary statistics seem to combine these stages of review

⁴ Years run from January 20 to January 19.

⁵ There is considerable variation across types of agencies. Using NPRMs issued in 1995 or later, free-standing executive agencies (such as the Environmental Protection Agency), as a group, have the longest rulemakings, on average, 484.2 days. Cabinet departments, as a group, have the next longest, 413.4 days. Independent regulatory commissions (such as the Securities and Exchange Commission) have the shortest, 354.4, again on average. And there is considerable variation within each category. Among cabinet departments, the Department of Commerce, for instance, has the shortest rulemakings, on average, 174.7 days, while the Departments of Justice and Labor have rulemakings averaging 642.4 days and 599.3 days, respectively. The Environmental Protection Agency's rulemaking process takes 517.3 days to complete, on average, once it issues an NPRM.

when reporting average durations of the OMB process.⁶ From OMB's own reporting of each of its reviews, the time between the OMB receiving an economically significant NPRM for review and the publication of the NPRM (the start of the calculated durations above) ranged from 6 days to 292 days in 2007, averaging 70.6 days. Much, in addition to OMB review, occurs before an NPRM is published and public comment is sought.

Figure 2. Average Duration of Completed Significant Rulemakings, by Year of NPRM, 1995-2008



These figures indicate that rulemakings commenced in the first year of an administration may not be implemented for some time. We offer several tentative suggestions for reducing the duration of rulemakings:

First, we encourage the OMB to utilize prompt letters to encourage agencies to start and finish rulemakings more quickly. Our informal understanding is that prompt letters of this sort have been utilized to advance substantive presidential priorities. However, they could as easily be utilized to advance congressional or statutory priorities. Particularly when agencies have been slow to implement statutory directives resulting in deadlines imposed by Congress or the courts, the OMB could facilitate compliance.⁷

⁶ See, for example, Patrick A. McLaughlin, Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time (Mercatus Center Working Paper, September 2008) and <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init>.

⁷ The only mentions of deadlines in Executive Order 12866 are in Subsections 4(b), 4(c)(E), and 6(A)(3)(D). Only the last subsection implies a role for deadlines in the regulatory review process, and the burden is placed on the agency, not the OMB.

Second, we see nothing to prevent an expedited or fast-track review process for important regulatory priorities. Either agencies could be given a limited number of expedited reviews per quarter or the agency and the OMB could work together to determine a proposed rule qualifies for fast-track review. We suspect this would best be accomplished via a regulation by regulation determination, rather than part of the annual regulatory planning process.⁸

Third, where possible we propose making OMB review concurrent as opposed to consecutive with the agency rulemaking process, where possible. Especially for straightforward rulemakings that are unlikely to generate significant controversy, the OMB could expedite or waive initial review of the NPRM.⁹ Section 6 of Executive Order 12866 specifies that the OMB review process contains two tracks, one for significant rules, involving benefit-cost analysis, and another for non-significant rules. Our understanding is that review of non-significant rules is far less intensive unless the rule is flagged by the OMB. Even so, for non-significant rules, we propose waiving the pre-NPRM review.

2. Benefit-Cost Analysis. Benefit-cost analysis is controversial, but we encourage its continued use to evaluate proposed rules, at least in one form or another. Although we do not comment on the precise method by which these calculations should be estimated, we think consideration of potential costs and benefits from regulation—however measured—is important, particularly for balancing competing risks across programs and agencies. We do, however, suggest an explicit waiver of the benefit-cost analysis for rules promulgated pursuant to statutory schemes that preclude such balancing.¹⁰ We also suggest the establishment of an alternative metric or method in those settings.

3. Inter-Risk Coordination. Third, the promise of OMB review has long been that better trade-offs could be made across rules within agencies as well as across agencies. To the extent not precluded by statute, we would applaud efforts to coordinate regulate programs across agencies so as to avoid unnecessary duplication of rules addressing the same underlying risk. Alternatively, coordinating regulatory efforts across agencies could enable the administration to better address risks to specific subpopulations. An explicit administration commitment to emphasize certain types or levels or risks throughout regulatory programs could provide greater benefits for the same level of government expenditures.

Thank you again for the opportunity to offer our input. Please let us know if we can be of further assistance.

Sincerely,

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⁸ See Section 4 of Executive Order 12,866.

⁹ Compare Section 6 of Executive Order 12,866.

¹⁰ For example, the Supreme Court has held that the Occupational Safety and Health Administration cannot use benefit-cost analysis in determining which standards to promulgate under § 6(b)(5) of the Occupational Safety and Health Act of 1970. *American Textile Manufacturers' Institute v. Donovan*, 452 U.S. 490 (1981).

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