

**AUDIT OF
DOT'S RULEMAKING PROCESS
AND TRACKING SYSTEM**

Department of Transportation

Report Number: SC-2004-035

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Memorandum

**U.S. Department of
Transportation**

Office of the Secretary
of Transportation
Office of Inspector General

Subject: **ACTION:** Report on DOT's Rulemaking Process and Tracking System
SC-2004-035

Date: March 2, 2004

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for Auditing and Evaluation

Reply to
Attn. of: JA-60

To: Acting Deputy Secretary
Chief of Staff
General Counsel

This report presents the results of the Office of Inspector General (OIG) audit of the Department of Transportation's (DOT) Rulemaking Process and Tracking System. We conducted this audit as a followup to our 2000 report on the Department's rulemaking process.¹ This audit was also requested by Representative James L. Oberstar, ranking Democratic member of the House Committee on Transportation and Infrastructure.

Our objectives were to determine: (1) how many rulemaking actions were completed on schedule, how many were completed behind schedule, and how many were not completed; and (2) for rules that were delayed, where the longest delays occurred (e.g., at the Operating Administrations, General Counsel, or Office of Management and Budget) and the length of those delays.

This report covers DOT's overall record in meeting its deadlines for significant rules during the period January through June 2003. We plan on issuing a second report covering the period July 2003 through June 2004. Our audit scope and methodology are discussed in Exhibit A.

¹ "Report on the Department of Transportation's Rulemaking Process," OIG Report Number MH-2000-109, July 20, 2000.

RESULTS IN BRIEF

In response to congressional concerns, we conducted a review of DOT's rulemaking process and issued our report in July 2000. That report found that significant rulemaking delays could be avoided or reduced if senior officials had a mechanism to identify problems. One of our recommendations for improvement called for the development of a departmentwide rulemaking tracking system. We also found that DOT took an average of 3.9 years to issue a significant rule in 1999, which was an increase over its 1993 level of 2.3 years.

In April 2001, we provided DOT management with an update of DOT's rulemaking activities, which identified the 11 oldest open rulemakings (ranging from 11.7 to 20 years old) and 19 congressionally mandated rules, which were overdue by an average of 6.6 years.

Our current review of DOT's rulemaking activities and key metrics indicates that DOT is making progress, but there is still room for improvement. As recommended, DOT implemented a departmentwide rulemaking tracking system with internet reporting capabilities in October 2002. In response to this audit, DOT pointed out that, given a relatively small number of rules, issuing very old rules increases the overall average time to complete rules. Because DOT did issue old rules in 2003, we portray the average with and without the oldest rules. Including the old rules, DOT's 2003 average was 3.0 years. Removing the rules over 8 years old drops the average to 1.7 years. For comparison purposes, we adjusted the 1999 average by removing the three rules over 8 years old from the rules issued in 1999, which decreased that average from 3.9 years to 2.6 years.

Of DOT's 11 oldest rules in 2001, 9 rules have been issued or withdrawn, but 8 additional rules are now 11.7 years or older, for a current total of 10 rules. In addition, the congressionally mandated rules that are overdue decreased from 19 to 13 but are overdue by an average of 8.5 years, compared to an average of 6.6 years in 2001. In part, rules were delayed as a result of DOT addressing emergency concerns raised by the September 11, 2001 terrorist attacks and handling several motor carrier and highway traffic safety legislative requirements.

The overriding reason for DOT's progress has been the attention given to rulemaking by the highest levels of DOT's management, namely the Secretary, Deputy Secretary, Chief of Staff, and General Counsel. The

implementation of the rulemaking tracking system was also a major contributing factor to DOT's progress. However, it is essential that DOT's senior management continue to provide priority attention to rulemaking activities.

Rulemaking is a fluid process, and the number of rules in process at any point continually changes—the number increases as new rules are initiated and decreases as rules are issued or withdrawn. Therefore, this review is a snapshot of DOT's rulemaking performance in the first 6 months of 2003. At this time, it is too early to determine the full extent of the effectiveness of DOT's initiatives because of insufficient data on which to base such determinations (e.g., all Operating Administrations were not represented in our 6-month universe of rules) and the initiatives are simply too new to demonstrate a clear impact.

The size of DOT's rulemaking workload is considerable—93 significant rulemakings were pending on June 30, 2003. These rules were in various stages of the rulemaking process. During this review we observed that of those 93 significant rules, 56 (60 percent) had already missed the estimated issuance dates for their current stages. The basic rulemaking *stages* are Notice of Proposed Rulemaking (NPRM), Supplemental NPRM, and Final Rule; other stages include Advanced NPRM and Interim Final Rule.

For each stage of a rulemaking, there are a series of internal steps, called *milestones*, that must be completed before a rulemaking is issued. Milestones include such steps as submission of the rulemaking to DOT's Office of the Secretary and submission to the Office of Management and Budget (OMB). These milestones culminate in publication of the rulemaking in the Federal Register.

Of the 93 rules in process during our audit, 68 had internally established milestone dates between January 1 and June 30, 2003. For these 68 rules: 21 rules (31 percent) completed their milestones by the estimated dates,² 33 rules (48 percent) did not complete their milestones, and 14 rules (21 percent) completed the milestones but did not complete them by the estimated dates.

² Given that some milestone dates were estimated 6 months ahead of time, we considered that the milestones were met if the actions were completed within 14 calendar days of the target dates.

Therefore, DOT must continue to focus its attention on the rulemaking process. In addition to continuing the highest level of management oversight, DOT needs to devote further management attention to the following areas:

- Requiring that the new rulemaking tracking system has accurate data and is used as a management tool by the Operating Administrations. We found the data in the departmental tracking system were not always complete and not all Operating Administrations were using the tracking system.
- Modifying the tracking system so mid-course adjustments can be made for rules that are behind schedule or have missed their initial issuance dates. For example, rules that have missed their originally scheduled issuance dates may be on track to meet the revised dates, and this should be reflected in the tracking system.
- Ensuring that its oldest pending rules are reviewed to determine whether they should remain ongoing rulemakings or be terminated. For example, we found that DOT is not actively working on three rules. DOT needs to review its old rules to determine if issuing rules on those subjects is still relevant, given the time that has passed since the rules were first considered.
- Ensuring that the Operating Administrations analyze the ages of their pending rulemakings in order to focus their efforts on completing the oldest rules.

DOT Corrective Actions

DOT generally agreed with our recommendations and has already begun taking corrective actions in response to our audit. They, however, took exception to our use of averages in discussing the length of time to complete rules. We agree that given the number of rules reviewed, averages are skewed by including the times it took to complete very old rules, but at the same time, we believe averages provide a useful perspective. Therefore, as a result of their comments, we adjusted Table 1 to show both averages—the averages for all rules completed and the averages with the oldest rules removed. Management's comments and our responses are provided on pages 17 through 19. The complete text of management's comments is in the Appendix.

BACKGROUND

By issuing rules, DOT establishes transportation policy and requirements for the transportation industry in the areas of safety, mobility, economic growth, environment, and national security. A need for rulemaking can be identified internally by DOT or externally, such as by Congress or the National Transportation Safety Board. DOT's rulemaking process usually begins with a rule proposal that assesses the impacts on society or industry and ends with a Final Rule published in the Federal Register.³ Under Executive Order Number 12866, "Regulatory Planning and Review," dated September 30, 1993, "each agency shall develop its regulatory actions in a timely fashion."

A significant rule is one that is costly (usually over \$100 million), controversial, or of substantial public interest. The number of significant rulemakings that DOT is processing or working on at any time frequently changes. The number of rules in process decreases as rules are issued or withdrawn, and the number increases as new rules are initiated. Further, as events change, some rules are changed from *significant* to *nonsignificant*. We obtained and analyzed data for all 93 significant DOT rulemakings in process during the first 6 months of 2003. In this report, we update data that were originally provided in our July 2000 report.

In response to our prior recommendation, DOT initiated development of a rulemaking tracking system and began entering data in the spring of 2001. In October 2002, DOT completed the system's phase that provided internet reporting capabilities. This system provides the status of DOT's significant rulemakings and their milestones for each stage. In addition, the system uses a color-coding scheme to indicate the status of a rule's schedule for each rulemaking stage. Rules are coded green, yellow, red, or black. Green designates that the rule is on track to meet its *originally* scheduled issuance date for that stage (e.g., NPRM); yellow means the rule is not likely to meet its original schedule; red indicates the rule is behind schedule; and black means the rule does not yet have a schedule.

RESULTS

Our current review of the key metrics for rulemaking indicates that DOT is making progress, but there is still room for improvement. For 2003, DOT's average time to completion was 3.0 years for all rules, and without the four rules over 8 years old (the oldest rules), DOT's average was 1.7 years.

³ Final Rules are subsequently published in the Code of Federal Regulations.

For comparison purposes, we adjusted the 1999 average by removing the three rules over 8 years old from the rules issued in 1999, which decreased that average from 3.9 years to 2.6 years.

In April 2001, we provided DOT management with an update of DOT's rulemaking activities, which identified the 11 oldest open rulemakings and 19 congressionally mandated rules. Of DOT's 11 oldest rules in 2001 (11.7 years or older), 9 have been issued or withdrawn, but 8 additional rules are now 11.7 years or older, for a current total of 10 rules. Further, the congressionally mandated rules that are overdue decreased from 19 to 13, but they are overdue by an average of 8.5 years, compared to an average of 6.6 years in 2001.

The overriding reason for DOT's progress has been the priority attention given to rulemaking by the highest levels of DOT's management, namely the Secretary, Deputy Secretary, Chief of Staff, and General Counsel. The Secretary has taken an active interest in improving DOT's rulemaking process and has emphasized to senior DOT managers the need to ensure that rules are completed in a timely manner or that problems and issues causing delays are identified and fixed. For example, on August 12, 2003, the Secretary issued a memorandum to all Operating Administrators reminding them of the importance he places on the timely completion of rulemakings. Further, a major DOT action to improve the rulemaking process was the implementation of the intranet-based tracking system, called the Rulemaking Management System. The tracking system captures all significant DOT rules and produces management reports that provide the subject matter, milestones, and status of each rulemaking.

A direct result of this senior level oversight was the July 24, 2003 withdrawal or termination of 53 unnecessary rulemakings (including 3 significant rules) that had been pending for years without action. Further, since our July 2000 report, DOT has issued a number of complex or controversial rules. For example, the National Highway Traffic Safety Administration (NHTSA) issued 13 of the 15 rules required by the 2000 Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act.

Notwithstanding the above advancements, our audit disclosed that the highest levels of DOT management must continue focusing on the timeliness of rulemaking. The oldest pending rules should be reviewed to determine whether they should remain rulemakings or be terminated (e.g., for congressionally mandated rules, DOT should seek legislation to amend or

cancel the requirement). In addition, DOT must improve the data in the tracking system and ensure the Operating Administrations are using the data to effectively manage the rulemaking process.

DOT Has Made Progress in Issuing Significant Rules, Including Congressionally mandated Rules

Significant Rules. Our review found that DOT is making progress in completing its significant rules. Table 1 provides the number of completed rulemakings in 2003 and the average time to complete those rules. The “Total – All Rules” columns of Table 1 show all rulemakings completed between October 1, 2002, and September 30, 2003, and their average times to completion. For the last two columns, we removed the four “aged” rulemakings (between 8 and 14 years old). This recognizes that, as DOT clears out its old rules, the “average time to complete” increases.

**Table 1. Significant Rules Completed in 2003^{a/}
by Operating Administration**

Agency ^{b/}	Total – All Rules		Rules – Not Including “Aged” Rules ^{c/}	
	No. of Rules	Average Time to Complete in Yrs. ^{d/}	No. of Rules	Average Time to Complete in Yrs. ^{d/}
FAA	8	2.9	7	2.1
FHWA	3	2.0	3	2.0
FMCSA	2	4.5	2	4.5
RSPA	1	0.9	1	0.9
NHTSA	9	2.0	8	1.0
FRA	2	2.4	2	2.4
FTA	2	7.2	1	0.6
BTS	1	0.9	1	0.9
OST	2	7.1	1	0.1
TOTAL	30		26	
AVERAGE		3.0		1.7

a/ These significant rules represent a “snapshot” of rulemaking activities, as cited in DOT’s reports on significant rules between October 2002 and September 2003.

b/ The agencies are the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), Federal Motor Carrier Safety Administration (FMCSA), Research and Special Programs Administration (RSPA), National Highway Traffic Safety Administration (NHTSA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), Bureau of Transportation Statistics (BTS), and Office of the Secretary (OST).

c/ For these two columns, we removed the four oldest, or “aged,” rules, i.e., those over 8 years old.

d/ The times to complete rules were calculated from the first official action dates (e.g., NPRM or ANPRM) to the completion dates.

Comparing the 2003 data to 1999 data in Table 2 shows that DOT has improved by increasing the number of completed rules (30 in 2003 compared to 19 in 1999) while decreasing the average time to complete rules (3.0 years in 2003 compared to 3.9 years in 1999). Removing the three rules over 8 years old from the 1999 calculations decreased DOT's average to 2.6 years.

**Table 2. Significant Rules Completed in 1993 and 1999^{a/}
by Operating Administration**

Agency	1993		1999	
	No. of Rules	Average Time to Complete in Yrs. ^{b/}	No. of Rules	Average Time to Complete in Yrs. ^{b/}
FAA	8	1.5	3	3.0
FHWA/FMCSA	3	0.4	3	2.3
RSPA	3	1.6	3	5.9
NHTSA	10	2.8	4	3.7
FRA	2	2.8	1	2.9
FTA	2	2.3	1	0.3
BTS	0	N/A	1	3.6
USCG ^{c/}	5	2.1	0	N/A
OST	2	6.6	3	6.6
TOTAL	35		19	
AVERAGE		2.3		3.9

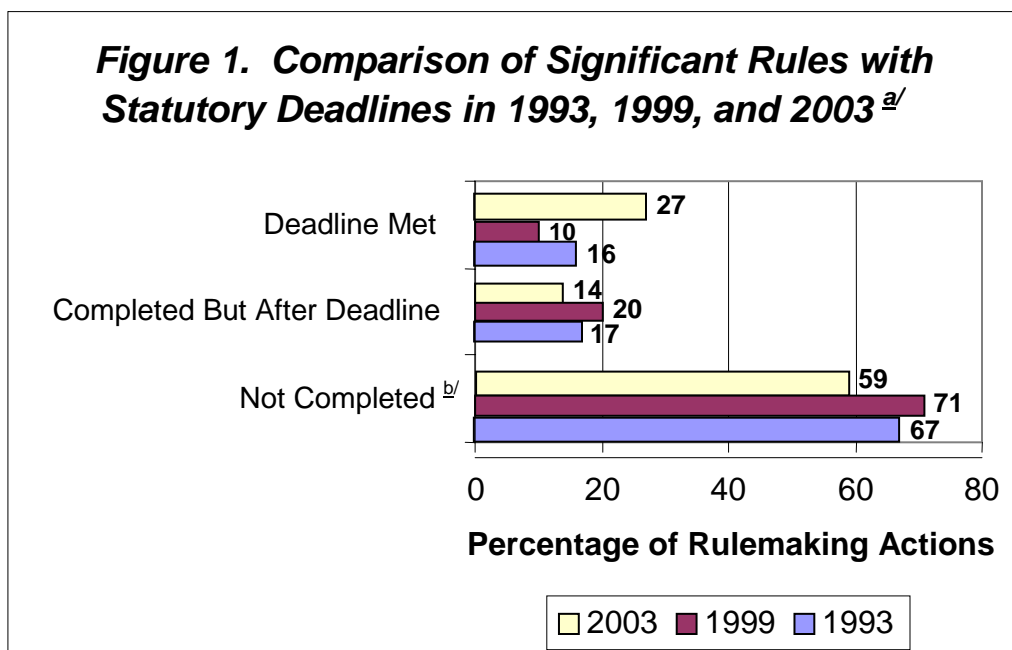
^{a/} These significant rules represent a “snapshot” of rulemaking activities, as cited in the spring and fall Semiannual Regulatory Agendas in 1993 and 1999. In response to comments from DOT's Office of General Counsel, we adjusted the numbers from our July 2000 report to remove anomalous rulemakings for purposes of computing average times to complete rules. For example, for 1993 we previously included the Federal Aviation Administration's completion of eight *intended* rulemakings that were simply removed from the Regulatory Agenda; because these had no starting dates or actual time spent on them, they were assigned zero time values for computing the average time to complete.

^{b/} The times to complete rules were calculated from the first official action dates (e.g., NPRM or ANPRM) to the completion dates.

^{c/} The U.S. Coast Guard (USCG) transferred to the Department of Homeland Security on March 1, 2003.

Congressionally Mandated Significant Rules. Our current review also found that DOT showed improvement in meeting its statutory deadlines. For the period January 1 through June 30, 2003, DOT met the deadlines for 27 percent (6 rules) of the 22 significant rules with statutory deadlines. This compares favorably to meeting only 10 percent (4 rules) of its 41 deadlines in 1999 and 16 percent (10 rules) of 64 deadlines in 1993. Figure 1 compares

DOT's success in achieving statutory deadlines in 6-month periods in 1993, 1999, and 2003.



^{a/} Federal Register, October 25, 1993, and November 22, 1999; and OIG audit for the period January 1 – June 30, 2003.

^{b/} For the 13 rules that were “Not Completed” as of June 30, 2003, all of their statutory deadline dates had passed.

DOT Needs to Continue to Focus on the Timeliness of Rulemaking

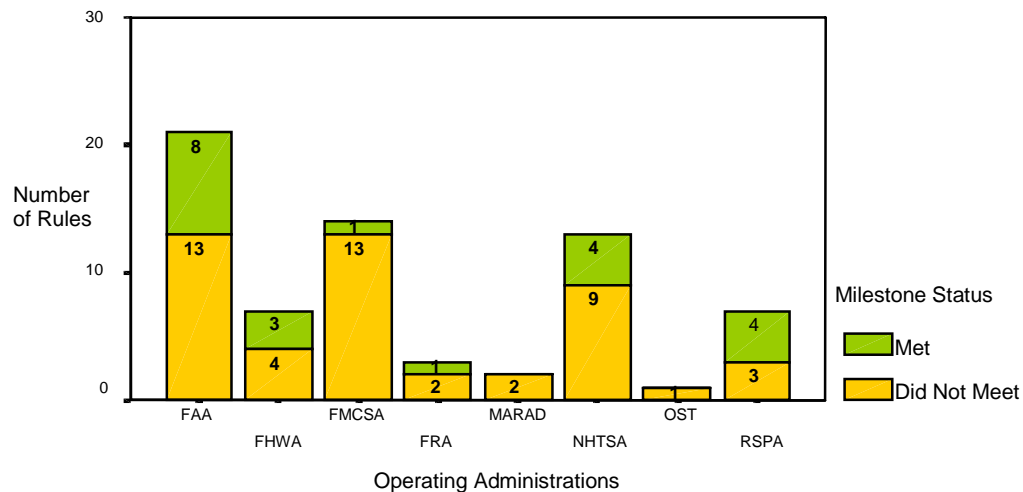
Since 1999, DOT has made progress in meeting the deadlines for issuing Final Rules and NPRMs and in promulgating several difficult and complex rules. The overriding reason for DOT's rulemaking progress has been the priority attention given to rulemaking by the highest levels of DOT's management. However, the Operating Administrations continue to miss milestones, and DOT needs to continue to work on reducing the number of old rulemakings.

To meet the issuance dates, the Operating Administrations establish dates for each of the key steps, or milestones, that must be completed for each stage (e.g., Final Rule or NPRM) prior to issuance. For example, an Operating Administration establishes and enters into the tracking system the key milestone dates by which it estimates a Final Rule or NPRM: (1) will be sent

to OST, (2) will be cleared by OST and sent to OMB, (3) will be cleared by OMB, and (4) will be published in the Federal Register.

Milestone Dates Were Missed. Of the 93 rules in process during our audit, 68 had milestone dates between January 1 and June 30, 2003. For these 68 rules: 21 rules (31 percent) completed their milestones by the estimated dates,⁴ 33 rules (48 percent) did not complete their milestones, and 14 rules (21 percent) completed the milestones but not by the estimated dates. Figure 2 shows the breakdown by Operating Administration of the rules that met and did not meet milestones during the period January 1 through June 30, 2003.

Figure 2. Milestone Status by Operating Administration



Our review of the 47 rules that missed their estimated milestone dates showed that all the delays, except for 1 rule that was delayed at OMB, occurred within the Operating Administrations and OST. For example, a motor carrier rule concerning commercial drivers' vision requirements was delayed because the FMCSA staff was directed to work on higher priority issues after the September 11, 2001 terrorist attacks. The delays of the 47 rules ranged from 15 days to 180 days. We found rules were delayed for a variety of reasons. The following are the three major categories of reasons for the rules being delayed:

⁴ Given that some milestone dates were estimated 6 months ahead of time, we considered that the milestones were met if the actions were completed within 14 calendar days of the target dates.

- 11 rules were delayed so staff could work on higher priority rules or other issues.
- 9 rules were delayed due to unforeseen problems coordinating these rules with other agencies.
- 6 rules were delayed due to data problems or the need for further studies or analyses to improve the integrity of the data.

Milestone Dates Were Reasonable and Provide Appropriate Targets for Issuing the Rules. We reviewed the estimated milestone dates established by the Operating Administrations and found them to be reasonable. Although the Operating Administrations missed 69 percent of these dates, we found that these dates provided appropriate targets for getting the rules completed.

Backlog of Old Rules Continues. Our audit included reviewing DOT's progress in completing the oldest rules⁵ and rules with congressional deadlines. We found that some progress had been made in these areas but that more should be done.

Since our April 2001 report, 9 of the 11 oldest rules were issued or withdrawn (this number includes the 3 rules withdrawn on July 24, 2003, which was after our audit period). However, eight other rules are now 11.7 years or older and have been added to the list of the oldest rules. Thus, there are now 10 significant rules 11.7 years or older. Table 3 provides the 10 rules that are 11.7 years or older and the next 4 oldest rules, which are more than 10 years old. During our next review, we will track DOT's progress in completing these 14 old rules.

⁵ We expanded this list, from the previous cut-off of more than 11.7 years old, to identify all significant rules over 10 years old.

**Table 3. Oldest Open Significant Rules
As of July 2003**

Rank	Agency	Title	Start Date	Years Open
1	FAA	Retrofit of Improved Seats in Air Carrier Transport Category Airplanes	12/30/87	15.5
2	FAA	Drug Enforcement Assistance ^{a/}	11/18/88	14.6
3	FMCSA	Commercial Driver's License (CDL) Standards; Biometric Identifier ^{a/}	11/18/88	14.6
4	OST	Accessibility of Passenger Vessels to Individuals with Disabilities	7/26/90	12.9
5	RSPA	Safeguarding Food From Contamination During Transport ^{a/}	10/21/90	12.7
6	FMCSA	Hazardous Materials Permitting ^{a/}	11/16/90	12.6
7	FMCSA	Safety Performance History	11/16/90	12.6
8	FMCSA	Qualifications of Drivers; Vision	2/1/91	12.4
9	FAA	Aging Aircraft Safety	10/28/91	11.7
10	FAA	Corrosion Prevention and Control Program	10/28/91	11.7
11	FMCSA	Training for Entry-Level Drivers ^{a/}	12/18/91	11.5
12	FMCSA	Longer Combination Vehicle (LCV) Training ^{a/}	12/18/91	11.5
13	RSPA	Response Plans for Onshore Oil Pipelines ^{a/}	4/12/92	11.2
14	FMCSA	Commercial Driver's Physical Fitness as Part of the CDL Process	7/15/93	10.0

^{a/} These rules also have congressionally mandated deadlines.

Under a February 2003 settlement agreement between DOT and public interest groups, Final Rules for four of the above congressionally mandated rulemakings (Rules 6, 7, 11, and 12 in Table 3) are required by June 2004. We found that DOT was not actively working on three rules (Rules 2, 3, and 4 in Table 3). For example, Congress directed FAA to issue a rule that would assist in drug enforcement efforts by requiring various certifications and background checks of general aviation aircraft owners. FAA has addressed all but one issue—requiring a 90-day waiting period before owners may operate newly acquired aircraft. FAA plans on asking Congress to cancel this requirement because of the additional burden it will place on the already stressed general aviation industry. The Office of General Council commented that, although staff may not be actively working on a rulemaking, the

underlying issue was being addressed in other ways. For example, for Rule 4 in Table 3, DOT is waiting on relevant physical accessibility standards to be issued by the US Access Board.⁶ Once those standards are issued, DOT will actively proceed with the rulemaking.

We are recommending DOT review its old rules at least yearly and determine whether issuing rules on those subjects is still relevant, given the time that has passed since the rules were first considered.

As of July 2003, DOT had 40 rules that had been open 5 years or longer. Table 4 provides the breakdown by Operating Administration of the 40 rules.

**Table 4. Significant Rules Open 5 Years or More
by Operating Administration
As of July 2003^{a/}**

Agency	Number of Rules Open	No. of Rules Open 5 Years or More
FMCSA	23	13
FAA	28	12
OST	7	4
FHWA	6	4
RSPA	7	3
NHTSA	13	1
FRA	4	2
MARAD ^{b/}	2	1
FTA	0	0
TOTAL	90	40

^{a/} From the 93 rules, we removed the 3 rules that were withdrawn on July 24, 2003, shortly after our audit period.

^{b/} Maritime Administration

Regarding the rules with congressionally mandated deadlines, we found the number of these rules that were overdue decreased by 6, from 19 rules in April 2001 to 13 rules in July 2003. However, the average length of time the rules were overdue increased from 6.6 years in 2001 to 8.5 years in 2003. Table 5 lists the 13 overdue congressionally mandated rules.

⁶ The Access Board is an independent Federal agency devoted to accessibility for people with disabilities. It operates with a board of representatives from Federal departments and public members appointed by the President.

**Table 5. Overdue Congressionally Mandated Rules
As of July 2003**

Rank	Agency	Title	Required Action	Original Deadline	Years Overdue
1	FAA	Drug Enforcement Assistance	Final Rule	09/18/1989	13.8
2	FMCSA	CDL Standards; Biometric Identifier	Final Rule	12/31/1990	12.5
3	RSPA	Safeguarding Food From Contamination During Transport	Final Rule	08/01/1991	11.9
4	FMCSA	Hazardous Materials Permitting	Final Rule	11/15/1991	11.6
5	RSPA	Response Plans for Onshore Oil Pipelines	Final Rule	08/18/1992	10.9
6	FMCSA	Training for Entry-Level Drivers – NPRM ^{a/}	NPRM	12/18/1992	10.5
7	FMCSA	Training for Entry-Level Drivers – Final Rule ^{a/}	Final Rule	12/18/1993	9.5
8	FMCSA	LCV Training Rule	Final Rule	12/18/1993	9.5
9	FMCSA	Railroad-Highway Crossing	Final Rule	02/16/1995	8.4
10	FMCSA	Unified Registration Process	Final Rule	01/01/1998	5.5
11	FMCSA	Safety of Small, Passenger-Carrying Commercial Vehicles	Final Rule	12/09/2000	2.6
12	FRA	Whistle Bans at Highway-Rail Grade Crossings	Final Rule	07/01/2001 ^{b/}	2.0
13	FAA	Part 139 - Certification of Airports	Final Rule	11/03/2001	1.7

^{a/} For the rulemaking on Training for Entry-Level Drivers, Congress stipulated deadlines for both the NPRM and Final Rule.

^{b/} In 2000, Congress passed legislation prohibiting this Final Rule from being published before 07/01/2001.

Our findings regarding the number of old rules and the length of time they were overdue demonstrate the need for DOT senior officials to continue to focus on reducing the number of old rules and overdue congressionally mandated rules. In our next review, we will continue to follow DOT's progress in issuing or completing these rules.

Tracking System Data and Use Can Be Improved

While the Operating Administrations establish milestone dates and enter the dates and other data into the tracking system, we found they were not entering timely and complete information into the tracking system. Of the

93 significant rulemakings open as of June 30, 2003, 20 rules (22 percent) either had no internal schedule or milestone dates (15 rules) or the milestone dates had already passed (5 rules). Further, of the 47 rules that missed their milestones as of June 30, 2003, the reasons for the delays were not explained in the tracking system for 27 rules (57 percent).

We also found that the Operating Administrations were not using the tracking system as a management tool. Each Operating Administration had some form of internal system or process that it continued to use, rather than relying on the tracking system. These processes ranged from manual reports to automated systems. Operating Administration officials rely on their own processes for monitoring rules, and they view the departmental tracking system primarily for use by OST to monitor and track rules. The Secretary, in his August 12, 2003 memorandum, stated that the Operating Administrators are to use the departmental tracking system to monitor their rules.

One reason for the lack of use is that the color-coded status system as implemented does not help the Operating Administrations or senior managers direct or prioritize their rulemaking efforts. For example, once a rule misses its original target date for issuance and goes into the red category, it stays red until completion of that stage, even if milestone dates are revised and then met. For rules that have missed their original issuance dates, DOT managers need a mechanism to monitor and track the progress of these rules against the *revised* target dates.

As shown in Table 6, the majority (55) of rules being tracked in the tracking system were red.

**Table 6. Status by Color Code of Rules Open
As of July 2003^{a/}**

Status Color	Description	Number of Rules	Percent of Total
Green	On schedule	17	19%
Yellow	May miss target date	2	2%
Red	Missed target date	55	61%
Black	No schedule	16	18%
Total		90	100%

^{a/} From the 93 rules, we removed the 3 rules that were withdrawn on July 24, 2003, shortly after our audit period.

Rules miss their target dates for numerous reasons. For example, the terrorist attacks of September 11, 2001, resulted in a significant change in the Department's priorities. When rules miss their original target dates, senior managers need a mechanism to acknowledge progress in meeting the new deadlines that they have established. The mechanism should also provide management with a means to set priorities or focus attention on rules that are at risk of missing the revised target dates. DOT could reflect progress and the current status of rules by revising the color-coding scheme or by providing a separate tracking system report that would indicate the rule's next target date and progress in meeting that revised date.

OST has taken a significant first step by developing, populating, and implementing the tracking system. Now OST should ensure that timely and complete data are entered into the system to help senior officials to effectively manage and oversee the rulemaking process. With timely and complete data, the tracking system would be a better management tool to set priorities for completing rulemakings in a timelier manner.

DOT's Performance Plan

In our July 2000 report, we recommended that DOT develop rulemaking performance measures for its Performance Plan. However, DOT's current Performance Plan does not have any performance measures regarding rulemaking activities. Annual Performance Plans including appropriate performance measures are required of all agencies by the Government Performance and Results Act. We maintain that having a rulemaking performance measure would emphasize the importance the Department is placing on its goal of timely rulemaking and would provide further visibility of DOT's progress in meeting that goal. Therefore, the recommendation from our July 2000 report is still open.

RECOMMENDATIONS

To address the above issues, we recommend that the Acting Deputy Secretary and Chief of Staff:

1. Require compliance with the directives stated in the Secretary's August 12, 2003 memorandum, which instructed Operating Administrators to input reliable data into the tracking system and to use the tracking system to monitor their rules.

2. Modify the tracking system so mid-course adjustments can be made for rules that have missed their original target dates for issuance.
3. Direct Operating Administrators to review the oldest pending rulemakings (those over 10 years old) to determine whether they should remain ongoing rulemakings (e.g., for congressionally mandated rules DOT should either petition Congress to cancel the requirement or withdraw the rulemaking).
4. Direct Operating Administrators to analyze the age of their pending rulemakings in order to focus their efforts on completing the oldest rules.

MANAGEMENT COMMENTS AND OIG RESPONSE

A draft of this report was provided to the Acting Deputy Secretary, Chief of Staff, and General Counsel on December 31, 2003. On February 3, 2004, the Deputy General Counsel replied for management generally agreeing with all our recommendations and providing the following comments. (See the Appendix for the complete text of the comments.) The actions taken and planned are responsive to our recommendations.

General Comments. While DOT officials were pleased with its rulemaking progress to date, they recognized the potential for further improvement and are continuing to fine-tune their processes. They did not expect modifications to the existing draft, but they commented that some data presented in the report could cause misunderstandings about DOT's rulemaking progress and successes. Examples of their comments regarding the data are:

- Averages are an inappropriate measurement of the effectiveness of DOT's rulemaking procedures, and the number of rulemakings identified in the report is too small for meaningful averages.
- Comparisons of the time from the issuance of the first rulemaking notice (e.g., an NPRM) to the issuance of the final action are also not meaningful; if a proposal is to be done well, a great deal of work must be done before the NPRM. DOT's tracking system includes the "initiation date" date for each rulemaking, which would allow the use of consistent, appropriate data for each rulemaking in the future.

As a result of their comments, we removed from our calculations the old rules, which would have resulted in higher averages, because we recognized that it is important for DOT to complete its oldest rules. We therefore adjusted

Table 1 to show both averages—the averages for all rules completed and those with the rules over 8 years old removed. We believe it is informative to provide these adjusted averages as simple comparisons of how long it took the Department and each Operating Administration to issue final rules in 1993, 1999, and 2003. Further, we agree that use of the “initiation date” provides a better indicator of the time taken to issue rules, and we will consider this in our future work. However, the initiation dates were not available for rules completed in 1993 and 1999, thus we were unable to analyze that data for this report.

Recommendation 1. Concur. DOT has already taken a number of steps to comply with the directives stated in the Secretary’s August 12, 2003 memorandum. These steps included remarks by the Secretary in a subsequent meeting with all senior DOT officials and regular meetings held by the Chief of Staff and Deputy Secretary with the individual Operating Administrations to discuss specific compliance issues. These actions will be conducted on a continuing basis to help ensure the timeliness of DOT’s rulemakings.

Recommendation 2. Concur in part. DOT has taken steps to ensure that the rulemaking tracking system is used as effectively as possible, including using the system to better evaluate rulemaking progress. This requires only analytical and management action and does not require a modification to the tracking system itself. The status of each significant rule is reviewed at least monthly. If the agency continually changes its projected dates to later dates, fails to meet projected dates, or is generally not taking reasonable action to complete the rulemaking in a timely manner, the General Counsel raises the issue directly with senior officials. The General Counsel also schedules regular meetings with the Chief of Staff, Deputy Secretary, and individual Operating Administrations. One of the purposes of these meetings is to address any scheduling problems or delays. These matters may also be raised as part of regular reports to the Secretary. These actions will be conducted on a continuing basis.

Recommendation 3. Concur. At the beginning of 2003, DOT developed a list of pending rulemakings, presenting them in order of their age. Senior DOT officials, including the Deputy Secretary, then met to discuss what action should be taken on each one. That review generated significant action on the old rulemakings, including a notice published in the Federal Register on July 24, 2003, withdrawing or terminating 53 rulemakings. The Deputy General Counsel stated that the rules OIG identified as ones DOT is not actively working on were in fact being “worked on” as a result of this review. DOT may not have been drafting a withdrawal notice or final rule, but DOT

was working to get a legislative fix or to get another agency to act so that DOT could proceed. Actions to address the oldest pending rulemakings will be conducted on a continuing basis.

Regarding the Deputy General Counsel's comment to recommendation 3, OIG recognizes that DOT had been at least considering alternatives to address each of the intended rulemakings' issues. However, we maintain that DOT was not actively working on the particular rulemakings.

Recommendation 4. Concur in part. DOT plans to keep the list discussed under recommendation 3 up-to-date, so that attention may continue to be focused on the older rulemakings, as appropriate, in the regulatory review meetings. DOT does not agree, however, that efforts should be focused on completing the oldest rules. A number of reasons arise, including emergencies, which may require efforts to be focused on completing other rulemakings. Actions to address the oldest pending rulemakings will be conducted on a continuing basis.

ACTION REQUIRED

The actions taken and planned by DOT are responsive to our findings and recommendations. OIG accepts DOT's alternative actions on recommendations 2 and 4. Therefore, all our recommendations are closed, subject to follow-up requirements in DOT Order 8000.1C.

We appreciate the courtesies and cooperation of Department of Transportation representatives during this audit. If you have any questions concerning this report, please call me at (202) 366-1992 or Robin Hunt at (415) 744-3090.

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EXHIBIT A. SCOPE AND METHODOLOGY

This was a departmentwide audit of the processes to develop and issue significant rulemaking actions. A significant rule is one that is costly (usually over \$100 million), controversial, or of substantial public interest. The audit was conducted in the Office of the Secretary of Transportation and DOT's Operating Administrations in Washington, D.C.

We obtained and analyzed data for all 93 significant DOT rulemakings in process during the first 6 months of 2003. We also reviewed DOT's July 24, 2003 list of withdrawn and terminated rulemakings, which included 3 rules that were on our list of 93 rules. In this report, we recognized and took into consideration these withdrawn rules, even though they were withdrawn after the scope of our audit.

We identified 68 rules with original or revised milestone due dates between January 1 and June 30, 2003. For these rules, we identified (1) how many rulemaking actions were completed on schedule, (2) how many were completed behind schedule, and (3) how many were not completed during the 6-month period. Our analysis included information on the length of the delays and the reasonableness of the amount of time that DOT and its Operating Administrations established as their goal for completion of the various rulemaking stages.

We developed a database of the 68 significant rulemaking actions. For each rulemaking action, we determined specific steps in the rulemaking process, dates that phases started and stopped in each specific step, amount of time in each specific step, and overall time period each rulemaking was in process.

We performed a detailed analysis of individual rulemaking actions that missed the mandated or estimated completion dates (47 rules) or had been in the process for a relatively long period of time to determine how many of those rulemakings met their scheduled milestones by the end of June 2003. We also interviewed appropriate DOT officials in OST and seven of the Operating Administrations¹ to understand the rulemaking process throughout the Department, identify the causes for rules being delayed, and determine the extent of officials' use of the rulemaking tracking system.

We analyzed the data to identify (1) the oldest significant rules, (2) the rules that had been open 5 years or longer, and (3) the congressionally mandated rules. We also obtained and analyzed Operating Administration data for the year ending

¹ The seven Operating Administrations were FAA, FHWA, NHTSA, FTA, FRA, RSPA, and FMCSA.

October 1, 2003, to provide updated information on the number of rules issued and the average time to issue those rules (see Table 1 on page 7). At the Office of the Secretary's request, we reviewed and revised our prior rulemaking data for 1993 and 1999.

We performed the audit from January through October 2003 in accordance with Government Auditing Standards prescribed by the Comptroller General of the United States.

EXHIBIT B. MAJOR CONTRIBUTORS TO THIS REPORT

THE FOLLOWING INDIVIDUALS CONTRIBUTED TO THIS REPORT.

<u>Name</u>	<u>Title</u>
Glenn Griser	Program Director
Robert Falter	Project Manager
Leroy Davis	Project Manager
Cindy Allen	Management Analyst
John Hudson	Management Analyst
Phil Windust	Management Analyst
Mike Sivi	Management Analyst
Petra Rose	Senior Statistician
Shirley Murphy	Writer/Editor
Seth Kaufman	Counsel


APPENDIX. MANAGEMENT COMMENTS



U.S. Department of
Transportation
Office of the Secretary
of Transportation

Memorandum

ACTION: Comments on Office of Inspector General (OIG)
Subject: Draft Report, "Audit of DOT's Rulemaking Process and Tracking System" Date: February 3, 2004

From: 
Rosalind A. Knapp
Deputy General Counsel

Reply to
Attn. of:

To: Alexis M. Stefani
Principal Assistant Inspector General
for Auditing and Evaluation

DOT Continues to Make Significant Progress Issuing Rules

Since the previous OIG report on the Department's rulemaking system was issued, we have made significant progress in improving the timeliness of our rulemakings and in the completion of rulemakings that have been pending for many years. Much of this progress is due to the important role played by senior DOT officials in managing the regulatory process and the help provided by the significant improvements made to our ability to electronically track rulemaking progress. The OIG report provides data that helps to illustrate the progress we have made. While we are pleased with the progress to date, we recognize the potential for further improvement and are working to continue fine-tuning our processes.

OIG Draft Offers a Snapshot of the Department's Progress

We generally agree with the thrust of the report and its recommendations, and we think the continued emphasis on rulemaking timeliness is valuable. We understand that OIG has worked hard to ensure this report presents a thorough analysis that enables comparison to its previous efforts. We appreciate the interactions we have had with OIG, and are pleased that many of our concerns have been addressed. There remain, however, a few issues we mention now with the intent of having the record reflect our concern and to provide input for any future analysis of the Department's rulemaking efforts. We do not expect modifications to the existing draft. We raise them because we believe they could cause misunderstandings about the progress DOT has made and the successes we are achieving.

- Averages are an inappropriate measurement of the effectiveness of DOT's rulemaking procedures. The number of rulemakings identified in the report is too small for meaningful averages. Also, rulemaking complexity can vary significantly, making comparisons difficult. It would be more appropriate to calculate medians or distributions or to measure the age of pending rules at a particular time.

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- If comparisons are to be made, they should be to multiple year averages or medians. Not only would a multiple-year data base be larger and more meaningful, but a particular year (e.g., the first year in an Administration) may not be typical of another year.
- Comparisons of the time from the issuance of the first rulemaking notice (e.g., an NPRM) to the issuance of the final action are also not meaningful; if a proposal is to be done well, a great deal of work must be done before the NPRM. Such an approach also could discourage the valuable use of earlier stage documents, such as ANPRMs (because the time measurement would start with the ANPRM and include all the time spent on researching, analyzing, preparing, and reviewing the NPRM, time not included for other rules to which it would be compared) and encourage agencies to delay issuance of an NPRM until they are certain they could quickly follow it up with a final action. In this regard, we note that our Rulemaking Management System (RMS) includes the “initiation date” date for each rulemaking, which would allow the use of consistent, appropriate data for each rulemaking in the future.

While we understand that addressing these concerns may result in a discontinuity with previous OIG analyses, the end result will be future analyses that provide a consistent and equitable basis for comparison.

Recommendations and Responses

Recommendation 1: Require compliance with the directives stated in the Secretary’s August 12, 2003 memorandum, which instructed operating administrators to input reliable data into the tracking system and to use the tracking system to monitor their rules.

Response: Concur. A number of steps have already been taken to address this recommendation. These include remarks by the Secretary in a meeting with all senior DOT officials and regular regulatory review meetings held with individual DOT agencies and the Secretary’s Chief of Staff and the Deputy Secretary to discuss specific compliance issues. These actions will be conducted on a continuing basis to help ensure the timeliness of the Department’s rulemaking projects.

Recommendation 2: Modify the tracking system so mid-course adjustments can be made for rules that have missed their original target dates for issuance.

Response: Concur in part. The Department has taken steps to ensure that the rulemaking tracking system is used as effectively as possible, including using the system’s data to better evaluate rulemaking project progress. This requires only analytical and management action, and does not require a modification to the tracking system itself. The system’s effectiveness depends on its data being kept up to date and effectively monitored. We encourage users to update the “New Projected Date” as often as necessary to ensure that the system accurately reflects the rulemaking project status. The status of each significant rule is reviewed, at least

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monthly. Rulemakings that have missed or will miss their *scheduled* dates (or statutory deadlines) for publication are coded/highlighted in red to ensure proper management attention. When rulemakings fall behind their scheduled or projected dates by more than 30 days, new projected dates are required. If the agency continually changes its *projected* dates to later dates, fails to meet projected dates (and to provide new projections), or is generally not taking reasonable action to complete the rulemaking in a timely manner, the General Counsel raises the issue directly with senior agency officials. The General Counsel also schedules regular regulatory review meetings with the Secretary's Chief of Staff, the Deputy Secretary, and individual agencies. One of the purposes of these meetings is to address any scheduling problems or delays. The matter may also be raised as part of regular reports to the Secretary. These actions will be conducted on a continuing basis.

Recommendation 3: Direct Operating Administrators to review the oldest pending rulemakings (those over 10 years old) to determine whether they should remain ongoing rulemakings (e.g., for congressionally-mandated rules DOT should either petition Congress to cancel the requirement or withdraw the rulemaking).

Response: Concur. At the beginning of 2003, we developed a list of pending rulemakings, presenting them in order of their age. Senior DOT officials, including the Deputy Secretary, then met to discuss what action should be taken on each one. That review generated significant action on the old rulemakings, including a Department-wide notice published in the *Federal Register* on July 24, 2003, withdrawing or terminating 53 rulemakings. Each of the rules that the OIG report identified as ones "DOT is not actively working on" were in fact being "worked on" as a result of this review. We may not have been drafting a withdrawal notice or final rule, but we were working to get a legislative fix or to get another agency to act so that we could proceed. Actions to address the oldest pending rulemakings will be conducted on a continuing basis.

Recommendation 4: Direct Operating Administrators to analyze the age of their pending rulemakings in order to focus their efforts on completing the oldest rules.

Response: Concur in part. We plan to keep the list discussed under recommendation 3 up-to-date, so that we may continue to focus attention on the older rulemakings, as appropriate, in the regulatory review meetings. We want to ensure that we complete them as quickly as reasonably possible. We do not agree, however, that we should focus our efforts on completing the oldest rules. There may be a number of reasons, including emergencies, that would require us to focus our efforts on completing other rulemakings. Actions to address the oldest pending rulemakings will be conducted on a continuing basis.