

**FOLLOW-UP AUDIT OF  
DOT'S RULEMAKING PROCESS AND  
TRACKING SYSTEM**

*Department of Transportation*

*Report Number: SC-2005-031*

*Date Issued: December 21, 2004*



# Memorandum

**U.S. Department of  
Transportation**

Office of the Secretary  
of Transportation  
Office of Inspector General

Subject: **ACTION:** Follow-up Report on DOT's  
Rulemaking Process and Tracking System,  
SC-2005-031

Date: December 21, 2004

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for Auditing and Evaluation

Reply to  
Attn. of: JA-60

To: Deputy Secretary  
Chief of Staff  
General Counsel

This report presents the results of the Office of Inspector General (OIG) follow-up audit of the Department of Transportation's (DOT) rulemaking process and tracking system. We conducted this audit as a follow-up to our March 2, 2004 report on the Department's rulemaking process.<sup>1</sup> This audit was requested by Representative James L. Oberstar, ranking Democratic member of the House Committee on Transportation and Infrastructure.

The objective of our review was to update DOT's progress in managing its rulemaking process and meeting its deadlines. This follow-up report covers DOT's overall progress in issuing significant<sup>2</sup> rulemaking actions and is a snapshot of DOT's rulemaking performance during the 1-year period from July 1, 2003, through June 30, 2004. Our audit scope and methodology can be found in Exhibit A.

## RESULTS IN BRIEF

DOT continues to make progress in issuing its rules, especially old and congressionally mandated rules with deadlines. However, the Operating Administrations continue to miss internal milestones, and DOT needs to continue to work on reducing the number of old rulemakings. The overriding reason for

<sup>1</sup> OIG Report Number SC-2004-035, "Report on the Department of Transportation's Rulemaking Process and Tracking System," March 2, 2004. OIG reports can be accessed on our Website: [www.oig.dot.gov](http://www.oig.dot.gov).

<sup>2</sup> A significant rule is one that is costly (usually over \$100 million), controversial, or of substantial public interest.

DOT's progress has been the priority given to rulemaking by the Secretary, Deputy Secretary, Chief of Staff, and General Counsel.

- **Issuing Significant Rules.** As compared to 1999,<sup>3</sup> DOT completed 39 percent more rules in 2004.<sup>4</sup> The average time to complete rules increased by approximately 1.5 years from 3.9 years in 1999 to 5.4 years in 2004 (as is shown in Table 1 on page 6); but the increase reflects the attention given by DOT to resolving old rules, either by publishing, withdrawing, or terminating them. Resolving old rules increases the overall average time to complete rules. For example, in 2004, DOT completed 10 rules over 5 years old. When these 10 rules are removed, the average time to complete a rule in 2004 is reduced to 2.6 years.
- **Publishing Congressionally Mandated Rules With Deadlines.** Since March 2004, DOT published 6 of the 13 congressionally mandated overdue rules with deadlines. Two additional congressionally mandated rules with deadlines were added during our current review. The nine remaining rules are now overdue by an average of 9.3 years, compared to an average of 8.5 years during our prior review, as is shown in Table 2 on page 8.
- **Publishing Oldest Rules.** Of DOT's 14 oldest rules (all more than 10 years old) that were identified in our March 2004 report, 4 rules have been published. Since our March 2004 report, no additional rules became 10 years old or older during this review, as is shown in Table 3 on page 11.

DOT had 93 significant rules in process at the beginning of our audit period on July 1, 2003, and 85 significant rules were pending on June 30, 2004, the end of our audit period. These 85 rules were in various stages of the rulemaking process, with an average of 5.1 years and a median of 3.4 years. These 85 significant rules establish transportation policy for the transportation industry in the areas of safety, mobility, economic growth, and environment. For example, DOT recently proposed or issued the following rules.

- Standards for all seats on board passenger aircraft that will result in increased passenger protection and survivability in survivable impact accidents.
- National Bridge Inspection Standards amended and updated so they incorporate state-of-the-art bridge inspection practices for ensuring the safety of the traveling public.

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<sup>3</sup> The July 20, 2000 OIG report (Number MH-2000-109) analyzed data from 1999.

<sup>4</sup> The 2004 data represent a "snapshot" of rulemaking activities, as cited in DOT's Rulemaking Tracking System, for significant rules from July 2003 through June 2004.

- Standards to reduce the incidence of collisions between trains and commercial motor vehicles.

As we previously reported, the overriding reason for DOT's progress continues to be 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. Additionally, congressional interest in DOT's rulemaking process has resulted in greater emphasis by DOT and several OIG audit reports in identifying ways to improve the rulemaking process.

Since our last report, DOT has taken steps to further improve the methods by which it manages and oversees the rulemaking process. The Operating Administrations are now using the rulemaking tracking system as a management tool and continue to enter more complete information in the tracking system. Further, DOT has implemented a process whereby a different Operating Administration meets with the Deputy Secretary, the Chief of Staff, and the General Counsel in a weekly regulatory review meeting to discuss any issues associated with the rules in the Operating Administration's significant and non-significant pending rules reports.<sup>5</sup> The significant and non-significant pending rules report provides the next target date for each open rule and the progress made in meeting that date. DOT is using this report to help the Operating Administrations focus attention on rules at risk of missing their target dates and prioritize their rulemaking efforts.

Because DOT recently implemented recommendations included in our March 2004 report, it is too early to see the overall results of changes DOT has made to improve the methods by which it manages and oversees the rulemaking process. Therefore, we do not make any recommendations in this report. However, DOT must continue its focused attention on the rulemaking process and work on meeting its internally established milestone dates.

DOT generally agreed with the report findings. However, they disagreed with OIG's inclusion of three rules in Table 2 where an interim final rule (IFR) had been issued. They stated that, by issuing an IFR, the agency met the congressional mandate and thus the rules should not be considered overdue. We acknowledge that an IFR was published by agencies; however, based on public comment, the provisions of the IFR can be changed. As a result, it is our opinion that the three

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<sup>5</sup> Each Operating Administration meets with the Deputy Secretary, the Chief of Staff, and the General Counsel approximately every 10 weeks.

rules should remain in Table 2 because the purpose of the table is to show those rules requiring more work before the final rule can be issued.

## BACKGROUND

By issuing rules, DOT establishes transportation policy and requirements for the transportation industry in the areas of safety, mobility, economic growth, the environment, and national security. A need for rulemaking can be identified internally by DOT or externally by such bodies as Congress and the National Transportation Safety Board. The basic rulemaking stages are notice of proposed rulemaking (NPRM) and final rule, other stages are advanced NPRM (ANPRM), supplemental NPRM (SNPRM), and IFR. For each stage of a rulemaking, there are a series of internal steps, called “milestones,” all of which must be completed before a rulemaking is issued. Milestones are steps such as submission of the rulemaking to DOT’s Office of the Secretary and submission to the Office of Management and Budget (OMB). DOT’s rulemaking process usually begins with a rule proposal that assesses the effects on society or industry and ends with a final rule published in the Federal Register.<sup>6</sup> Under Executive Order Number 12866, “Regulatory Planning and Review,” September 30, 1993, “...each agency shall develop its regulatory actions in a timely fashion.”

The number of significant rulemakings that DOT is processing or working on at any point frequently changes. The number of rules in process decreases as final rules are issued or proposed rules are withdrawn, and the number increases as new rules are initiated. As events change, some rules are changed from “significant” to “nonsignificant” or from “nonsignificant” to “significant.”

In response to congressional concerns regarding DOT’s timeliness in issuing its rules, we reviewed the Department’s rulemaking process in 1993 and in 2000.<sup>7</sup> Both reviews identified DOT’s need to improve the timeliness for completing rules. In our July 2000 report, we recommended that DOT implement a Department-wide rulemaking tracking and monitoring system to identify problems occurring both Department-wide and at the individual Operating Administrations. DOT implemented an Intranet-based rulemaking tracking system with reporting capabilities in October 2002. See Exhibit C for prior audit coverage.

In response to a congressional request on February 4, 2003, we conducted a two-phase review of DOT’s rulemaking process and issued our first report on March 2, 2004. That report found that DOT’s rulemaking activities and key metrics

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<sup>6</sup> Final rules are subsequently published in the Code of Federal Regulations.

<sup>7</sup> OIG, “Report on the Department of Transportation Rulemaking Process,” March 23, 1993, and OIG Report Number MH-2000-109, “The Department of Transportation’s Rulemaking Process,” July 20, 2000.

indicate that DOT is making progress, but there was still room for improvement. The report attributed DOT's progress to the attention given to rulemaking by the highest levels of DOT's management. DOT's October 2002 implementation of the rulemaking tracking system was also a major contributing factor to DOT's progress.

## RESULTS

DOT is making progress in issuing its rules, especially old and congressionally mandated rules. The overriding reason for DOT's progress has been the priority given to rulemaking by the Secretary, Deputy Secretary, Chief of Staff, and General Counsel. However, the Operating Administrations continue to miss internal milestones, and DOT still has a backlog of old rulemakings.

### **DOT Continues to Make Progress in Issuing Significant Rules, Including Congressionally Mandated Rules With Deadlines**

#### *Significant Rules*

DOT continues to make progress in completing its significant rules. The progress can be seen by comparing 1999 data (1999 data were reviewed as part of the report we issued in July 2000) to 2004 data, as is shown in Table 1. DOT completed 39 percent more rules in 2004 than in 1999. The average time to complete rules increased by 1.5 years, from 3.9 years in 1999 to 5.4 years in 2004; but the increase reflects the attention given by DOT to resolving the rules that were at least 10 years old (either by publishing, withdrawing, or terminating them). By resolving old rules, the overall average time to complete rules increases. DOT issued six rules older than 10 years old in 2004, with the oldest rule issued being over 22 years old.

Table 1 shows the number of completed rulemakings from July 2003 through June 2004 and the average time to complete those rules. The "All Rules" columns of Table 1 show all rulemakings completed in 1999 and 2004 and their average times to completion. For 2004, we removed the rules that were 8 years old or older, recognizing that as DOT clears out its old rules, the "average time to complete" increases. Removing rules 8 years or older resulted in an average of 3.1 years to complete rules in 2004, and an average of 2.8 years to complete rules in 1999. However, just removing the rules that are 8 years or older does not necessarily remove all the old rules. In 2004, DOT completed 10 rules over 5 years old. DOT's efforts to issue these 10 rules over 5 years old has resulted in an increase in the average time to complete a rule. When these 10 rules are removed, the average time to complete a rule is reduced to 2.6 years.

**Table 1. Significant Rules Completed in 1999 and 2004  
by Operating Administration**

Agency <sup>a/</sup>	1999 Rules <sup>b/</sup>		2004 Rules <sup>c/</sup>			
	All Rules		All Rules		Does Not Include Rules 8 Years Old or Older	
	No. of Rules	Average Time to Complete (Years) <sup>d/</sup>	No. of Rules	Average Time to Complete (Years) <sup>d/</sup>	No. of Rules	Average Time to Complete (Years) <sup>d/</sup>
FAA	3	3.0	7	3.9	6	2.0
FHWA	3	2.3	4	4.5	4	4.5
FMCSA <sup>e/</sup>	N/A	N/A	8	7.1	4	3.9
RSPA <sup>f/</sup>	3	5.9	2	4.1	2	4.1
NHTSA	4	3.7	6	7.2	4	1.5
FRA	1	2.9	2	3.4	2	3.4
FTA	1	0.3	0	0.0	0	0.0
BTS	1	3.6	0	0.0	0	0.0
OST	3	6.6	2	3.3	2	3.3
<b>Total</b>	<b>19</b>		<b>31</b>		<b>24</b>	
<b>Average</b>		<b>3.9</b>		<b>5.4</b>		<b>3.1</b>

<sup>a/</sup> See Exhibit B for a list of abbreviations.

<sup>b/</sup> These significant rules represent a “snapshot” of rulemaking activities, as cited in the 1999 spring and fall DOT Semiannual Regulatory Agendas.

<sup>c/</sup> These significant rules represent a “snapshot” of rulemaking activities, as cited in DOT’s reports on significant rules, between July 2003 and June 2004.

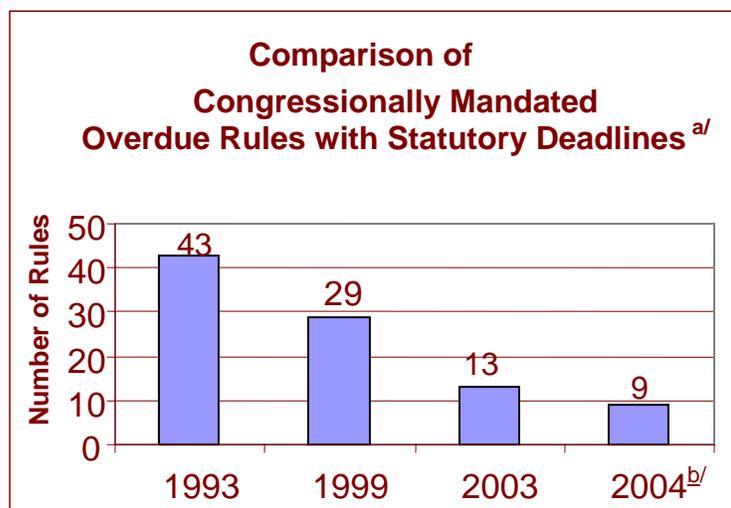
<sup>d/</sup> The times to complete rules were calculated from the first official action dates (for example, NPRM or ANPRM) to the completion dates.

<sup>e/</sup> FMCSA was established as a separate DOT administration (apart from FHWA) on January 1, 2000.

<sup>f/</sup> As a result of the Norman Y. Mineta Research and Special Programs Improvement Act (P.L. 108-426) passed on November 30, 2004, the Department will dissolve the RSPA and establish the new Research and Innovative Technologies Administration (RITA) and the Pipeline and Hazardous Materials Safety Administration (PHMSA). All RSPA rules will be transferred to these two new administrations.

### *Congressionally Mandated Significant Rules with Deadlines*

Our current review also found that DOT showed improvement in meeting its statutory deadlines. For the period ending June 2004, the number of congressionally mandated rules with deadlines not completed decreased from 43 rules in 1993 to 9 rules in 2004. The figure below shows a comparison of the number of rules not completed in 1993, 1999, 2003, and 2004.



<sup>a/</sup> Data sources: Federal Register, October 25, 1993; Federal Register, November 22, 1999; OIG Report Number SC-2004-035, "Report on the Department of Transportation's Rulemaking Process and Tracking System," March 2, 2004; and Federal Register, June 17, 2004.

<sup>b/</sup> For the nine rules not completed by June 2004, all statutory deadlines had passed.

DOT decreased the number of overdue rules with statutory deadlines from July 2003 through July 2004. In our last report, we reported that 13 congressionally mandated rules with statutory deadlines were overdue as of July 2003. From July 2003 to July 2004, six rules were issued and two were added, for a total of nine overdue congressionally mandated rules with statutory deadlines. These nine rules are now overdue by an average of 9.3 years, compared to the average of 8.5 years shown in our last report.

The two rules that were added during this review were not included in our prior report because they were not properly reported in the DOT tracking system. One rule was not identified in the July 2003 tracking system report as a congressionally mandated rule with a deadline, so it was not included in our prior report. This rule would amend the hours-of-service recordkeeping requirements to clarify what supporting documents motor carriers must have to validate hours-of-service records. This action is required by the Hazardous Materials Transportation Authorization Act of 1994. The second rule was not included because the July 2003 tracking system report did not identify the rule as having a legal deadline for the final rule. This rule, which is also from the Federal Motor Carrier Safety Administration (FMCSA), would require that any safety inspection, audit, or review be conducted by a certified safety auditor, inspector, or investigator.

DOT has work in progress to resolve the nine congressionally mandated rules with statutory deadlines still overdue (see Table 2). Exhibit D shows the rules with statutory deadlines included in the semiannual regulatory agendas from 1999 through September 30, 2004.

**Table 2. Overdue Congressionally Mandated Rules with Statutory Deadlines As of June 30, 2004**

Agency <sup>a/</sup>	Title	Required Action	Original Deadline	Years Overdue	Current Status as of December 2, 2004 <sup>b/</sup>
FAA	Drug Enforcement Assistance	Final Rule	9/18/1989	14.8	An NPRM was submitted to OMB on 11/29/2004.
FMCSA	Commercial Driver's License Standards—Biometric Identifier	Final Rule	12/31/1990	13.5	This rulemaking was approved for withdrawal on 11/17/2004.
RSPA	Safeguarding Food from Contamination During Transport	Final Rule	8/1/1991	12.9	An SNPRM was cleared by OMB on 12/15/2004.
RSPA	Response Plans for Onshore Oil Pipelines <sup>c/</sup>	Final Rule	8/18/1992	11.9	The final rule was submitted to OMB on 11/17/2004.
FMCSA	Railroad-Highway Crossing	Final Rule	2/16/1995	9.4	FMCSA is unclear on the action they want to take on this rule.
FMCSA	Hours of Service of Drivers: Supporting Documents <sup>c/</sup>	Final Rule	2/26/1996	8.3	An SNPRM was published on 11/3/2004.
FMCSA	Unified Registration Process	Final Rule	1/1/1998	6.5	An NPRM was submitted to the Office of General Counsel on 12/16/2004.
FMCSA	Certification of Safety Auditors, Safety Investigators, and Safety Inspectors <sup>c/ d/</sup>	Final Rule	12/9/2000	3.6	Based on comments to the IFR, DOT will publish an NPRM that will address issues not raised in the IFR.
FRA	Whistle Bans <sup>c/</sup>	Final Rule	7/1/2001	3.0	The final rule was submitted to OMB on 11/16/2004.

<sup>a/</sup> See Exhibit B for a list of DOT acronyms.

<sup>b/</sup> As reported in DOT's report on significant rules, December 2004

<sup>c/</sup> An IFR was issued: Response Plans for Onshore Oil Pipelines on 1/5/1993, Whistle Bans on 12/18/2003, and Certification of Safety Auditors, Safety Investigators, and Safety Inspectors on 3/19/2002.

<sup>d/</sup> Not included in our prior report because the July 2003 tracking system report did not include the appropriate information. The Hours of Service of Drivers rule was not identified as a congressionally mandated rule. The Certification of Safety Auditors rule was not identified as having a legal deadline for the final rule.

As is shown in Table 2, three of the nine overdue congressionally mandated rules with statutory deadlines were published as IFRs. Agencies publish IFRs when they have met the requirements for issuing final rules but desire to obtain public comment on the provisions of the final rule.

## **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 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 internal milestones, and DOT still has a backlog of old rulemakings.

To meet the issuance dates, the Operating Administrations establish milestone dates for each of the key steps that must be completed for each stage of the rulemaking 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 the Office of the Secretary of Transportation (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.

### *Internal Milestone Dates Were Missed*

Of the 85 pending rules as of June 30, 2004, 64 had internally established milestone dates between July 1, 2003 and June 30, 2004. For these 64 rules, milestones for:

- 21 rules (33 percent) were completed by the estimated dates,<sup>8</sup> up slightly from the 31 percent during our prior review;
- 40 rules (62 percent) had not been completed by June 30, 2004, up from the 48 percent during the prior review; and
- 3 rules (5 percent) were not completed by the estimated dates, down from 21 percent during the prior review.

Our review of the 43 rules that missed their estimated milestone dates showed that 34 rules were delayed at the Operating Administrations, 6 at OST, and 3 at OMB. For example, a proposed FAA rule to amend commercial space transportation regulations governing licensing and safety requirements for launch sites was delayed at FAA so a contractor could be hired to perform an independent economic assessment. The delays of the 43 rules ranged from 2 days to 352 days. Rules were delayed for the following reasons.<sup>9</sup>

- 15 rules had unanticipated issues requiring further analysis.

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<sup>8</sup> Given that some milestone dates were estimated 6 months ahead of time, we considered the milestones met if the actions were completed within 14 calendar days of the target dates.

<sup>9</sup> A single rule can have more than one reason for being delayed.

- 16 rules needed additional coordination with other entities.
- 3 rules needed the development of additional data.
- 9 rules had staff diverted to work on higher priority rules or other issues.

### *Progress Made in Reducing the Backlog of Old Rules*

Our audit included reviewing DOT's progress in completing the oldest rules. DOT has made progress in this area but continues to have a backlog of old rules.

In our March 2004 report, we identified 14 rules that were 10 years old or older. During this review, we tracked DOT's progress in completing the 14 oldest rules, and found that it has issued 4. No additional rules reached the 10-year old or older mark during this review. Thus, as of June 30, 2004, there were 10 significant rules that were more than 10 years old (see Table 3).

**Table 3. Oldest Open Significant Rules  
As of June 30, 2004**

Rank	Agency <sup>a/</sup>	Title	Start Date	Years Open	Current Status as of December 2, 2004 <sup>b/</sup>
1	FAA	Retrofit of Improved Seats in Air Carrier Transport Category Airplanes	12/30/1987	16.5	FAA sent a final rule to OST on 12/7/2004.
2	FAA	Drug Enforcement Assistance <sup>c/</sup>	11/18/1988	15.6	An NPRM was submitted to OMB on 11/29/2004.
3	FMCSA	Commercial Driver's License (CDL) Standards—Biometric Identifier <sup>c/</sup>	11/18/1988	15.6	This rulemaking was approved for withdrawal on 11/17/2004.
4	OST	Accessibility of Passenger Vessels to Individuals with Disabilities	7/26/1990	13.9	An ANPRM was published on 11/29/2004.
5	RSPA	Safeguarding Food From Contamination During Transport <sup>c/</sup>	10/21/1990	13.7	An SNPRM was cleared by OMB on 12/15/2004.
6	FMCSA	Qualifications of Drivers; Vision	2/1/1991	13.4	As of 11/23/2004, FMCSA is working on the NPRM.
7	FAA	Aging Aircraft Safety	10/28/1991	12.7	The final rule was submitted to OMB on 10/6/2004.
8	FAA	Corrosion Prevention and Control Program <sup>c/</sup>	10/28/1991	12.7	The rule was withdrawn on 8/16/2004. This rule was withdrawn because FAA believes that the safety objectives of this rule can be accomplished by other means, including other rulemakings.
9	RSPA	Response Plans for Onshore Oil Pipelines <sup>c/</sup>	4/12/1992	12.2	The final rule was submitted to OMB on 11/17/2004.
10	FMCSA	Commercial Driver's Physical Fitness as Part of the CDL Process	7/15/1993	11.0	FMCSA is unclear on the action it wants to take on this rule.

<sup>a/</sup> See Exhibit B for a list of DOT acronyms.

<sup>b/</sup> As reported in DOT's report on significant rules, December 2004

<sup>c/</sup> This rule also has a congressionally mandated deadline.

The 4 oldest significant rules DOT published, all were congressionally mandated FMCSA rules. They were required to be published by June 2004 under a February 2003 settlement agreement between DOT and public interest groups.

Our prior report identified three rules that DOT was not actively working on (Rules 2, 3, and 4 listed above). Since March 2004, DOT has taken action on all three rules. On August 25, 2004, FAA sent OST a request to withdraw the NPRM for Drug Enforcement Assistance. The requirements of this rule instead will be incorporated in a new NPRM. For the Accessibility of Passenger Vessels rule, OST forwarded the draft ANPRM to the Office of General Counsel on August 12, 2004, and that office forwarded the rule to OMB on September 14, 2004. The

proposed FMCSA rule to establish minimum uniform standards for a biometric identification system for commercial motor vehicle operators was approved for withdrawal by DOT on November 17, 2004.

Our prior report also looked at rules that were open 5 years or more. DOT continues to make progress in reducing the number of these rules, as can be seen in Table 4, which compares 1999 data to 2004 data. The number of rules open 5 years or more decreased by 20, from 54 in 1999 to 34 in 2004.

**Table 4. Significant Rules Open 5 Years or More by Operating Administration**

Agency <sup>c/</sup>	As of November 22, 1999 <sup>a/</sup>		As of June 30, 2004 <sup>b/</sup>	
	No. of Rules Open	No. of Rules Open 5 Years or More <sup>d/</sup>	No. of Rules Open	No. of Rules Open 5 Years or More <sup>d/</sup>
FMCSA <sup>e/</sup>	N/A	N/A	19	7
FAA	50	22	30	15
OST	11	5	9	3
FHWA	37	13	2	0
RSPA	11	5	7	2
NHTSA	9	5	8	1
FRA	10	3	5	5
MARAD	2	0	4	1
FTA	6	1	1	0
<b>Total</b>	<b>136</b>	<b>54</b>	<b>85</b>	<b>34</b>

a/ These significant rules represent a “snapshot” of rulemaking activities, as cited in the DOT Semiannual Regulatory Agenda, November 22, 1999.

b/ These significant rules represent a “snapshot” of rulemaking activities, as cited in DOT’s report on significant rules as of June 30, 2004.

c/ See Exhibit B for a list of DOT acronyms.

d/ The rule’s time in process was calculated from the rule’s initiation date to November 22, 1999 for 1999 rules and to June 30, 2004 for 2004 rules.

e/ FMCSA was established as a new DOT administration (separate from the Federal Highway Administration) on January 1, 2000.

Although progress has been made, DOT senior officials should continue to focus on reducing the number of old rules and overdue congressionally mandated rules. FMCSA has taken a significant step to reduce its backlog of old rules. For example, FMCSA has received permission from Congress to reprogram \$3.2 million in border enforcement funds to help eliminate its rulemaking backlog. On August 5, 2004, OMB apportioned the reprogrammed funds for FMCSA’s use. FMCSA will use the funds to extend the tenure of regulatory writers and to hire additional legal and analytical staff, all for a period of 18 months. This increase in staff should help FMCSA reduce its number of old (three) and overdue (five) congressionally mandated rules with deadlines.

## **DOT Makes Progress Using Management Tools To Oversee the Rulemaking Process**

In our prior review, we found that the Operating Administrations were not entering timely and complete information into the tracking system and were not using the tracking system as a management tool. During this review, we reevaluated the sufficiency of the information the Operating Administrations were entering into the tracking system and the Operating Administrations' use of the tracking system. We found that DOT has made progress using the tracking system and is now using an additional rule tracking report to manage and oversee the rulemaking process.

We found that of the 85 significant rulemakings open as of June 30, 2004, only 9 rules (11 percent) had no internal schedule, down from 22 percent in our March 2004 review. In that review, the Operating Administrations did not explain the reasons for the delays in the tracking system for 57 percent of the rules that missed their milestones as of June 30, 2003. During this review, we found that of the 43 rules that missed their milestones as of June 30, 2004, the reasons for the delays were not explained in the tracking system for only 8 rules (19 percent).<sup>10</sup>

Although the Operating Administrations have increased the amount of information entered into the tracking system, improvements are still needed in the level of detail. For example, the explanation provided in the tracking system for the delay in an FAA rule amending the commercial space transportation regulations was that additional coordination was necessary. According to FAA, it hired a contractor to conduct an independent economic assessment, and upon the completion of the assessment, FAA forwarded the SNPRM to the Office of General Counsel on July 19, 2004, for review. This information was not provided in the tracking system.

In our March 2004 report, we reported that the Operating Administrations were not using the tracking system as a management tool. We recommended that, for rules that have missed their original issuance dates, DOT managers implement a mechanism to monitor and track the progress of these rules against the revised target dates.

As a result of our March 2004 recommendation, Operating Administrations are now using the tracking system as a management tool. However, they have not implemented a mechanism to monitor and track the progress of rules against revised target dates. Instead, DOT has implemented another management tool to

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<sup>10</sup> A DOT official stated that an explanation for the delay will only be provided in the tracking system for those rules that have missed, or are expected to miss, a statutory deadline or a publication date. If a rule misses an internal milestone (for example, forwarding a rule to OST or OMB) but the Operating Administration believes that the delay can be made up in a later milestone, DOT will not provide an explanation for the delay.

address the concerns in our prior report and to better monitor rules. DOT has implemented a process whereby a different Operating Administration meets with the Deputy Secretary, the Chief of Staff, and the General Counsel in a weekly regulatory review meeting to discuss any issues associated with the rules in the Operating Administration's significant and non-significant pending rules reports. The significant and non-significant pending rules report provides the next target date for each open rule and the progress made in meeting that date. DOT is using this report to help the Operating Administrations focus attention on rules at risk of missing their target dates and prioritize rulemaking efforts.

An official from the Federal Highway Administration stated that this management tool has enabled the Federal Highway Administration to issue rules in a timelier manner. The official also stated that regular meetings with his Administrator to discuss the progress of all rulemaking actions has led to increased attention to rulemaking projects, dedication of necessary resources to the project, and timely management decision-making.

A review of DOT's status of rules shows that DOT has made improvements in tracking rules. As of July 2004, 48 rules in the tracking system missed their target date and so are categorized as red in the color code system (see Table 5). However, this is a decrease from the 55 rules classified as red in July 2003. Further, more rules have moved into the green "on schedule" status; at the same time DOT has decreased the number of rules with no schedule (black rules) by half.

**Table 5. Status by Color Code of Open Rules**

Status Color	Description	As of July 2003		As of July 2004	
		No. of Rules	Percent of Total	No. of Rules	Percent of Total
Green	On schedule	17	19	25	30
Yellow	May miss target date	2	2	4	5
Red	Missed target date	55	61	48	56
Black	No schedule	16	18	8	9
<b>Total</b>		<b>90</b>	<b>100</b>	<b>85</b>	<b>100</b>

DOT recently implemented recommendations included in our March 2004 report; therefore it is too early to see the overall results of changes DOT has made to improve the methods by which it manages and oversees the rulemaking process. Consequently, we do not make any recommendations in this report. However, DOT must continue its focused attention on the rulemaking process in addition to continuing the highest level of management oversight.

## **MANAGEMENT COMMENTS AND OIG RESPONSE**

Because we are making no recommendations in this report, no response is required. A draft of this report was provided to the Assistant General Counsel for Regulation and Enforcement on November 15, 2004. At a December 3, 2004 meeting, the Assistant General Counsel for Regulation and Enforcement generally agreed with the report findings. However, he disagreed with the OIG's inclusion of three rules in Table 2 for which an IFR had been issued, stating that, by issuing an IFR, the agency met the congressional mandate and thus the rules should not be considered overdue. We acknowledge that an IFR was published by agencies; however, based on public comment, the provisions of the IFR can be changed. As a result, it is our opinion that the three rules should remain in Table 2 because the purpose of the table is to show those rules requiring more work before the final rule can be issued.

## **ACTION REQUIRED**

Because we are making no recommendations in this report, no response is required. 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, Deputy Assistant Inspector General for Hazardous Materials, Security and Special Programs, at (415) 744-0420.

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## **EXHIBIT A. SCOPE AND METHODOLOGY**

This was a Department-wide 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 conducted this audit as a follow-up to our March 2, 2004 report on the Department's rulemaking process. This audit was also requested by Representative James L. Oberstar, ranking Democratic member of the House Committee on Transportation and Infrastructure. This report covers DOT's overall progress in issuing significant rulemaking actions for the 1-year period from July 1, 2003 through June 30, 2004. During this review, we updated data from the March 2004 report as of December 2004.

We obtained and analyzed Operating Administration data from DOT's reports on significant rules from July 2003 through June 2004 to provide updated information on the number of rules issued and the average time to issue those rules. We compared the data to the 1999 data identified in our March 2004 report to determine if DOT's rulemaking process has improved since earlier OIG audits (see Table 1 on page 6).

To assess DOT's progress in meeting statutory deadlines in 2004, we compared 2004 data, as cited in the June 17, 2004 Federal Register to 1993, 1999, and 2003 data as cited in (1) the October 25, 1993 Federal Register, (2) the November 22, 1999 Federal Register, and (3) data from this OIG audit from January 1 through June 30, 2004 (see the figure on page 7).

We obtained and analyzed data for all 85 significant DOT pending rulemakings as of June 30, 2004. We identified 64 rules with original or revised milestones between July 1, 2003 and June 30, 2004. 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 1-year period. In addition, our analysis included information on the length and cause of the delays.

In this report, we updated data that were originally provided in our March 2004 report. We analyzed the data to determine DOT's progress in issuing (1) overdue significant congressionally mandated rules (see Table 2 on page 8), (2) the oldest significant rules (see Table 3 on page 11), and (3) the significant rules that had been open for 5 years or longer (see Table 4 on page 12).

We reviewed the 85 significant DOT pending rulemakings (as of June 30, 2004) being tracked in the DOT rulemaking tracking system to determine DOT's assessment of whether the rule was on track to meet the milestone schedule, was in danger of missing milestones, or had already missed milestone dates (see Table 5 on page 14).

We identified significant rules with statutory deadlines in process by reviewing the DOT Semiannual Regulatory Agendas for fall 1999 through spring 2004 and DOT's reports on significant rules from October 2002 through October 2004 (the October reports reflects September information).

We also interviewed appropriate DOT officials in OST and eight of the Operating Administrations<sup>11</sup> 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 performed the audit from July through December 2004 in accordance with Government Auditing Standards prescribed by the Comptroller General of the United States and included such tests as we considered necessary to provide reasonable assurance of detecting abuse or illegal acts.

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<sup>11</sup> The eight Operating Administrations were the Federal Aviation Administration, the Federal Highway Administration, the Federal Transit Administration, the Federal Railroad Administration, the Research and Special Programs Administration, the Maritime Administration, the National Highway Traffic Safety Administration, and the Federal Motor Carrier Safety Administration.

## **EXHIBIT B. LIST OF DOT ABBREVIATIONS**

BTS	Bureau of Transportation Statistics
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
NHTSA	National Highway Traffic Safety Administration
OST	Office of the Secretary of Transportation
RSPA	Research and Special Programs Administration

## **EXHIBIT C. PRIOR AUDIT COVERAGE**

### **OIG Report Number SC-2004-035, “Audit of DOT’s Rulemaking Process and Tracking System,” March 2, 2004**

We found that the key metrics for rulemaking indicated that DOT was making progress in its management and oversight of the rulemaking process, but there was still room for improvement. For 2003, DOT’s average time to completion was 3.0 years for all rules. Without the four oldest rules (over 8 years old), DOT’s average was 1.7 years. The report also found that the overriding reason for DOT’s progress was the priority given to rulemaking by the highest levels of DOT’s management. The implementation of the rulemaking tracking system was also a major contributing factor to DOT’s progress. We recommended that the Operating Administrations review and analyze pending rulemakings and focus their efforts on completing the oldest rules. The report also recommended that DOT require compliance with the Secretary’s directive that instructed Operating Administrators to input reliable data into the rulemaking tracking system and use the system to monitor rules.

In response to our audit, DOT has implemented a process whereby a different Operating Administration meets with the Deputy Secretary, the Chief of Staff, and the General Counsel in a weekly regulatory review meeting to discuss any issues associated with the rules in the Operating Administration’s significant and non-significant pending rules reports. The significant and non-significant pending rules report provides each open rule’s next target date and the progress in meeting that date. DOT is using this report to help the Operating Administrations in focusing attention on rules at risk of missing their target dates and in prioritizing rulemaking efforts.

### **OIG Report Number MH-2000-109, “The Department of Transportation’s Rulemaking Process,” July 20, 2000**

We found that DOT took more than twice as long and completed half as many significant rules in 1999 as it did in 1993. The time to complete a rule—from publishing the initial proposed rule to publishing the final rule—increased from an average of 1.8 years and a median of 10 months in 1993 to an average of 3.8 years and a median of 2.8 years in 1999. Also, during 1999, the Department had not completed action on 152 rules that had been in development for an average of 3.1 years compared to 177 significant rules for an average of 2.1 years in 1993. We recommended a series of actions to correct the Department’s deficiencies in completing rules and managing the rulemaking process, which included

implementing a Department-wide rulemaking tracking and monitoring system. In response to our recommendations, DOT implemented an Intranet-based rulemaking tracking system with reporting capabilities in October 2002.

## EXHIBIT D. RULES WITH STATUTORY DEADLINES INCLUDED IN THE SEMIANNUAL REGULATORY AGENDA FROM 1999 TO SEPTEMBER 30, 2004

Agency <sup>a/</sup>	Title	Required Action	Original Deadline	Deadline Completed	Years Overdue
OST	New Restrictions on Lobbying	Final Rule	3/22/1990	4/5/1999 Withdrawn <sup>b/</sup>	9.0
FAA	Retrofit of Improved Seats in Air Carrier Transport Category Airplanes	NPRM	4/28/1988	5/17/1988	0.1
FAA	Drug Enforcement Assistance	Final Rule	9/18/1989	Open <sup>c/</sup>	15.0
FAA	Sole Radio Navigation System; Minimum Standards for Certification	Final Rule	9/30/1989	6/21/2001 Withdrawn <sup>d/</sup>	11.7
FAA	Aging Aircraft Safety	Initiate	4/24/1992	10/28/1991	N/A
FAA	Anti-Drug and Alcohol Misuse Prevention Programs for Employees of Foreign Air Carriers Engaged in Specified Aviation Activities	Final Rule	10/28/1992	1/13/2000 Withdrawn <sup>e/</sup>	7.2
FAA	Revisions to Passenger Facility Charge Rule for Compensation to Air Carriers	Final Rule	6/12/2004	3/18/2004	N/A
FHWA	Hours of Service of Drivers; Supporting Document Recordkeeping <sup>f/,g/</sup>	NPRM	8/26/1995	4/20/1998	2.7
FHWA	Federal Motor Carrier Safety Regulations: Definition of Commercial Motor Vehicle <sup>g/</sup>	Final Rule	6/9/1999	1/11/2001	1.6
FHWA	Parts and Accessories Necessary for Safe Operation: Lighting Devices, Reflectors, and Electrical Equipment	Final Rule	6/9/1999	3/31/1999	N/A
FHWA	Design-Build Contracting	Final Rule	6/9/2001	12/10/2002	1.5
FMCSA	Commercial Driver's License Standards—Biometric Identifier	Final Rule	12/31/1990	Open <sup>g/,h/</sup>	13.8
FMCSA	Federal Motor Carrier Safety Regulations: Hazardous Materials Safety Permits	Final Rule	11/15/1991	6/30/2004	12.6

**Exhibit D. Rules with Statutory Deadlines from 1999 to September 30, 2004**

Agency <sup>a/</sup>	Title	Required Action	Original Deadline	Action Completed	Years Overdue
FMCSA	Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators	NPRM	12/18/1992	8/15/2003	10.7
		Final Rule	12/18/1993	5/21/2004	10.4
FMCSA	Minimum Training Requirements for Longer Combination Vehicle (LCV) Operators and LCV Driver-Instructor Requirements	Final Rule	12/18/1993	3/30/2004	10.3
FMCSA	Railroad-Highway Grade Crossing Safety	Final Rule	2/26/1995	Open <sup>ef</sup>	9.6
FMCSA	Hours of Service of Drivers: Supporting Documents	Final Rule	2/26/1996	Open <sup>ef</sup>	8.6
FMCSA	Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations	ANPRM	3/1/1996	11/5/1996	0.7
		NPRM	11/5/1997	5/2/2000	2.5
		Final Rule	1/5/1999	4/28/2003	4.3
FMCSA	Unified Registration System	Final Rule	1/1/1998	Open <sup>ef</sup>	6.8
FMCSA	Interstate School Bus Body Joint Safety	Initiate	12/9/1998	6/9/1998	N/A
FMCSA	Safety Performance History of New Drivers	NPRM	1/31/1999	3/14/1996	N/A
FMCSA	Safety Requirements for Operators of Small Passenger-Carrying Commercial Motor Vehicles Used in Interstate Commerce	Final Rule	12/9/2000	8/12/2003	2.7
FMCSA	Certification of Safety Auditors	Final	12/9/2000	Open <sup>ef</sup> IFR	3.8
NHTSA	Uniform Criteria for State Observational Surveys of Seat Belt Use	Final Rule	12/8/1998	3/14/2000	1.3
NHTSA	Advanced Air Bags	Final Rule	3/1/2000	5/12/2000	0.2
NHTSA	Improve Tire Safety Information	ANPRM	12/1/2000	12/1/2000	N/A
		Final Rule	6/1/2002	11/18/2002	0.5
NHTSA	Early Warning Defect Reporting Requirements	Initiate	3/1/2001	11/1/2000	N/A
		Final Rule	6/30/2002	7/10/2002	0.0
NHTSA	Tire Pressure Monitoring System	Final Rule	11/30/2001	6/5/2002	0.5
NHTSA	Automotive Fuel Economy Manufacturing Incentive for Alternative Fuel Vehicles	Final Rule	12/31/2001	2/19/2004	2.1
NHTSA	Improved Tire Safety	Final Rule	6/1/2002	6/26/2003	1.1
NHTSA	Federal Motor Vehicle Safety Standards; Child Restraint Anchorage Systems	Final Rule or Report to Congress	11/1/2002	4/06/2004	1.4

**Exhibit D. Rules with Statutory Deadlines from 1999 to September 30, 2004**

Agency <sup>a/</sup>	Title	Required Action	Original Deadline	Action Completed	Years Overdue
FRA	Power Brake Regulations: Freight Power Brake Revisions	Final Rule	12/31/1993	1/17/2001	7.1
FRA	Passenger Equipment Safety Standards	Final Rule	11/2/1997	5/12/1999	1.5
FRA	Whistle Bans at Highway-Rail Grade Crossings	Final Rule	7/1/2001	Open <sup>g/</sup> IFR	3.3
FTA	National Environmental Policy Act and Related Procedures for Transportation Decisionmaking	Final Rule	5/18/1992	9/20/2002 Withdrawn <sup>h/</sup>	10.3
FTA	Major Capital Investment Projects	NPRM	10/7/1998	4/7/1999	0.5
		Final Rule	12/7/1998	12/7/2000	2.0
RSPA	Maps and Records of Pipeline Locations and Characteristics; Notification of State Agencies; Pipe Inventory	Final Rule	11/1/1989	1/25/2002 Withdrawn <sup>h/</sup>	12.2
RSPA	Safeguarding Food From Contamination During Transportation	Final Rule	8/1/1991	Open <sup>e/</sup>	13.2
RSPA	Response Plans for Onshore Oil Pipelines	Final Rule	8/18/1992	Open <sup>g/</sup> IFR	12.1
RSPA	Pipeline Safety: Areas Unusually Sensitive to Environmental Damage	Final Rule	10/24/1994	12/21/2000	6.2
RSPA	Increased Inspection Requirements	Final Rule	10/24/1995	12/1/2000	5.1
RSPA	Emergency Flow Restricting Devices	Final Rule	10/24/1996	12/1/2000	4.1
RSPA	Pipeline Safety: Pipeline+ Integrity Management in High-Consequence Areas (Gas Transmission Pipeline Operators)	Final Rule	12/17/2003	12/15/2003	N/A
MARAD	Eligibility of U.S.-Flag Vessels of 100 Feet or Greater To Obtain Commercial Fisheries Documents	Final Rule	4/1/2000	7/19/2000	0.3

ANPRM: Advanced Notice of Proposed Rulemaking

NPRM: Notice of Proposed Rulemaking

Data source: information on significant rules with statutory deadlines obtained from the DOT Semiannual Regulatory Agendas for fall 1999 through spring 2004 and DOT's reports on significant rules from October 2002 through October 2004.

<sup>a/</sup> See Exhibit B for a list of DOT acronyms.

<sup>b/</sup> This rule was withdrawn because OMB issued additional guidance that covered the purpose of this rule.

<sup>c/</sup> For rules that are still open, the number of years overdue was calculated from the original deadline to September 30, 2004.

<sup>d/</sup> The section of the law that required this rule was repealed.

<sup>e/</sup> Alternative action covered the purpose of this rule.

<sup>f/</sup> This rulemaking was merged with the Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations rule after the NPRM was issued.

<sup>g/</sup> These rules were transferred to FMCSA when FMCSA was created.

<sup>h/</sup> This rule was approved for withdrawal on November 17, 2004.

#### **Exhibit D. Rules with Statutory Deadlines from 1999 to September 30, 2004**

- i/ Agencies determined that this rule generated such diversity and disparity of comments that further substantial work was necessary.
- j/ RSPA implemented a pipeline mapping system which eliminated the need for a rule.