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FEDERAL AGENCY COMPLIANCE WITH CONGRESSIONAL REGULATORY DEADLINES

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INTRODUCTION

The final years of the Obama administration, like the Bush administration before it, have been characterized by acrimonious debates over executive power and accountability. Regulatory deadlines are just one area in which the legislative and executive branches fail to see eye to eye. The ongoing implementation of the Patient Protection and Affordable Care Act (ACA) is a case in point. A 2012 American Action Forum report found that federal agencies had missed 47 percent of deadlines associated with the ACA.¹ Similar analyses by Avik Roy indicate that roughly half of the mandated regulations associated with the ACA were either completed late or not completed at all.²

1. Sam Batkins and Dan Goldbeck, "Analysis Finds Obamacare Already Missed Nearly Half of Its Regulatory Deadlines," American Action Forum, June 7, 2012. <http://americanactionforum.org/research/analysis-finds-obamacare-already-missed-nearly-half-of-its-regulatory-deadl>.

2. Avik Roy, "Unpublished CRS Memo: Obama Administration Has Missed Half of Obamacare's Legally Imposed Implementation Deadlines," *Forbes*, Aug. 18, 2013. <http://www.forbes.com/sites/theapothecary/2013/08/18/unpublished-crs-memo-obama-administration-has-missed-half-of-obamacares-legally-imposed-implementation-deadlines/>.

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Problems with Congressional deadlines go beyond the ACA: a June 2012 report by the liberal advocacy group Public Citizen analyzed 159 regulations subject to statutory deadlines in 2011 and found that agencies failed to complete 78 percent of required actions within the time-period allotted.³ Low levels of statutory deadline compliance are a concern to those on both ends of the political spectrum.

One might argue that these are exceptional cases, but unfortunately, deadline compliance is a systemic problem. Data collected for this analysis suggest that federal agencies failed to meet more than 1,400 deadlines between 1995 and 2014, which translates into an estimated success rate of less than 50 percent.⁴

Interestingly, deadlines set by the judicial branch are met at a considerably higher rate – nearly 80 percent. The disparity in compliance rates emerges, in part, from the disparate legal treatment of different types of deadlines and from congressional incentives to engage in oversight. The fact that different deadlines generate different results suggests that deadline compliance can be improved by making oversight easier and by making statutory deadlines directly enforceable.

3. Public Citizen, "Public Safeguards Past Due to Missed Deadlines Leave Public Unprotected," June 2012, <https://www.citizen.org/documents/public-safeguards-past-due-report.pdf>.

4. These figures include all unique statutory regulatory deadlines listed in the *Unified Agenda of Federal Regulatory and Deregulatory Actions between 1996 and 2014*. Regulations with insufficient information are omitted. Section 3 (Measuring deadlines) discusses a variety of caveats when interpreting these numbers.

BACKGROUND ON STATUTORY DEADLINES

The basic concept of a statutory regulatory deadline is quite straightforward.⁵ Congress passes a law that grants one or more agencies authority to issue regulations (rules) on a particular topic. Such laws may be very specific or very vague.⁶ As part of legislation, Congress may elect to include a number of possible constraints on agency decision-making. Regulatory deadlines – requiring that a specific action be completed by a specific date – are just one example.⁷

Before delving into the data, it is worth reviewing that statutory regulatory deadlines are not an unalloyed good. Several existing studies have evaluated the impact of regulatory deadlines on the rulemaking process. Deadlines are associated with faster completion of proposed rules,⁸ but also lower-quality regulatory analysis (faster rulemaking encourages agencies to cut corners),⁹ potential implementation risks,¹⁰ and agency planning errors.¹¹

Research to-date on regulatory deadlines has found that deadlines can make agencies work somewhat faster (although apparently not as fast as Congress desires), at the cost of increased risk of implementation errors. These errors may, in part, result from flawed expectations. Legislators have limited knowledge of the complexities of bureaucratic policy development and, as a result, sometimes set

unrealistic deadlines.¹² Agencies also can be resistant to external demands,¹³ and legislators frequently complain that agencies are insufficiently responsive.¹⁴

Agency officials likely would argue that they face more demands than can be managed and they prioritize as best they can. Inarguably, agencies have some authority to allocate resources as they see fit. But statutory deadlines are law. In most areas of statutory interpretation, agencies do not possess authority to override such restrictions, however reasonable their actions might be.

The courts do not evaluate deadlines according to normal statutory interpretation standards. When deadline cases are litigated, courts utilize a “balancing” test to determine whether an agency has taken too much time to complete a given task. The Congressional Research Service notes that there is no uniformly accepted standard for when a court should compel action. Congress often is the only party to suffer any form of harm from a neglected deadline, yet cannot (in practice) sue the agency in question. The courts typically have curtailed efforts by legislators to sue either the president or federal agencies, deeming such disputes “political questions.”¹⁵ There are very good reasons for this: accepting such lawsuits too readily could generate a flood of frivolous, politically motivated litigation. But if no party has standing to sue over an unmet deadline, legal recourse is extremely difficult to achieve, if not impossible.¹⁶ In order to enforce its mandates, Congress’ only option is to pass another law.

5. For a discussion of legal deadlines and delays, see: Daniel Shedd, “Administrative Agencies and Claims of Unreasonable Delay: Analysis of Court Treatment,” Congressional Research Service Report R43013, March 21, 2013, <http://fas.org/sgp/crs/misc/R43013.pdf>.

6. There is a large academic literature on statutory specificity. David Epstein and Sharyn O’Halloran, *Delegating Powers: A Transaction-Cost Politics Approach to Policy Making under Separate Power*, Cambridge University Press, 1999; and John Huber and Charles Shipan, *Deliberate Discretion: The Institutional Foundations of Bureaucratic Autonomy*, Cambridge University Press, 2002.

7. Other examples of common constraints include limitation riders and Hammer provisions. See Jason MacDonald, “Limitation Riders and Congressional Influence Over Bureaucratic Policy Decisions,” *American Political Science Review*, Vol. 104, No. 4, November 2010 and Elizabeth Magill, “Congressional Control over Agency Rulemaking: the Nutrition Labeling and Education Act’s Hammer Provisions” *Food and Drug Law Journal*, Vol. 50.

8. Jacob E. Gersen and Anne Joseph O’Connell, “Deadlines in Administrative Law,” *156 U. Pa. L. Rev.* 923 (2007), <http://scholarship.law.berkeley.edu/facpubs/193>.

9. Stuart Shapiro and John Morall, “Does Haste Make Waste? How long does it take to do a Good Regulatory Impact Analysis?” *Administration and Society*, 2013; and Christopher Conover and Jerry Ellig, “Beware the Rush to Presumption, Part C: A Public Choice Analysis of the Affordable Care Act’s Interim Final Rules,” Mercatus Center Working Paper No. 12-03, January 2012, http://mercatus.org/sites/default/files/publication/Beware_the_Rush_to_Presumption_PartC_ConoverEllig_1.pdf

10. Daniel Carpenter and Justin Grimmer, “The Downside of Deadlines,” working paper, Feb. 7, 2009. <http://people.hmdc.harvard.edu/~dcarpent/Downside.pdf>.

11. Paradoxically, Lavertau and Webb-Yackee argue that deadlines actually increase regulatory delays: agencies set overly optimistic target-dates when deadlines are present, resulting in higher failure rates. Stephane Lavertau and Susan Webb-Yackee, “Regulatory Delay and Rulemaking Deadlines,” *Journal of Public Administration Research and Theory*, October 2012.

12. Analysis conducted as part of this project suggests that Congress issues a surprisingly large number of deadlines demanding action within two years. For comparison, it typically takes an average of between one and two years to finalize a rule that has already been proposed. Jacob E. Gersen and Anne Joseph O’Connell, “Deadlines in Administrative Law,” *156 U. Pa. L. Rev.* 923. While a full analysis of the length of statutory deadlines is beyond the scope of this project, research on the subject is under development. See also: Caitlin A. Bubar, “Improving Statutory Deadlines on Agency Action: Learning from the SEC’s Missed Deadlines under the JOBS Act,” *92 Texas L. Rev.* 995, <http://www.texaslrev.com/wp-content/uploads/Bubar-92-4.pdf>.

13. Research on FOIA responsiveness, to cite another example, has found that a surprisingly large number of agencies fail to respond to records requests effectively. David Lewis and Abby Wood, “The Paradox of Agency Responsiveness: A Federal FOIA Experiment,” working paper, June 4, 2015, <https://my.vanderbilt.edu/davidlewis/files/2011/12/lewis-and-wood-agency-responsiveness.pdf>; and Greg Monroe, “Key Agencies Flub Response to Simple Request,” FOIA Project Report, <http://foiaproject.org/2015/04/24/agencies-rated/>.

14. See, for example, a statement from House Committee on Science, Space and Technology Chairman Lamar Smith on a subpoena issued to the EPA requesting data from the agency: “This subpoena could have been avoided. Unfortunately, we’ve been put in this position by an agency that willfully disregards congressional requests and makes its rules using undisclosed data. After two years of failing to respond, it’s clear that the EPA is not going to give the American people what they deserve—the truth about regulations.” See <http://science.house.gov/issue/committee-investigation-epa-secret-science>.

15. Lyle Dennison, “Constitution Check: Could the House sue the President for refusing to carry out the laws?” National Constitution Center, June 24, 2014, <http://blog.constitutioncenter.org/2014/06/constitution-check-could-the-house-sue-the-president-for-refusing-to-carry-out-the-laws/>.

16. Daniel Shedd and Todd Garvey, “A Primer on the Reviewability of Agency Delay and Enforcement Discretion,” CRS Report R43710, Sep. 4, 2014, <http://fas.org/sgp/crs/misc/R43710.pdf>.

Given the massive demands on Congress' time, oversight tends to be neglected.¹⁷ This neglect may be understandable, but the institution of Congress as a whole suffers. There is no actor available to represent Congress' prerogatives as an institution.¹⁸ Low rates of executive agency compliance with regulatory deadlines is but one manifestation of this problem.

MEASURING DEADLINES

Data in this paper consist of a large sample of statutory regulatory deadlines enacted between 1995 and 2014. There is no single definitive data source for regulatory deadlines. As a result, one may reach different counts based on different sources. The approach most commonly taken by the existing research, as well as by this paper, is to rely on the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, published annually by the Office of Management and Budget's Regulatory Information Services Center (RISC).¹⁹

Deadlines were located by searching the *Unified Agendas* for regulations subject to statutory deadlines. This provided basic descriptive information about all listed entries.²⁰ Following existing research, only the most recent entry was utilized.²¹ Next, a custom Web-scraping script (developed in Python) was used to compile detailed information about each agenda entry. Entries contain data on all actions submitted under the Regulatory Identification Number (RIN) in question; a description of the rule; descriptions of the legal authority for the rule; and various other points of interest.²² Each RIN specifies whether or not a deadline is in place; explains the type of deadline; and sets a "due date" for the action in question.²³ The result of this process is a dataset

of more than 4,320 statutory deadlines, affecting 58 distinct agencies.²⁴

TYPES OF DEADLINES

A regulatory deadline may require an agency to complete any action in the rule-making process. The most typical deadlines (consisting of nearly 3,800 of the 4,320 total deadlines identified) require actions that correspond with the main two stages of the regulatory process: notices of proposed rulemaking (NPRM) and final actions.²⁵ Analysis is restricted to these varieties.²⁶

An NPRM deadline specifies a date by which an agency should have completed an NPRM or comparable action.²⁷ These notices typically provide a first draft of a rule and announce a public comment period for the proposal. In the data collected here, 667 of the deadlines required publication of proposed rules and 488 of these have specific compliance data.

A final action deadline requires that a given rulemaking process be completed by the date specified. This is a demanding requirement: moving a rule from conception to completion is time-intensive. Existing research suggests it takes agencies, on average, between 500 and 600 days to finalize a proposed rule.²⁸ This does not account for the work required to develop proposed rules. Some studies suggest that complex proposals might require years of preliminary effort before they are ready for publication. More than 3,000 of the deadlines in this dataset required the publication of a final rule or its procedural equivalent. Roughly 2,200 of these have specific compliance data.²⁹

17. This is a common theme of political science research on Congressional oversight. Legislators gain little benefit from spending their time on extensive efforts to monitor the bureaucracy. They rely heavily upon external actors to alert them of oversight issues. For a prominent example of this argument, see: Matthew McCubbins and Thomas Schwartz, "Police Patrols and Fire Alarms: Congressional Oversight Overlooked," *American Journal of Political Science*, Vol. 28, No. 1 (1984).

18. Individual congressmen represent themselves and their constituents—not Congress as a whole.

19. Examples of this approach include: Anne Joseph O'Connell, "Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State," UC Berkeley Public Law Research Paper No. 999099, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999099; and Jacob E. Gersen and Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 *U. Pa. L. Rev.* 923 (2007). <http://scholarship.law.berkeley.edu/facpubs/193>.

20. These publications are available online at <http://www.reginfo.gov>. As an aside, RISC has done an excellent job of making their data accessible; other agencies should follow their example. Data availability problems cited in this study are not the fault of RISC: they are artifacts of the collection method used under current law.

21. Jacob E. Gersen and Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 *U. Pa. L. Rev.* 923 (2007), <http://scholarship.law.berkeley.edu/facpubs/193>.

22. Each rule published by a federal agency is identified by a unique RIN.

23. In cases where dates were not listed with precision, the 1st of the month was imputed for actions and the 15th of the month for deadline due dates. This approach assumes that an agency is in compliance when there is uncertainty.

24. This project relies on agencies' self-reported due dates. Nearly 2,700 of these deadlines are associated with specific compliance information. The remainder either do not specify a clear required action, do not include information on deadline and/or action dates, or include significant caveats that make compliance estimates unreliable. (An example of the latter: several deadlines include supplemental notes explaining that compliance was delayed by lawsuits or approved by Congress. These cases were omitted whenever possible.)

25. For a summary of the notice and comment rulemaking process, see: Curtis Copeland, "The Federal Rulemaking Process: An Overview," Congressional Research Service Report RL32240, Feb. 22, 2011, http://www.thecrs.com/pdf/20120422_RL32240.pdf; and Curtis Copeland, "Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs," Congressional Research Service Report RL32397, <http://fas.org/sgp/crs/misc/RL32397.pdf>.

26. This restriction is also useful in that it removes a large number of deadlines that do not include specific compliance information (e.g. due dates, actions required to complete a deadline).

27. A number of different actions are defined as "equivalent" to completing a proposed rule. In brief, any regulatory action that seems to indicate successful completion of a preliminary stage in a regulatory process is counted as an NPRM completion.

28. Jacob E. Gersen and Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 *U. Pa. L. Rev.* 923 (2007), <http://scholarship.law.berkeley.edu/facpubs/193>; Scott Atherley, "The Politics of Regulatory Deadlines," draft manuscript presented at the Annual Meeting of the Midwest Political Science Association, April 2015.

29. There is some ambiguity regarding what specifically constitutes a "final rule." In addition to final rules and final actions, agencies may issue "interim final rules" (temporary rules that carry the force of law) and "direct final rules," which bypass the notice-and-comment process and are permissible only under certain conditions. For

TABLE I: DEADLINE COMPLIANCE RATES, ALL AGENCIES, 1995 – 2014

Measurement	Deadlines	Compliance rate (%)
All deadlines	2,684	47.4
Direct mandates	1,892	46.0
Non-mandates	792	50.6

Source: R Street analysis of OMB data

Beyond the specific actions required for compliance, regulatory deadlines also can be categorized by the intent of the deadline in question. Deadlines can be classified into three main intention groupings: direct mandates, periodic reviews and procedural deadlines. Each type of deadline serves a different function.

Direct mandates are the most common type of deadline, representing nearly 2,600 of the 4,320 total deadlines in this data. A deadline is defined as a “mandate” if it demands an explicit action from an agency in direct response to a piece of legislation.³⁰

Periodic review deadlines occur when a statute requires an agency to review or update a regulation at particular intervals. For example, the Department of Energy is required to review and update energy-efficiency regulations periodically.³¹ This is not equivalent to a direct mandate.

Procedural deadlines, similarly, are designed to control the time an agency spends on a process. For example, the 1973 Endangered Species Act (ESA) established a procedure by which interested parties might petition agencies such as the U.S. Fish and Wildlife Service (FWS) to consider a particular species for official protection. The act requires FWS to respond to petitions within a specific timeframe. This requirement is a type of statutory deadline, but does

purposes of this paper, all these actions (in addition to several hundred less common types of actions) are treated as successful completions of a rule and eligible for compliance with a deadline. For details on these and other types of regulatory actions, see Curtis Copeland, “The Federal Rulemaking Process: An Overview,” Congressional Research Service Report RL32240, February 22, 2011, http://www.thecre.com/pdf/20120422_RL32240.pdf. Agencies record literally thousands of unique types of actions. While the vast majority are NPRMs and completions of rules, there are many other types.

30. More specifically, I use a two-step test: first, I look for mandate language, e.g. “this action implements” or “this action is required by.” Second, I check the time between the statute and the deadline – particularly long-term differences suggest the statute established procedural requirements rather than mandating specific actions. Finally, I draw on general knowledge of statutes: many procedural rules derive from the Clean Air and Water Acts, which helps with identification.

31. Some of these review deadlines are triggered by changes in industry best practices (procedural deadlines) while others operate on a six-year review cycle under the Energy Policy and Conservation Act.

not represent an explicit congressional mandate.³² Rather, it reflects Congress’ efforts to outsource oversight to interest groups, such as WildEarth Guardians, which sued the FWS so extensively under the ESA that the agency was forced to negotiate a settlement and collaborate with the organization on an action plan to prioritize activities.³³ The settlement is an excellent example of a well-functioning statutory deadline: by placing a restriction on agency operations, Congress successfully empowered external actors to exert oversight on its behalf. Given the substantial ambiguity around procedural deadlines and periodic review deadlines, this paper focuses on direct mandates.³⁴

DEADLINE COMPLIANCE

This section presents estimates of deadline compliance for various agencies between 1995 and 2014. Compliance is defined simply as whether an agency successfully completes a required action on or before a statutory deadline. As described below, “successful completion” is defined as broadly as possible. In the case of final rules, this entails treating interim final rules and direct final rules as equivalent to final rules. This is only one example; a wide variety of actions are coded as “equivalent” to completing a deadline.³⁵

Data are summarized based on two primary measurements of deadline compliance: all unique deadlines with sufficient and reliable information recorded and direct mandates. This restriction allows for a focused evaluation of the effectiveness of regulatory deadlines. The results of this analysis suggest that regulatory deadline compliance is far from ideal.

Overall compliance rates between 1995 and 2014 stand between 46 percent and 51 percent. Table 1 summarizes these (limited) variations. In short, direct mandates are perhaps marginally more difficult to comply with than non-mandates. This is not particularly surprising: direct mandates’ deadlines are likely to be shorter-term and less predictable. The

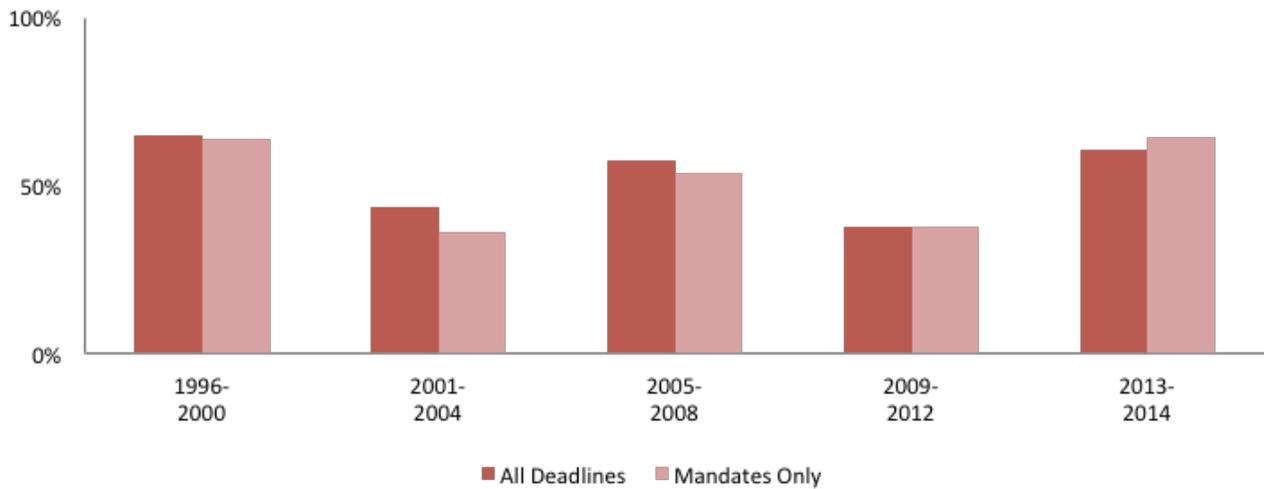
32. U.S. Fish and Wildlife Service, “Listing Program Work Plan: Questions and Answers,” 2011, https://www.fws.gov/endangered/improving_ESA/FWSpercent20Listingpercent20Programpercent20Workpercent20Planpercent20FAQspercent20FINAL.PDF; see James Salzman, “Evolution and Application of Critical Habitat under the Endangered Species Act,” http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1887&context=faculty_scholarship for a review and history of the ESA’s “Critical Habitat” provisions and <http://www.fws.gov/endangered/what-we-do/listing-petition-process.html> for a summary of the ESA’s petition procedures.

33. *Ibid.* Litigation over procedural deadlines is relatively common, especially on environmental issues. Requiring a strict response time and making agencies legally liable for meeting those response times has been a historically effective method of compelling agency actions.

34. The main point of interest here is that a sizable number of deadlines are not the result of a direct congressional mandate.

35. This is necessary to account for different reporting procedures used by different agencies. A “final action” might not be called a final action. This study attempts to cast a wide net and define as many actions as “successful” completions as appropriate. To anticipate a conclusion of this study, more detailed reporting from agencies would make monitoring compliance a far less uncertain task.

FIGURE I: COMPLIANCE RATES BY PRESIDENTIAL TERM



SOURCE: R Street analysis of OMB data

ACA, for example, assigned agencies dozens of challenging rulemakings with deadlines of only a few years.

Deadline compliance also has varied substantially over time. Figure 1 presents compliance rates in each presidential term during this time period, from Clinton’s first term through Obama’s second.³⁶ The data suggest that deadline compliance varies substantially over time, from extremely low rates before 1995 to a high of 65 percent during Bill Clinton’s second term and 61 percent during the first half of Barack Obama’s second term.³⁷

These shifts are more apparent in Figure 2, which plots the same information by year. There is some indication that compliance improves in a president’s second term. Compliance was substantially higher in Clinton and Bush’s second terms and has been thus far in Obama’s second term. There do not seem to be any major differences across administrations, although it is difficult to generalize based on only three presidents. Compliance was quite low during both Bush and Obama’s first terms, but considerably higher in both presidents’ second terms.

It is also worth noting that the volume of deadlines, like compliance rates, has varied substantially over time. Deadlines were highest in 2000, with 188 total deadlines, and 2011, with 180 total deadlines.³⁸ The data suggest that agencies managed

the former set of deadlines better than the latter: compliance exceeded 70 percent in 2000 and was less than 35 percent in 2011.

AGENCY-LEVEL COMPLIANCE

There are several interesting points to observe regarding deadline compliance by specific agencies. Not surprisingly, the bulk of deadlines are concentrated in large cabinet agencies. More than half of the recorded deadlines fell on just four agencies: the Department of Health and Human Services (HHS), the Environmental Protection Agency (EPA), the Department of Transportation (DOT) and the Department of Commerce (DOC). The top 10 agencies accounted for nearly 80 percent of total deadlines (see Table 2).

TABLE 2: DEADLINES FOR TOP 10 AGENCIES

Agency	Deadlines	Share of total deadlines (%)
HHS	529	19.7
EPA	312	11.6
DOT	307	11.4
DOC	216	8.0
USDA	203	7.6
TREAS	175	6.5
DOE	118	4.4
DOI	99	3.7
DOD	71	2.6
DHS	67	2.5

SOURCE: R Street analysis of OMB data

36. Both of the cited terms are somewhat abbreviated, given the years involved.

37. My estimates put compliance below 21 percent prior to 1995, although data availability is a concern in these cases. The *Unified Agenda* was not published systematically until 1995 and the *Federal Register* was not available in machine-readable format.

38. Deadlines due in 2011 are largely the result of the ACA and the Dodd-Frank financial reforms.

FIGURE 2: ANNUAL DEADLINE COMPLIANCE RATES



SOURCE: R Street analysis of OMB data

These agencies both dominate the deadline data and drive variations in compliance. Table 3 presents overall deadline compliance by the four most heavily burdened agencies over time. HHS and the EPA each show the alternating pattern of compliance rates in second terms, followed by low-compliance rates in first terms.

TABLE 3: DEADLINE COMPLIANCE RATES, BY PRESIDENTIAL TERM (%)³⁹

Years	HHS	EPA	DOT	DOC
1996-2000	62.5	76.2	45.9	60.4
2001-2004	50.9	48.1	45.8	53.6
2005-2008	63.5	64.5	45.7	65.8
2009-2012	35.8	40.0	29.0	52.2
2013-2014	53.6	28.6	40.0	--

SOURCE: R Street analysis of OMB data

Among the 10 agencies facing the most deadlines over this period, five have compliance rates between 39 percent and 41 percent (DOT, USDA, DOE, DOD and DHS). The most responsive agency is the EPA, with an overall compliance rate of 64.5 percent, although it seems to have fallen back in recent years. The Department of the Interior (DOI) ranks a close second, at 63 percent.

39. Note that the data lists only 5 deadlines due for the Department of Commerce in 2013-14; the agency is omitted from this period as a result. The outcome (0 percent) is misleading. If we were grading this period, the fairest result would be “incomplete.”

Generally speaking, the 2009 to 2012 period was a difficult time for regulatory deadlines. The Dodd-Frank Act and Affordable Care Act each generated hundreds of new, complex requirements, associated with highly ambitious deadlines. Many of these deadlines were not met (and many rulemakings remain in regulatory limbo). Taking a broader view of deadlines and deadline compliance makes it possible to identify uniquely challenging years (such as 2011). It also offers reason for optimism: deadline compliance has not always been as problematic as in recent years.

JUDICIAL DEADLINE COMPARISON

Comparing statutory and judicial deadline compliance provides a final useful data point. A judicial deadline occurs when the courts have involved themselves in an issue. One example is workplace safety regulation, managed by the Occupational Safety and Health Administration (OSHA). OSHA receives petitions from “interested parties” regarding various workplace safety issues. The agency may elect to address these petitions by initiating a rulemaking or they may reject the petitions.⁴⁰ One such petition, submitted in July 1993, dealt with hexavalent chromium, a chemical compound commonly used in industrial dyes and anti-corrosive agents. The substance is also generated as a natural byproduct of working with chromium at high temperatures. Inhalation of hexavalent chromium poses a health hazard.

40. For a case of the latter, see: Lydia Wheeling, “OSHA denies petition for slower line speeds at meat plants,” *The Hill*, March 18, 2015. <http://thehill.com/regulation/labor/236149-osha-denies-petition-for-slower-work-speeds-at-meat-and-poultry-plants>.

In their petition, the Oil, Chemical, and Atomic Workers International Union (OCAW) and Public Citizen argued that OSHA should issue an immediate Emergency Temporary Standard (ETS) to reduce exposure limits. OSHA declined to do so, but did initiate rulemaking on the subject. Like many rules, the hexavalent chromium regulation languished. In 1997, OSHA was sued by the original petitioners on the grounds of unreasonable delay. However, as discussed earlier, proving unreasonable delay is challenging. The suit was rejected. In 2002, OSHA was sued again by Public Citizen, this time in conjunction with the Paper, Allied-International, Chemical and Energy Workers International Union (PACE), for continued delay. In this case, the courts found for the plaintiffs and ordered the agency to proceed with rulemaking.⁴¹ The decision remanded the question of the precise timing of remediation, with an external panel responsible to determine a timetable if the agency and the plaintiffs failed to agree on one within 60 days.⁴²

The case was settled in late 2002. The timetable specified that an NPRM should be issued by October 2004 and a final rule promulgated by late February 2006. OSHA met both deadlines successfully. The interested parties' suit was instrumental in compelling OSHA to alter its priorities and issue a regulation. Following Public Citizen's initial petition in 1993, little action occurred for nearly a decade. However, after the successful lawsuit concluded, a final rule was completed within three years.

The OSHA lawsuits initiated a set of court cases that eventually resulted in a court order requiring the agency to complete the rule by a specified date. As in the ESA petitions, Congress was not involved. Oversight was conducted exclusively by interest groups, operating through the courts. While judicial deadlines are less common and are concentrated in fewer agencies, differing compliance rates between deadline types suggest that agencies treat court-ordered deadlines as higher priorities than deadlines developed by Congress. The ambiguous legal status of some statutory deadlines reinforces this point: statutory deadlines can be difficult to litigate in practice.

Data on judicial deadlines are collected following the same procedure for statutory deadlines. Although in-depth statistical tests are beyond the scope of this paper, descriptive statistics suggest that the data are consistent with expectations: agencies are far more likely to comply with judicial deadlines than with statutory deadlines. The overall com-

pliance rate for judicial deadlines during the years studied is nearly 80 percent.

Agencies faced just under 600 distinct judicial deadlines during the sample period. The vast majority of these (more than 500) fall on two major agencies: the DOI and the EPA. DOI deadlines deal almost exclusively with endangered species petitions, mostly submitted to the Fish and Wildlife Service. EPA deadlines are concentrated in the Office of Air and Radiation (OAR) and deal largely with air-quality standards and reviews. Table 4 summarizes judicial deadline compliance by sub-agencies with at least 10 deadlines: FWS; OAR; the EPA's Office of Water (OAW) and Office of Solid Waste and Emergency Response (SWER); the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA); and the Department of Energy's Office of Energy Efficiency & Renewable Energy (OEE).

TABLE 4: COMPLIANCE WITH JUDICIAL DEADLINES, SELECT SUB-AGENCIES

Subagency	Judicial deadlines	Compliance rate (%)
FWS	244	80.74
OAR	179	89.94
OAW	67	86.57
SWER	31	93.55
NOAA	26	46.15
OEE	13	92.31

SOURCE: R Street analysis of judicial data

The EPA and DOI seem to have little difficulty meeting judicial deadlines. Compliance rates for both agencies are quite strong. The EPA, in particular, stands out: the agency's overall judicial compliance rate is nearly 90 percent.

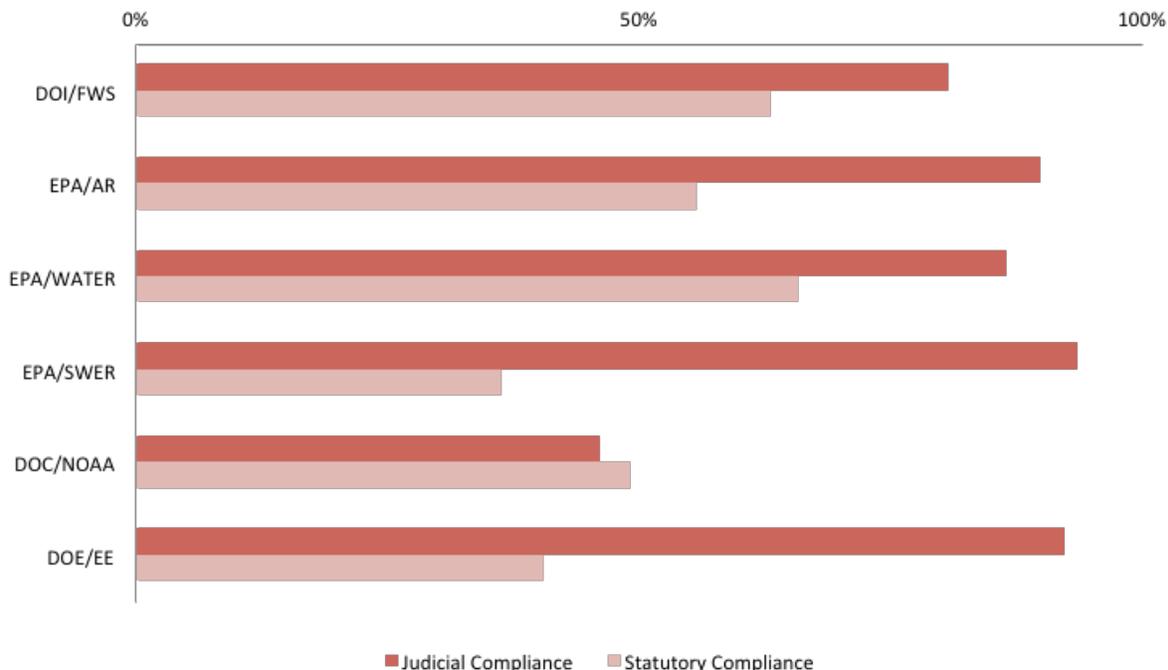
Comparing these figures to statutory deadline compliance rates highlights the apparent qualitative difference between the types of deadline; recall that overall statutory deadline compliance rates are roughly 50 percent. Figure 3 contrasts statutory and judicial compliance rates for the six bureaus in Table 4. The results are generally quite consistent; all agencies save NOAA are considerably more likely to comply with judicial deadlines.

There are other possible explanations for these figures. Judicial deadlines are concentrated within a small number of agencies and focused on several distinct pieces of legislation (the Endangered Species Act and the Clean Air and Water Acts, prominently). Sustained interaction between agencies and the courts within a single policy area may elicit effective coordination.

41. The decision emphasized the length of elapsed time between the agency's initial proposal, the agency's failure to meet internal deadlines and the continued lack of a rule following the last court decision.

42. *Public Citizen Health Research Group and the Paper, Allied-Industrial, Chemical & Energy Workers International Union v. Elaine Chao, Secretary of Labor, Occupational Safety and Health Administration*, <http://caselaw.findlaw.com/us-3rd-circuit/1262699.html>.

FIGURE 3: TOTAL STATUTORY AND JUDICIAL DEADLINE COMPLIANCE RATES



SOURCE: R Street analysis of OMB and judicial data

IMPROVING DEADLINE COMPLIANCE

Any effort to improve agency compliance with statutory deadlines should begin with data availability. There is little detailed information available regarding agencies’ progress in meeting statutory regulatory deadlines. What data does exist has its share of problems.⁴³ While in-depth qualitative analysis can identify whether or not an agency responded to a specific legislative directive, large-scale quantitative analysis is limited by the lack of detailed data linking statutory directives to specific required actions. The general categories reported in the *Unified Agenda* are too broad for analyses more granular than descriptive statistics. Congress cannot monitor federal agencies effectively without a system dedicated to tracking directives and following up to evaluate agency responsiveness.⁴⁴

43. Data on deadlines are actually *better* than data on other congressional requests of agencies, such as committee requests for information or decision documentation. The 2012 IRS targeting controversy, while politically-charged, is an example of the difficulty of getting specific information from agencies. See, for example: John Hicks, “House Republican slams Lois Lerner in report on IRS targeting,” *Washington Post*, March 11, 2014, <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/03/11/house-republicans-slam-lois-lerner-in-report-on-irs-targeting/>. For background on the controversy, see Zachary Goldfarb and Karen Tumulty, “IRS admits targeting conservatives for tax scrutiny in 2012 election,” *Washington Post*, May 10, 2013, http://www.washingtonpost.com/business/economy/irs-admits-targeting-conservatives-for-tax-scrutiny-in-2012-election/2013/05/10/3b6a0ada-b987-11e2-92f3-f291801936b8_story.html.

44. Committee staff members often shoulder this responsibility, in addition to their many other responsibilities. However, tracking of congressional requests is neither systematic nor transparent. A single system would improve matters immensely.

Fortunately, data availability is a relatively easy problem to fix. Reporting requirements could be updated to include more detail. For example, instead of recording generic deadline categories (NPRM statutory deadline), agencies should record the exact action requested by Congress. This information is often mentioned either in the description of a rule, or in an “additional information” field. However, it is not recorded systematically. There is no reason for it not to be. Providing additional information at a more granular level would ease the work of researchers and improve the transparency of the regulatory process.

These marginal record-keeping improvements, while necessary, are not sufficient. While RISC’s *Unified Agenda* was once a milestone in regulatory transparency, time has passed it by.⁴⁵ The document is published bi-annually (at best) and is not always clear or reliable. The general format of the online agenda could be retained, but policymakers would benefit from having a database in which agencies record regulatory milestones as they complete them. Agencies already record this information internally, to compile their *Unified Agenda* submissions. This new regulatory tracking system could be modeled on RISC’s Regulatory Review Dashboard tool, which provides real-time monitoring of executive review of regulations.

45. It bears repeating that RISC has done a very nice job in promoting data availability. It stands head and shoulders above most other federal agencies in this regard.

Improved data and a central tracking system would enhance the transparency of the rulemaking process, and enable Congress to more accurately assess agencies regulatory actions and progress toward deadlines. These improvements also would generate data that would suggest ways to improve the regulatory process.

Beyond simple information-collection efforts, Congress would benefit greatly from an organization or office devoted to legislative engagement with the regulatory process. RISC is part of OMB's Office of Information and Regulatory Affairs. It is, in other words, primarily interested in promoting presidential management of the regulatory process, not congressional engagement. Such an organization –a Congressional Regulatory Affairs Office– might also be responsible for managing committee requests of the bureaucracy and tracking compliance with legislative requests for information or assistance from federal agencies. A centralized system for making and tracking requests of federal agencies could save time and effort for both congressmen and agency officials. There are likely large numbers of unnecessarily complex, duplicative or unclear requests issued from legislators to civil servants. Assigning a single manager for the request process would help build a long-term working relationship between the legislative branch and the agency officials who interact with it.⁴⁶

The Congressional Regulatory Affairs Office proposed here is conceptually comparable, but distinct, from proposals to create an “Office of Regulatory Analysis.”⁴⁷ Whereas a regulatory analysis office would estimate the costs of regulation, the CRAO would serve a much more limited role, emphasizing data collection and coordination roles rather than judgment and evaluation. Partisan disagreements about regulatory analysis (especially over the use and methodology of cost-benefit analysis) are common, but it seems likely that legislators of both parties could find value in expanded information about the status of their requests to federal agencies.

Finally, at least in the somewhat unique case of regulatory deadlines, Congress would benefit from an institution empowered to litigate on its behalf. Such an organization would have to be strongly independent of Congress itself (in

order to protect it from partisan political entanglements), with a clear mandate to enforce the will of the institution, as stated in unambiguous law. The objective of this institution would simply be to ensure that issues of importance to Congress as an institution are actually represented. It goes without saying that congressional members do not always act in the best interests of Congress; their constituents come first.

CONCLUSION

As the data in this study make plain, agencies routinely fail to meet deadlines. Why this is the case is not entirely clear and worthy of additional study. Indisputably, Congress is partly to blame for setting overly ambitious regulatory deadlines. But it strains credulity to posit that Congress is wholly to blame for the nearly 1,300 regulatory deadlines missed. The data showing substantial variance in compliance rates over time underscore that high rates of compliance are not impossible. Moreover, the fact that agencies are considerably more successful in meeting judicial deadlines suggests that increased involvement of the judiciary could improve matters.⁴⁸

The low levels of deadline compliance suggest that Congress needs to bolster its power to oversee and enforce regulatory deadlines. As suggested above, improvements in agency regulatory compliance may be achieved by upgrading information-collection standards, establishing a new Congressional Regulatory Affairs Office or through enacting a limited form of legal recourse.

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46. Agencies have adopted conceptually similar policies already: many agencies have created offices of legislative or congressional affairs to monitor activities in the legislature and/or manage relationships with congressmen. Comparable work in Congress equivalent is currently handled by individual committees and/or member offices, both of which are chronically over-worked and under-staffed.

47. Proposed by legislation in 1998 (S.1675: Congressional Office of Regulatory Analysis Act) and again in 2011 (H.R. 214: Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2011), this office was conceived as a vehicle to re-assert congressional interests in the regulatory process, analogous to the use of the CBO to counter-act executive dominance of the budgetary process. See committee testimony by Robert Hahn and Robert Litan of the AEI-Brookings Joint Center for discussion of the 1990s version of the act (http://www.brookings.edu/-/media/research/files/testimony/1999/4/righttoknow-litan/04_righttoknow_litan.pdf). For a broader discussion of the intent of such an office, see: Angela Antonelli, “Two Years and 8,600 Rules: Why Congress Needs an Office of Regulatory Analysis,” Heritage Foundation Background Report, June 1998, https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/4720.pdf.

48. There a number of possible ways to achieve this. Allowing legislators to sue agencies in highly specific circumstances, or empowering a non-partisan entity to sue on the behalf of Congress (without requiring explicit Congressional authorization) are two. The general principle is to ensure that an interested party always has standing exists to challenge an agency's failure to achieve mandated policy goals.