OSHA Inaction

Onerous Requirements Imposed on OSHA Prevent the Agency from Issuing Lifesaving Rules

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Acknowledgments

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Introduction: Our Regulatory System Is Broken

A ccording to certain pundits, a "regulatory hurricane" is brewing.¹ Yet when it comes to health and safety protections for workers, there has been a regulatory drought. The Occupational Safety and Health Administration (OSHA) has produced regulations during the George W. Bush and Barack Obama presidencies at a slower rate than in any other period in the agency's history (see Figure 1).² While OSHA was once able to develop a rule in less than a year, the process now exceeds six years on average.



Five pending OSHA standards have been subject to delays ranging from 4 to 31 years. Analyzing OSHA's risk assessment data, we found that eliminating the delays would have prevented more than 100,000 serious injuries, more than 30,000 cases of occupational illness and hundreds of worker fatalities. Additionally, there are hundreds of chemicals to which workers can be exposed at levels known to be unsafe, but which OSHA has not yet

¹ Tom Donohue, *The Regulatory Hurricane*, Free Enterprise, October 2010.

² In our analysis, a "new standard issued" is any regulation resulting in new protections addressing health or safety hazards. In this category, we included substantive revisions to existing regulations. We excluded minor regulatory actions such as small changes in record keeping requirements or technical amendments to existing rules.

begun to address. Further, protections are lacking for such common hazards as heat stroke, repetitive motion injuries and workplace violence.

Over the years, OSHA has been hamstrung by Congress, presidential administrations, and the courts. A particular Supreme Court decision has prevented the agency from responding quickly to new hazards or addressing multiple hazards with a single rule. Several laws have imposed additional, onerous steps for the agency to complete rules. As corporate influence in U.S. politics has increased, Congress and presidential administrations have become more directly involved in OSHA rulemakings, setting roadblocks for the agency's regulatory initiatives.

OSHA regulations save lives and protect workers' health. They have been remarkably effective, with some preventing thousands of cases of injury, illness, or fatality.³ But OSHA is still a long way off from being able to protect every worker. About 55,000 people still die every year from work-related injuries and illnesses.⁴ Millions more workers suffer non-fatal occupational injuries.⁵ Many of these incidents could be prevented with new regulations, but OSHA has been forced into a state of near-paralysis when it comes to issuing rules.

The 1970 law that created OSHA requires each employer to provide a workplace that is free of known hazards. To address a broad array of hazards as quickly as possible, the law gave the agency a two-year window to bypass the rulemaking process and adopt "consensus standards"—health and safety guidelines developed by non-governmental organizations. The agency adopted hundreds of regulations in this manner. Once the window closed, OSHA was supposed to update its standards through the rulemaking process as new hazards entered the workplace or new scientific data on health risks emerged.

In the 1970s—the agency's first decade—OSHA issued new regulations fairly quickly. Its rulemakings for asbestos (1972), vinyl chloride (1974), and the pesticide DBCP (1978) each took less than one year. But the rulemaking process has grown longer ever since. Since the 1980s, it has taken OSHA an average of six years to move from deciding to

³ See Justin Feldman, Regulations At Work: Five Rules that Save Workers' Lives and Protect their Health. Public Citizen (2011).

⁴ Estimating the annual number of fatalities due to occupational illness is a difficult task. The most recent peer reviewed study to provide such an estimate used data from 1997 to analyze the number of fatalities that could be attributed to exposure to some (but not all) occupational hazards. The estimate ranged from 26,000 to 72,000 deaths. While fatal work-related injuries have decreased by nearly 25 percent since 1997, there are no data showing such a decline for fatal work-related illness. For the study based on 1997 data, see K. Steenland, C. Burnett, *et al.*, Dying for work: the magnitude of U.S. mortality from selected causes of death associated with occupation, 43 AMERICAN JOURNAL OF INDUSTRIAL MEDICINE 461 (2003).

⁵ J. P Leigh, S. B Markowitz, et al., *Occupational injury and illness in the United States: estimates of costs, morbidity, and mortality*, 157 Archives of INTERNAL MEDICINE 1557 (1997).

regulate a hazard to issuing a final rule. The situation has worsened in the past decade: the administrations of George W. Bush and Barack Obama have produced far fewer OSHA rules than any of their predecessors (see Figure 1, above).

The rulemaking process has failed to keep pace with the growing number of known hazards in American workplaces. As a result, OSHA cannot adequately protect workers from toxic chemicals, heat stress, repetitive use injuries, workplace violence, or many other occupational dangers.

I. Regulatory Delay and Inaction Threaten Workers

Faced with a broken regulatory system, OSHA cannot issue rules in a timely and efficient manner. Inadequate regulation imposes tremendous costs on workers, who may be forced to pay with their health or even their lives. Individual rules have been delayed at OSHA for as long as 31 years. The delays have contributed to many cases of injury, illness and fatality. In addition to these delayed rules, OSHA lacks the resources to even begin to address many other important workplace hazards.

A. Delays in Protections Have Caused More Than 100,000 Avoidable Cases of Illness and Injury

As of October 2011, five proposed OSHA standards had suffered delays ranging from 4 to 31 years.⁶ Analyzing OSHA's risk assessment data, we found that eliminating the delays would have prevented more than 100,000 serious injuries, more than 30,000 cases of occupational illness and hundreds of worker fatalities (see Table 1).

Standard Name	Start Date	Delay ⁷	Estimated Health Effects of Delay	
Beryllium	11/2002	8 yr. 10 mo.	Beryllium sensitization: 5,413 excess cases	
			Chronic beryllium disease: 4,194 excess cases	
			Lung cancer: 216 excess cases	
Diacetyl	10/2007	3 yr. 11 mo.	Bronchiolitis obliterans: 6,405 excess cases	
Silica Dust	10/2003	7 yr. 11 mo.	Fatal silicosis: 325 excess cases	
			Fatal lung cancer: 150 excess cases	
			Non-fatal silicosis: 19,919 excess cases	
Confined Spaces in	3/1980	31 yr. 6 mo.	Fatal injuries: 189 excess cases	
Construction			Non-fatal injuries: 18,900 excess cases	
Fall Prevention	4/1990	21 yr. 5 mo.	Fatal injuries: 320 excess cases	
(Walking Working			Serious non-fatal injuries: 104,026 excess cases	
Surfaces)				

Table 1. Health	Effects of	Delayed	OSHA	Rulemakings

Sources: See footnotes for bulleted paragraphs below.

⁶ A sixth standard for combustible dust has remained on hold for 1 year, 11 months. OSHA has not yet released an analysis showing the rule's benefits.

⁷ Delay is the time elapsed between OSHA's first public action on a particular rule (such as holding a public stakeholder meeting or issuing a request for information, notice of proposed rulemaking, or advanced notice of proposed rulemaking) and September 2011.

- OSHA's beryllium standard has been delayed for nearly nine years. Beryllium is a toxic substance to which workers in the electronics, nuclear, and metalwork sector are exposed. The current OSHA beryllium standard, based on science from the 1950s, allows workers to be exposed at levels that are ten times higher than those allowed by Department of Energy for nuclear power plant workers. Public Citizen petitioned OSHA to update the standard in 2001.⁸ In response, the agency began a rulemaking in November 2002. OSHA's estimates show that—if it were enacted nine years ago—the standard would have prevented 4,194 cases of chronic beryllium disease (a potentially fatal respiratory ailment), 5,413 cases of beryllium sensitization (a condition that often leads to chronic beryllium disease) and 216 cases of lung cancer.⁹
- OSHA's diacetyl standard has been delayed for nearly four years. Diacetyl is a chemical used to add artificial butter flavor to popcorn. Exposed workers can develop bronchiolitis obliterans, a debilitating and sometimes fatal respiratory disease. OSHA has known about health risks from diacetyl since 2002, but has not developed a regulation for the chemical. A rulemaking for the chemical began in 2007. If enacted in 2007, the standard would have already prevented an estimated 6,405 cases of bronchiolitis obliterans.¹⁰
- OSHA's silica dust standard has been delayed for nearly eight years. More than two million workers in the United States are exposed to silica dust. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease). Most at risk are construction, foundry, and metal workers. OSHA acknowledges that its current silica dust standard is obsolete.¹¹ The first concrete action it took to update the standard was in October 2003, when it convened a small business panel to review its proposed rule. Over this nearly eight- year period of delay, a standard would have prevented an estimated 150 cases of lung cancer, 325 cases of fatal silicosis, and 19,919 cases of non-fatal silicosis.¹²

⁸ Petition available at <u>http://www.citizen.org/Page.aspx?pid=2042</u>.

⁹ OSHA, Preliminary Initial Regulatory Flexibility Analysis of the Preliminary Draft Standard for Occupational Exposure to Beryllium (2007). Figures show median of values for estimated range and assumes a permissible exposure limit of 0.02 mcg/m³.

¹⁰ OSHA, Preliminary Initial Regulatory Flexibility Analysis of the Preliminary Draft Standard for Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl (2009). Estimate assumes a permissible exposure limit of 0.03 ppm. OSHA's range for estimated benefits at this level was wide (between 100 and 3,168 cases of bronchiolitis prevented annually. Our analysis used the median value.

¹¹ OSHA Occupational Exposure to Crystalline Silica, 75 Fed. Reg. 79.603 (December 20, 2010).

 $^{^{12}}$ OSHA, Preliminary Initial Regulatory Flexibility Analysis of the Draft Proposed OSHA Standard for Silica Exposure for General Industry and Maritime (2003). OSHA, Preliminary Initial Regulatory Flexibility Analysis of the Draft Proposed OSHA Standard for Silica Exposure in Construction (2003). Assumes PEL of 50 μ g/m³.

- OSHA's confined spaces standard for the construction industry has been delayed for more than 31 years. Confined spaces include tanks, silos, vessels, or any other areas with limited means of exit. Confined spaces are particularly dangerous because workers may be placed at a high risk of electrocution, suffocation, or drowning. In 1980, OSHA issued an advanced notice of proposed rulemaking to solicit information for a confined spaces standard protecting construction workers. Shortly after, the agency abandoned the rulemaking effort. In 1993, OSHA issued a standard requiring training, monitoring, and warning signs for confined spaces, but exempted the construction industry from the rule. That same year, the United Steel Workers union sued OSHA, demanding that the construction industry be included. OSHA agreed to work on the regulation as part of a settlement. The agency did not propose a standard until 2003, however. Had the rule been issued immediately, the regulation would have prevented an estimated 189 deaths and 18,900 non-fatal injuries over the past 31 years.¹³
- OSHA's fall protection standard for "walking / working surfaces" has been delayed for more than 21 years. In 1990, OSHA proposed a rule that would protect workers on scaffolds, towers, and ladders by providing them with harnesses or other fall protection equipment. The rule was abandoned shortly after OSHA held initial hearings. In 2003, OSHA again invited the public to comment on the rule. In 2010, OSHA proposed a revised rule incorporating changes in fall protection technologies that had occurred over the previous two decades. If issued in 1990, the rule would already have prevented an estimated 320 deaths and 104,026 injuries.¹⁴

B. Burdens Placed on OSHA Leave Many Hazards Unaddressed

OSHA's delayed regulations represent the tip of the iceberg of unaddressed dangers to workers. Due to the onerous requirements imposed on OSHA's regulatory initiatives, there are many workplace hazards that the agency has been entirely unable to address. After adopting hundreds of consensus standards between 1970 and 1972, OSHA's regulations were nearly in line with the scientific research that was available at the time. Since then, a tremendous chasm has developed between what researchers know and what OSHA regulates.

OSHA's failure to keep pace with changing workplace hazards is best illustrated by its inability to protect workers from toxic chemicals. While OSHA has only regulated two

¹³ OSHA, Preliminary Initial Regulatory Flexibility Analysis of the Draft Proposed OSHA Standard for Confined Spaces in Construction (2003).

¹⁴ OSHA, Technical and Analytical Support and Docket Review for OSHA's Preliminary Analysis of Costs, Benefits, and Economic Impacts for OSHA's Proposed Standard for Walking And Working Surfaces (2007).

chemicals since 1997, industry develops two new chemicals every day.¹⁵ Because the agency cannot keep pace with the knowledge of chemical toxicity, America's workers can be legally exposed to hundreds of toxic chemicals at levels known to be unsafe.



The National Institute for Occupational Safety and Health (NIOSH) has identified 682 toxic chemicals to which workers are exposed.¹⁶ While some chemicals cause relatively minor health problems such as skin or eye irritation, others can result in serious respiratory diseases or fatal cancers. OSHA has no existing regulations for 244 of the toxic NIOSH chemicals, meaning workers can be exposed to them at any level (See Figure 2). For another 196 chemicals, OSHA's standards offer less protection than NIOSH's recommendation. In some cases, OSHA rules allow for exposure at levels that are hundreds of times higher than NIOSH guidelines. Compared to the recommendations, a mere 35 percent of the NIOSH chemicals are regulated by OSHA at levels that are at least as protective.

In addition to toxic chemicals, OSHA has failed to regulate many other basic occupational hazards. Homicide is a leading cause of death for workers killed on the job, but OSHA has

¹⁵ OSHA issued a regulation for methyl chloride in 1997 and hexavalent chromium in 2006. According to the Government Accountability Office, 700 new chemicals enter U.S. commerce each year. John Stephenson, *Chemical Regulation: Options for Enhancing the Effectiveness of the Toxic Substances Control Act.* GAO (2009). ¹⁶ NIOSH, POCKET GUIDE TO CHEMICAL HAZARDS (2011).

never developed a standard for workplace violence prevention.¹⁷ Despite a large body of scientific knowledge on heat stress prevention, OSHA has no standard to ensure workers do not suffer heat stroke.¹⁸

II. Case Study: OSHA Loses its Ability to Respond to New Hazards

In February 1974, the Center for Disease Control (CDC) reported the death of four tire plant workers who were employed at the same B.F. Goodrich factory in Kentucky.¹⁹ The cluster of deaths was unusual—each of the four men succumbed to an extremely rare form of liver cancer known as hepatic angiosarcoma. The company's medical staff identified vinyl chloride, a chemical used in the production of polyvinyl chloride (PVC), as the cause of the cancer. Public concern grew once the report surfaced. Thousands of workers were being exposed to high levels of a substance whose toxicity had come to light.

Once news of vinyl chloride's risks surfaced, OSHA—not even four years old at the time sprang into action. Less than three months after the publication of the CDC article, the agency issued an emergency temporary standard lowering the permissible exposure level for vinyl chloride from 500 parts per million (ppm) to 50 ppm.²⁰ The following month, OSHA proposed a permanent rule that would reduce the exposure level to 0 ppm. Industry groups protested, claiming such a standard would put plastics manufacturers out of business. As a slight compromise, OSHA's final standard allowed manufacturers to maintain no more than a 1 ppm air concentration of vinyl chloride. The entire rulemaking process took nine months. Manufacturers were easily able to comply with the rule after B.F. Goodrich developed a system to sequester the chemical and prevent worker exposure.²¹

Twenty-eight years later, in May 2002, the CDC reported another cluster of work-related deaths.²² This time the culprit was diacetyl, a chemical used to flavor microwave popcorn. Eight employees at a Missouri popcorn factory died after developing a debilitating respiratory disease known as bronchiolitis obliterans. A physician who treated several of the workers urged OSHA to inspect the factory. The agency sent inspectors who were

¹⁷ OSHA can use the General Duty Clause to address workplace violence but historically has been reluctant to do so. Recently, OSHA issued a directive that may improve enforcement for workplaces where violence is a problem. This is no substitute for a violence prevention standard, however.

¹⁸ On September 1, 2011, Public Citizen petitioned OSHA to develop a heat stress standard. The petition is available at <u>http://www.citizen.org/petition-to-osha-for-a-heat-standard-2011</u>.

¹⁹ J. Creech, M. N. Johnson, et al., *Angiosarcoma of the liver among polyvinyl chloride workers—Kentucky*, 23 MORBIDITY MORTALITY WEEKLY REP 49 (1974).

²⁰ Paul H. Weaver, *On the Horns of the Vinyl Chloride Dilemma*, Fortune, October 1974.

²¹ See Negah Mouzoon and Taylor Lincoln, *Regulation: The Unsung Hero in American Innovation*. Public Citizen (2011) at 10 – 13.

²² E. Simoes, R. Maley, et al., *Fixed obstructive lung disease in workers at a microwave popcorn factory: Missouri, 2000–2002*, 51 MMWR 354 (2002).

unable to take any action because there was no applicable regulation to enforce.²³

This time around, OSHA did not spring into action—it crawled. In April 2007, five years after the CDC published the diacetyl report, a popcorn factory worker named Eric Peoples testified before a congressional sub-committee that exposure to diacetyl had all but destroyed his lungs.²⁴ As the 35-year-old father of two young daughters described, contracting a case of pneumonia would require him to receive a lung transplant. If that were to happen, he would likely survive just another five years.²⁵

The House of Representatives passed the Popcorn Workers Lung Disease Prevention Act in September 2007 with strong bipartisan support.²⁶ The bill would have required OSHA to regulate diacetyl. Apparently in response to this legislation, OSHA held an informal meeting of stakeholders to discuss diacetyl regulation the month after the House vote.²⁷ But the Senate never took up the diacetyl issue, so OSHA was not compelled to regulate it. OSHA took no further action on diacetyl during the remainder of the Bush administration.

In January 2009, OSHA issued an outline of a proposed diacetyl regulation and asked interested parties to submit comments. It seemed as though the regulatory process were moving forward under the new administration. But by March 2009, OSHA withdrew its proposal. Before the agency could continue, the Small Business Regulatory Enforcement Fairness Act (SBREFA) required it to convene a panel of small business representatives to comment on the rule. A company with up to 500 employees could participate on the panel as a "small" business.²⁸ The panel met in May. In July, OSHA published a 259-page report summarizing the panel's comments, which largely sought greater clarity on the rule's provisions and to whom it applied.²⁹

²⁷ OSHA, *Meeting Summary Report: Diacetyl and Food Flavorings Containing Diacetyl* at <u>http://www.osha.gov/dsg/guidance/101707-diacetyl-meeting-notes.html</u> (November 27, 2007).

²³ David Michaels, et al., *A Case of Regulatory Failure – Popcorn Workers Lung*. Project on Scientific Knowledge and Public Policy. Available at <u>http://www.defendingscience.org/case_studies/A-Case-of-Regulatory-Failure-Popcorn-Workers-Lung.cfm</u>.

²⁴ Have OSHA Standards Kept up With Workplace Hazards? Hearing Before the Subcomm. On Workforce Protections of the House Comm. On Education and the Workforce, 111th Cong. (2007) (statement of Eric Peoples). Available at

http://www.defendingscience.org/case_studies/upload/Eric_Peoples_Testimony_April07.pdf.²⁵ *Ibid.*

²⁶ The proposal was introduced to the House during the 110th session of Congress as H.R. Res. 2693. Voting in favor of the bill were 213 Democrats and 47 Republicans.

²⁸ The Small Business Administration, whose Office of Small Business Advocacy participates in the review panels, sets criteria defining the size of smalls business. Popcorn factories fall under the "Miscellaneous Food Manufacturing" category, which can have up to 500 workers.

²⁹ OSHA, Report of the Small Business Advocacy Review Panel on the OSHA Draft Proposed Standard for Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl (July 2, 2009).

In April 2009, OSHA had completed a draft of a required document outlining the costs and benefits of the diacetyl regulation. The report relied on figures from a private contractor. To ensure its analysis would be strong enough to survive any future lawsuits from industry, OSHA continued to analyze the regulation's prospective costs and benefits after publishing the draft. The agency planned to enlist a group of academics to review its work by June 2011. But agency resources were stretched thin. OSHA was working on several other rules and was also required by an executive order to conduct reviews of existing regulations to see which ones might be "streamlined."³⁰ By October 2011, the review of diacetyl's health effects still had not begun. OSHA began collaborating with NIOSH in an attempt to expedite the risk assessment process.³¹

Nine years have passed since the dangers of diacetyl first came to light. Yet OSHA may still be years away from regulating the substance. This excessive delay imposes significant costs. Based on OSHA's estimate, a diacetyl regulation could have prevented about 15,000 workers from developing bronchiolitis over the nine years that have elapsed since the CDC report.³² OSHA's failure to regulate harms businesses as well as workers. Some popcorn companies have been forced to pay millions of dollars after losing lawsuits brought against them by sick employees.³³

III. Why Do OSHA Rulemakings Take So Long?

A confluence of factors prevents OSHA from issuing regulations in a timely and efficient manner. Most of these impediments are external to the agency. A Supreme Court decision has prevented OSHA from responding quickly to new hazards or addressing multiple hazards at once. Several laws add onerous steps to the rulemaking process. Finally, as corporate political influence has increased, Congress and presidential administrations have become more directly involved in OSHA rulemakings, setting roadblocks for the agency's initiatives.

A. The Benzene Decision

In 1980, the U.S. Supreme Court struck down OSHA's updated standard regulating benzene, a carcinogenic component of petroleum.³⁴ In the case, referred to as the Benzene decision,

³⁰ Exec. Order No. 13563, 76 Fed. Reg. 3,821 (January 21, 2011).

³¹ Christopher Cole, *NIOSH Chief: Diacetyl, Silica Studies Bolster OSHA Rulemaking As Agencies Hike Cooperation*, INSIDE OSHA (May 31, 2011).

³² OSHA's risk assessment shows that a standard with a permissible exposure level of 0.03 ppm would prevent between 100 and 3,168 cases of bronchiolitis annually (median = 1,534 cases).

³³ Eric Peoples received \$20 million from his employer after winning a lawsuit based on his illness. See Stephen Labaton, *OSHA Leaves Worker Safety in Hands of Industry*, THE NEW YORK TIMES (2007).

³⁴ Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980).

the Court ruled that the Occupational Safety and Health Act requires OSHA to prove "significant risk" for any hazard that the agency choses to regulate. OSHA had not sufficiently proven that the original benzene standard posed a risk to workers left workers at risk, the Court ruled. The decision created ambiguity as to how extensive OSHA needed to be in its risk analyses.

In 1989, OSHA attempted its most ambitious rulemaking ever. Realizing that toxic chemical regulations were far out of line with available science, it issued a rule creating new protections for 376 substances at once. Industry groups challenged the new rule in court. In 1992, a federal appeals court cited the Benzene decision when it threw out the new protections.³⁵ In the decision, the court ruled that OSHA needed to give more thorough consideration to each chemical's risks.

Since the adverse court decisions, OSHA has adopted a very cautious approach in developing its rules. The agency never again regulated multiple chemicals with a single rule. When it considers regulating a chemical, OSHA now reviews hundreds of studies and produces thousands of pages of analysis. The agency often recruits outside academics to review the agency's analysis of the scientific literature. This more extensive risk assessment method imposes considerable time and resource expenditures.

B. Growing Review Requirements

While developing a regulation is an extensive process for any government agency, the burdens that OSHA faces are unique because of the array of obligations it faces, the enormous number of workplaces it is tasked with regulating and its relatively tiny budget. Each OSHA regulation is required to undergo numerous review processes before it can be issued. While review requirements have grown significantly since 1980, agency funding has flat lined and staffing levels have decreased.³⁶

In 1980, Congress passed the Regulatory Flexibility Act, which requires OSHA and other agencies to conduct an extensive analysis for each significant rule it proposes. For this type of analysis, OSHA must estimate compliance costs for the new rule and its effect on small businesses as well as the projected benefits to workers' health and safety (*i.e.*, the number of fatalities, injuries, and cases of illness that would be prevented annually). The agency is also required to describe alternative regulatory approaches it has considered and justify the path it has chosen. These analyses can be hundreds of pages long and involve a considerable expenditure of resources, often requiring OSHA to hire private contractors.

³⁵ AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir., 1992).

³⁶ Since 1980, OSHA's budget has remained relatively constant when adjusted for inflation. The agency's staffing has decreased from 2,950 in 1980 to 2,335 in 2010. See OMB Watch, *Workers Threatened by Decline in OSHA Budget, Enforcement Activity* at http://www.ombwatch.org/node/3587 (January 23, 2008). Also see FY 2012 Congressional Budget Justification: Occupational Safety and Health Administration.

In 1997, Congress passed the Small Business Regulatory Flexibility Act, which requires OSHA and EPA to create a review process for business representatives. While nominally geared towards small businesses, participating companies—depending on industry—may qualify with up to 1,500 employees.³⁷ Locating eligible businesses, convening the panels, and producing reports based on the feedback can take considerable time. The only other organization sharing this requirement is the Environmental Protection Agency, whose budget is about 18 times larger than that of OSHA.

In addition to the resources OSHA must devote to making new rules, the Regulatory Flexibility Act and Executive Order 12866 require the agency to conduct periodic reviews of regulations that already exist, analyzing their costs and benefits and recommending modifications. OSHA has published eight of these "lookback" reviews since 2000, resulting in hundreds of pages of documents.³⁸ The agency has been forced to divert resources to conduct these reviews that could have been put towards new rulemakings. Benefits of the lookback reviews have been minimal.

C. Politicization of Rulemaking

The history of OSHA coincides with rising corporate influence in U.S. politics and the growth of an ideology that rejects government intervention in the private sector. At various points, Congress and presidential administrations have become increasingly involved in particular rulemakings, often using their influence to block standards that OSHA is attempting to issue.

In addition to imposing additional review requirements on OSHA, Congress also gave itself a new tool to "veto" particular regulations in 1996 when it passed the Congressional Review Act (CRA). Although the CRA is applicable to a number of federal agencies, Congress has only ever vetoed one regulation: OSHA's ergonomics standard, which was finalized in 2000 after an extensive rulemaking process lasting more than eight years. With the real threat posed by the CRA, OSHA must now concern itself not only with proving that its rules address risk to workers that the courts would deem significant, but also with the possibility of veto by an unfriendly Congress.

Presidential administrations have also come to play a more hands-on role in OSHA rulemakings. OSHA was once able to operate with a degree of independence. But a succession of executive orders issued during the Reagan, Clinton, and Obama administrations increased presidents' roles in regulatory affairs. Part of this role is exercised through the White House's Office of Management and Budget (OMB). Although OMB has limited expertise in health and safety, the office can review and modify OSHA

³⁷ Small Business Administration, *Table of Small Business Size Standards*. Available at http://www.sba.gov/content/table-small-business-size-standards.

³⁸ OSHA, *Lookback Reviews*. Available at <u>http://www.osha.gov/dea/lookback.html</u>.

rules. OMB is supposed to conclude its reviews within 90 days of receiving an agency's proposal, but can delay reviews indefinitely if it so chooses.

Before the George W. Bush administration, presidential influence did not seem to determine the number of OSHA rules issued. During all but one administration, OSHA produced new rules at a rate of 2.3 to 3.8 per year (the annual rate was 1.2 during the George H.W. Bush presidency). But during the eight years George W. Bush presidency, the rate fell to 0.3 new rules per year. During his eight years in office, OSHA issued only two rules: a narrowly tailored fire prevention rule for shipyards and a rule regulating hexavalent chromium exposure that came about only as a result of a lawsuit brought by Public Citizen.³⁹ In the first three years of the Obama presidency, OSHA has produced new rules at a rate of 0.7 per year. The two standards it has issued over this time are narrow in scope and uncontroversial to industry. The first was the cranes and derricks standard. Representatives from industry groups and labor unions reached consensus on the rule six years before it was issued.⁴⁰ The second rule involved regulating various safety hazards in shipyards (a standard distinct from the shipyard fire prevention rule issued under the previous administration). The rule resulted from a request by shipyard industry groups sent to OSHA in 1982.⁴¹

 ³⁹ Public Citizen Health Research Group v Elaine Chao 2002 US App LEXIS 26778 (December 24, 2002).
⁴⁰ See Taylor Lincoln and Negah Mouzoon, Cranes & Derricks: The Prolonged Creation of a Key Public Safety Rule. Public Citizen (2011).

⁴¹ OSHA General Working Conditions in Shipyard Employment, 76 Fed. Reg. 24,575 (May 2, 2011).