



Testimony

Before the Subcommittee on
Government Operations, Committee on
Oversight and Government Reform,
House of Representatives

For Release on Delivery
Expected at 2:00 p.m. ET
Tuesday, March 15, 2016

FEDERAL RULEMAKING

Opportunities Remain for OMB to Improve the Transparency of Rulemaking Processes

Statement of Michelle Sager, Director, Strategic Issues

GAO Highlights

Highlights of [GAO-16-505T](#), a testimony before the Subcommittee on Government Operations, Committee on Oversight and Government Reform, House of Representatives

Why GAO Did This Study

Federal regulation is a basic tool of government. Agencies issue regulations to achieve public policy goals such as ensuring that workplaces, air travel, foods, and drugs are safe; that the nation's air, water, and land are not polluted; and that the appropriate amount of taxes is collected. Congresses and Presidents have acted to refine and reform the regulatory process during the last several decades. Among the goals of such initiatives are enhancing oversight of rulemaking by Congress and the President, promoting greater transparency and public participation in the process, and reducing regulatory burdens on affected parties.

Congress has often asked GAO to evaluate the implementation of procedural and analytical requirements that apply to the rulemaking process. The importance of improving the transparency of the rulemaking process emerged as a common theme throughout GAO's body of work. Based on that body of work, this testimony addresses (1) GAO's prior findings and OIRA's progress to date on recent GAO recommendations to improve the transparency of the regulatory review process, and (2) other challenges and opportunities GAO has identified for increasing the transparency and oversight of the rulemaking process.

GAO has made 25 prior related recommendations of which OMB has implemented 9 to date.

View [GAO-16-505T](#). For more information, contact Michelle Sager at (202) 512-6806 or sagem@gao.gov.

March 2016

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What GAO Found

GAO has consistently found opportunities to improve the transparency of regulatory processes coordinated through the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). Three GAO reports on OIRA's reviews of agencies' rules under Executive Order 12866 illustrate current and specific actions that would increase the transparency of that review process.

- In a 2014 report on cost-benefit analysis, GAO found that OIRA's reviews resulted in changes. However, in 72 percent of the 109 rules GAO reviewed, there was no explanation for why the rule was designated as significant.
- In a 2009 report on the development of rules, GAO found that documentation of OIRA's reviews could be improved. In reviews of 12 case studies, GAO found uneven attribution of changes made during the OIRA review period and differing interpretations regarding which changes required documentation.
- In a 2003 report, GAO examined 85 rules from nine health, safety, or environmental agencies. GAO found that, while the OIRA review process had significantly affected 25 of those rules, some agencies' files did not provide clear and complete documentation of changes made during OIRA's review. However, a few agencies exhibited exemplary transparency practices.

Four GAO reports covering the topics of regulatory guidance, retrospective regulatory review processes, and exceptions for expediting the rulemaking process further illustrate opportunities for OMB to enhance transparency.

- In a 2015 report on guidance development processes at four agencies GAO found that all four identified standard practices to follow when developing guidance. However, the four agencies addressed OMB's requirements on significant guidance to varying degrees.
- In 2007 and 2014 reports on retrospective regulatory reviews, GAO found that, while such reviews often resulted in changes, OMB and agencies could improve the reporting of progress to enhance the transparency and usefulness of information provided to the public.
- In a 2012 report on exceptions to proposed rules, GAO reviewed a generalizable sample of final rules published over an 8 year period. GAO found that, although agencies often requested comments on final major rules (rules with an annual impact of \$100 million or more) issued without a prior notice of proposed rulemaking, the agencies did not always respond to comments received.

GAO made 25 recommendations to OMB to address the transparency issues identified in these seven reports. OMB has implemented 9 of the recommendations. GAO believes that the other 16 recommendations that have not been implemented still have merit and, if acted upon, would improve the transparency of federal rulemaking. In a step in that direction, the OIRA Administrator in 2015 noted that OIRA has worked with agencies to help them with their Executive Order disclosure requirements.

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee:

I am pleased to be here today to discuss the federal rulemaking process, focusing in particular, at your request, on opportunities to improve the transparency of the regulatory review process coordinated through the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).

Federal regulation is a basic tool of government. Agencies issue regulations to achieve public policy goals such as ensuring that workplaces, air travel, food, and drugs are safe; that the nation's air, water, and land are not polluted; and that the appropriate amount of taxes is collected. Given the sizable benefits and costs of these regulations, Congresses and Presidents have taken a number of actions to refine and reform the regulatory process during the past few decades. Among the goals of such initiatives are enhancing oversight of rulemaking by Congress and the President, promoting greater transparency and participation in the process, and reducing regulatory burdens on affected parties. OIRA is a key player in the regulatory process with its responsibility for ensuring that regulations are consistent with applicable law, the President's priorities, and the principles set forth in executive orders, among other things.

Congress has often asked us to evaluate the implementation of procedural and analytical requirements that apply to the rulemaking process.¹ Drawing on that body of work, my remarks today highlight seven relevant reports regarding (1) our prior findings and OIRA's progress to date on recent recommendations to improve the transparency of the regulatory review process under Executive Order 12866, and (2) other challenges and opportunities our work has identified for increasing the transparency and oversight of the rulemaking process. We have consistently found opportunities to improve the transparency of regulatory processes coordinated through OMB. We made a total of 25

¹Under the Congressional Review Act, we also provide the Congress with a report on each major rule containing our assessment of whether the promulgating federal agency's submissions to us indicate that it has complied with the procedural steps required by various acts and Executive Orders governing the regulatory process. A major rule is one that, among other things, has resulted in or is likely to result in an annual effect on the economy of \$100 million or more.

recommendations to OMB on these particular topics of which OMB has implemented 9 to date. The importance of increasing the transparency of the rulemaking process is a common theme throughout our body of work on federal regulation.

My testimony today is based on work that we have issued on the rulemaking process prepared at the request of Congress.² We used multiple methodologies to develop the findings, conclusions, and recommendations for these issued products. We conducted our work for these reports in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. A more detailed discussion of prior reports' objectives, scope, and methodology, including our assessment of data reliability, is available in the reports cited in the related products list at the end of this statement.

Aspects of the OIRA Regulatory Review Process Could Be More Transparent

Our reports on cost-benefit analysis in the rulemaking process, rule development and regulatory reviews, and OMB's role in reviews of agencies' rules under Executive Order 12866 illustrate specific actions that, if taken, would increase the transparency of the rulemaking process.

Cost-benefit Analysis

In our 2014 report on cost-benefit analysis in agencies' rulemaking processes, we found that OIRA's reviews of agencies' rules sometimes resulted in changes, but also concluded that the transparency of the review process could be improved.³ We found that in the majority of the 109 significant rules that we reviewed, the rulemaking process was not as transparent as it could be. For example, in 72 percent of these rules, there was no explanation for why the rule was designated as significant,

²A selected list of related GAO products is included at the end of this statement.

³GAO, *Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent*, [GAO-14-714](#) (Washington, D.C.: Sept. 11, 2014).

thus triggering additional oversight required by Executive Order 12866.⁴ We made two recommendations based on our review of the cost benefit analyses included in selected rules. We recommended that (1) OMB work with agencies to clearly communicate the reasons for designating a regulation as a significant regulatory action, and explain its reason for any changes to an agency's initial assessment of a regulation's significance; and (2) OMB encourage agencies to clearly state in the preamble of significant regulations the section of Executive Order 12866's definition of a significant regulatory action that applies to the regulation. While OMB staff did not state whether they agreed or disagreed with the recommendations, they took action in 2015 to implement the first recommendation.

Rules Development and Regulatory Reviews

In our 2009 report on the regulatory review process, we found that OIRA's reviews of agencies' draft rules often resulted in changes.⁵ Of the 12 case-study rules subject to OIRA review that we examined, 10 reviews resulted in changes, about half of which included changes to the regulatory text. Agencies used various methods to document OIRA's reviews which generally met disclosure requirements.⁶ However, we found that the transparency of this documentation could be improved. In particular, there was uneven attribution of changes made during the OIRA review period and differing interpretations regarding which changes were "substantive" and thus required documentation. Both of these issues had

⁴Executive Order 12866 defines significant regulatory actions as those that are likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. The order further directs executive branch agencies to conduct and submit to OIRA a regulatory analysis for economically significant regulations (those rules under the first item in the definition above).

⁵GAO, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*, [GAO-09-205](#) (Washington, D.C.: Apr. 20, 2009).

⁶Executive order 12866 contains several transparency provisions that require both OIRA and agencies to disclose certain information about the OIRA review process.

been identified in our earlier work.⁷ We made four recommendations that OMB provide guidance to agencies to improve transparency and documentation of the OIRA review process, specifically that OIRA (1) define what types of changes made as a result of the review process are substantive and need to be publicly identified; (2) direct agencies to clearly state in final rules whether they made substantive changes as a result of OIRA reviews; (3) standardize how agencies label documentation of these changes in public rulemaking dockets; and (4) instruct agencies to clearly attribute those changes made at the suggestion or recommendation of OIRA. While OMB staff generally agreed with these four recommendations, to date, they have not implemented them.

OMB's Role in Reviews of Agencies' Draft Rules

In 2003, we examined 85 rules from nine health, safety, or environmental agencies and found that the OIRA review process had significantly affected 25 of those 85 rules.⁸ OIRA's suggestions appeared to have at least some effect on almost all of the 25 rules' potential costs and benefits or the agencies' estimates of those costs and benefits. The agencies' docket files did not always provide clear and complete documentation of the changes made during OIRA's review or at OIRA's suggestion, as required by the executive order, even though a few agencies exhibited exemplary transparency practices. We made eight recommendations in 2003 targeting aspects of the OIRA review process that remained unclear and where improvements could allow the public to better understand the effects of OIRA's review, including that the Director of OMB:

1. instruct agencies to document the changes made to rules submitted for OIRA review in public rulemaking dockets and within a reasonable time after the rules have been published;
2. define the types of substantive changes made during the review process that agencies should disclose;
3. disclose the reasons for withdrawal of a rule from OIRA review;

⁷GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, [GAO-03-929](#) (Washington, D.C.: Sept. 22, 2003); *Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented*, [GAO/GGD-98-31](#) (Washington, D.C.: Jan. 8, 1998).

⁸[GAO-03-929](#).

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4. reexamine OIRA policy that only documents exchanged by agencies with OIRA branch chiefs and above during the review process need to be disclosed;
 5. differentiate in OIRA's database which rules were substantively changed at OIRA's suggestion or recommendation and which were changed in other ways and for other reasons;
 6. define transparency requirements to also include the informal review period when OIRA says it can have its most important impact on agencies' rules;
 7. encourage agencies to use best practice methods of documentation that clearly describe changes; and
 8. disclose in OIRA's logs of meetings with outside parties which regulatory action was being discussed and the affiliation of the meeting participants.

OMB staff disagreed with the first seven of these eight recommendations but did implement the eighth.

Additional Opportunities Exist to Enhance Transparency and Congressional Oversight of Federal Regulations and the Rulemaking Process

Improvements made to the transparency of the regulatory process benefit the public and aid congressional oversight. Four relevant reports covering the topics of regulatory guidance, retrospective regulatory review processes, and exceptions for expediting the rulemaking process illustrate additional opportunities to enhance transparency of federal regulations. OMB plays an important role in these activities through oversight and by providing guidance to regulatory agencies about how to comply with various requirements.

Regulatory Guidance

Regulatory guidance, while not legally binding, provides agencies with flexibility to interpret their regulations, clarify policies, and address new issues more quickly than may be possible using rulemaking. However, concerns have been raised about the level of oversight for agencies' guidance, whether agencies seek feedback from affected parties on guidance, and how to ensure that agencies do not issue guidance when they should undertake rulemaking. Given both the importance of guidance and the concerns about its use, in 2007 OMB recognized the

need for good guidance practices. OMB established review processes for the guidance documents with the broadest and most substantial impact.⁹

In 2015, we reviewed guidance development processes at four departments—Agriculture (USDA), Education (Education), Health and Human Services (HHS), and Labor (DOL)—and 25 of their components.¹⁰ All four departments identified standard practices to follow when developing guidance and addressed OMB’s requirements for significant guidance to varying degrees. Education and USDA had written departmental procedures for approval of significant guidance as required by OMB. DOL’s procedures were not available to staff and required updating. HHS had no written procedures. Ensuring these procedures are available could better ensure that components consistently follow OMB’s requirements.¹¹

Retrospective Review

We have long advocated the potential usefulness to Congress, agencies, and the public of conducting retrospective regulatory analyses.¹² Retrospective analysis can help agencies evaluate how well existing regulations work in practice and determine whether they should be modified or repealed. In 2007, we found that agencies had conducted more retrospective reviews of the costs and benefits of existing regulation than was readily apparent, especially to the public.¹³ We made seven recommendations to improve the effectiveness and transparency of retrospective regulatory review. These included that OMB develop guidance to regulatory agencies to consider or incorporate into their

⁹Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432 (Jan. 25, 2007).

¹⁰GAO, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, [GAO-15-368](#) (Washington, D.C.: Apr. 16, 2015).

¹¹We recommended that HHS and DOL ensure consistent application of OMB requirements for significant guidance. The agencies generally agreed with the recommendation. We did not address any recommendations to OMB.

¹²See, for example, GAO, *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, [GAO-14-268](#) (Washington, D.C.: Apr. 11, 2014); and *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, [GAO-07-791](#) (Washington, D.C.: July 16, 2007).

¹³[GAO-07-791](#).

policies, procedures, or agency guidance that govern regulatory review activities the following elements:

1. consideration of whether and how they will measure the performance of new regulations;
2. prioritization of review activities based upon defined selection criteria;
3. specific review factors to be applied to the conduct of agencies' analyses that include, but are not limited to, public input;
4. minimum standards for documenting and reporting all completed review results and, for reviews that included analysis, making the analysis publicly available;
5. mechanisms to assess their current means of communicating review results to the public and identifying steps that could improve this communication; and
6. steps to promote sustained management attention and support to help ensure progress in institutionalizing agency regulatory review initiatives.

We also recommended that OMB

7. work with regulatory agencies to identify opportunities for Congress to revise the timing and scope of existing regulatory review requirements and/or consolidate existing requirements.

In 2011 and 2012, the administration issued new directives to agencies on how they should plan and conduct analyses of existing regulations that addressed each of our seven recommendations.¹⁴

In a 2014 report on reexamining regulations, we found that agencies often changed regulations in response to completed retrospective analyses, but could improve the reporting of progress and strengthen links between those analyses and the agencies' performance goals.¹⁵ We also concluded that OMB could do more to enhance the transparency and

¹⁴These directives included Executive Orders 13563, 13579, and 13610, along with related OMB memoranda. The three executive orders were published at 76 Fed. Reg. 3821 (Jan. 21, 2011), 76 Fed. Reg. 41,587 (July 14, 2011), and 77 Fed. Reg. 28,469 (May 14, 2012).

¹⁵[GAO-14-268](#).

usefulness of the information provided to the public. Although we found that agencies posted their retrospective review plans online, obtaining a comprehensive picture of the agencies' progress was difficult because results were spread across multiple web sites. In addition, consistently providing links or citations to the supporting analyses and data, and including more detail on the methodologies and key assumptions used to estimate savings, would help Congress and the public to better understand the basis for projected results. We made three recommendations to OMB to (1) improve reporting on the outcomes of retrospective regulatory reviews, (2) improve how these reviews can be used to help agencies achieve their priority goals, and (3) ensure that OIRA, as part of its oversight role, monitors the extent to which agencies have implemented guidance on retrospective regulatory review requirements and confirm that agencies have identified how they will assess the performance of regulations in the future.¹⁶ Staff from OIRA generally agreed with the three recommendations, and the OIRA Administrator indicated last year that his agency was taking actions to address them.

Exceptions to Proposed Rules

The Administrative Procedure Act (APA), which spells out the basic rulemaking process, generally requires agencies to publish a notice of proposed rulemaking (NPRM) in the *Federal Register* and solicit public comments before finalizing regulations. However, the APA and other statutes permit exceptions to proposed rules to expedite rulemaking in certain circumstances, such as for an emergency or other "good cause" or when issuing rules about an agency's organization or management. In 2012, we reviewed a generalizable random sample of 1,338 final rules published over 8 years (from 2003 through 2010) to provide information on the frequency, reasons for, and potential effects of agencies issuing

¹⁶The GPRA Modernization Act of 2010 requires the 24 agencies identified in the Chief Financial Officers Act, or as otherwise determined by OMB, to develop agency priority goals (APG) every 2 years. Agencies are to identify the various regulations, as well as federal organizations, program activities, policies and other activities (both within and external to the agency) that contribute to each of their APGs and review and report on progress quarterly.

final rules without NPRMs.¹⁷ We found that agencies frequently used available exceptions to issue final rules without prior NPRMs.¹⁸

We also found that agencies, though not required, often requested comments on major final rules issued without an NPRM. However, they did not always respond to the comments received. This is a missed opportunity because we found that agencies often made changes to improve the rules when they did respond to public comments. To better balance the benefits of expedited rulemaking procedures with the benefits of public comments, and to improve the quality and transparency of rulemaking records, we recommended that OMB issue guidance to encourage agencies to respond to comments on final major rules issued without a prior notice of proposed rulemaking. OMB stated that it did not believe it necessary to issue guidance at that time and has not, to date, taken any action to implement our recommendation. We continue to believe that the recommendation has merit and urge OMB to reconsider its prior position.

In summary, OIRA to date has implemented 9 of the 25 recommendations we made to improve transparency and effectiveness of the Executive Order review process and other aspects of federal rulemaking. We believe that the other 16 related recommendations cited in this statement that have not been implemented still have merit and, if acted upon, would improve the transparency of federal rulemaking. In a step in that direction, the OIRA Administrator in 2015 noted that OIRA has worked with agencies to help them with their Executive Order disclosure requirements.

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other members of the subcommittee might have at this time.

¹⁷GAO, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, [GAO-13-21](#) (Washington, D.C.: Dec. 20, 2012).

¹⁸Agencies did not publish an NPRM for about 35 percent of major rules and about 44 percent of nonmajor rules published from 2003 through 2010.

GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this testimony, please contact Michelle Sager, Director, Strategic Issues, at (202) 512-6806 or sagerm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Tim Bober, Tara Carter, Andrea Levine, and Joseph Santiago.

Related GAO Products

Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices. [GAO-15-368](#). Washington, D.C.: April 16, 2015.

Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent. [GAO-14-714](#). Washington, D.C.: September 11, 2014.

Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals. [GAO-14-268](#). Washington, D.C.: April 11, 2014.

Federal Rulemaking: Regulatory Review Processes Could Be Enhanced. [GAO-14-423T](#). Washington, D.C.: March 11, 2014.

Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments. [GAO-13-21](#). Washington, D.C.: December 20, 2012.

Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews. [GAO-09-205](#). Washington, D.C.: April 20, 2009.

Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews. [GAO-07-791](#). Washington, D.C.: July 16, 2007.

Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention. [GAO-06-228T](#). Washington, D.C.: November 1, 2005.

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Regulatory Reform: Procedural and Analytical Requirements in Federal Rulemaking. GAO/T-GGD/OGC-00-157. Washington, D.C.: June 8, 2000.

Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented. [GAO/GGD-98-31](#). Washington, D.C.: January 8, 1998.

Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results. [GAO/GGD-98-3](#). Washington, D.C.: October 2, 1997.

Related GAO Products

Regulatory Reform: Implementation of the Regulatory Review Executive Order. [GAO/T-GGD-96-185](#). Washington, D.C.: September 25, 1996.

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