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July 13, 2007

The Honorable David M. Walker
Comptroller General
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Walker:

The federal regulatory process has grown increasingly complicated as congressional and presidential directives have expanded procedural and analytical requirements for rulemakings. I am writing to request that the Government Accountability Office examine how these requirements are affecting the agencies' ability to issue timely and effective rules. This work should examine the effect on agency rulemakings of both the requirements themselves and agency interactions with OMB's Office of Information and Regulatory Affairs (OIRA) regarding these requirements.

Federal regulations are critical to implement the laws that Congress passes to protect human health, worker safety, consumers, and the environment. Agencies must issue strong and effective rules in a timely manner to carry out congressional directives and respond to pressing problems. It would be problematic if the numerous layers of analysis and review were playing a role in delaying and weakening agency rules.

In one recent example, it took EPA a decade to issue a rule implementing national ambient air quality standards for fine particulate matter. EPA set these standards in 1997. The standards were challenged in litigation but by 2002 all challenges had been resolved by the courts. EPA made repeated statements in the ensuing years that a rule implementing the 1997 standards was forthcoming. Then in April 2005, EPA indicated that a proposed rule was expected soon, after the completion of an inter-agency review. EPA did not issue the proposed rule until November 1, 2005. In September 2006, EPA indicated that the draft final rule was at OMB undergoing inter-agency review. However, EPA did not formally submit the rule to OMB until March 22, 2007. OMB approved the rule on March 28, 2007, and EPA published the final rule implementing the 1997 fine particulate matter standards on April 25, 2007.¹ This example

¹ U.S. EPA, *Clean Air Fine Particle Implementation Rule*, 72 Fed. Reg. 20586 (Apr. 25, 2007).

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and many others raise questions about how the complexity of the regulatory process and OMB's role in the process may be affecting the timing and outcome of agency rules.

Over the years, Presidents and Congress have required agencies to comply with an increasing number of across-the-board procedural and analytical requirements prior to issuing a rule. For example, under Executive Order 12866, agencies must obtain approval from OIRA of all significant rules and conduct a detailed analysis of the estimated costs and benefits of all "economically significant" rules. The Unfunded Mandates Reform Act requires agencies to consult with state and local governments on certain rules containing federal mandates and prepare a written statement that includes an assessment of the costs and benefits of the federal mandate and that summarizes the agency's consultation efforts and the comments received. The Regulatory Flexibility Act requires agencies to assess the impact of a rule on small entities and prepare a regulatory flexibility analysis. In addition, the Small Business Regulatory Enforcement Fairness Act requires EPA and OSHA to convene "advocacy review panels" before publishing a regulatory flexibility analysis for a proposed rule.

A number of new requirements have been added in recent years. OMB's 2003 revision of Circular A-4 provides detailed guidance on how agencies must conduct cost-benefit analyses. OMB's 2004 bulletin on peer review requires agencies to comply with certain peer review requirements for "influential scientific information," including information used in rulemakings. Executive Order 13422 issued in January 2007, in part, requires agencies to obtain the approval of a "Regulatory Policy Officer" before commencing a rulemaking unless specifically authorized by the agency head.

Each of these directives demands time and resources. An analysis is needed to reveal the cumulative impact of these requirements on the time it takes agencies to issue rules.

I am also interested in better understanding how agency interactions with OMB's Office of Information and Regulatory Affairs may contribute to delays in agency rules. The increasing lack of transparency in these interactions between agencies and OIRA enhance the need for a GAO evaluation of this process. GAO found in a 2003 report that OIRA was taking a more active role in agency rulemakings than in previous administrations, acting more as a "gatekeeper" than a "counselor."² GAO found that OIRA is increasingly conducting informal reviews of draft rules before the rules are formally submitted and that these informal reviews "can have a substantial effect on the agencies' regulatory analysis and the substance of the rules."³

² Government Accountability Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews* (Sept. 2003) (GAO-03-929).

³ *Id.*

It is difficult to determine how long OIRA takes to conduct its informal reviews. Under Executive Order 12866, OMB is required to complete its review of a rule within 90 days. While OIRA makes available information about rules that have been formally submitted by agencies for review, OIRA is not transparent about its interactions with agencies during informal reviews. As a result, OMB could hold up a rule for months in an informal review but appear to approve the rule quickly during the formal review process.

I request that GAO address the following questions:

1. What analytical and procedural requirements must an agency comply with to issue a major rule?
2. How long is it taking agencies to issue rules? What is the range of time and the average length of time? Specifically, how long does it take the agencies charged with issuing environmental, health, and safety protections such as EPA, HHS, OSHA, and DOT to finalize rules? How does this compare to independent agencies such as the SEC?
3. What is the cumulative impact of the required analyses and review on the length of time it takes for an agency to finalize a new rule?
4. To the extent information is available, how have recent changes in analytical and procedural requirements affected the complexity, length, and cost of the rulemaking process?
5. How do agency interactions with OIRA, including informal reviews of rules, affect the time it takes for an agency to finalize a rule and the cost to agencies of issuing a rule? What effect do these interactions have on the outcome of a rule? If appropriate, please conduct case studies to evaluate these impacts.
6. GAO recommended in its 2003 report that OMB improve the transparency of the informal review period, the period when OIRA can have a significant impact on agency rules. Has OMB taken any actions since GAO's report to improve transparency and make information about OMB's interactions with agencies during the informal review process publicly available? If so, please describe any such actions.

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For each of these questions, please determine how the answers vary by agency or type of regulation.

If you have any questions, please contact Krista Boyd of my staff at (202) 225-5051.

Sincerely,

A handwritten signature in black ink that reads "Henry A. Waxman". The signature is written in a cursive, flowing style.

Henry A. Waxman
Chairman