United States General Accounting Office

GAO

Report to the Committee on Governmental Affairs, U.S. Senate

January 1998

REGULATORY REFORM

Changes Made to Agencies' Rules Are Not Always Clearly Documented

GAO/GGD-98-31

GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-276296

January 8, 1998

The Honorable Fred Thompson
Chairman
The Honorable John Glenn
Ranking Minority Member
Committee on Governmental Affairs
United States Senate

The number of federal regulations and their effect on the American economy have grown dramatically during the past 30 years. With that growth has come an increased concern about the manner in which those regulations are developed by federal agencies. Executive Order 12866 on "Regulatory Planning and Review," which was issued on September 30, 1993, describes the process by which proposed significant[1] rules of regulatory agencies (other than those considered to be independent regulatory agencies) are to be reviewed by the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).[2]

One of the stated purposes of Executive Order 12866 is to make the federal rulemaking process "more accessible and open to the public." In furtherance of that objective, the order includes requirements to improve the "transparency" of the process. Specifically, the order requires that agencies identify for the public in a complete, clear, and simple manner the substantive changes that are made to rules while under review at OIRA and, as a separate requirement, the changes that are made at the suggestion or recommendation of OIRA. The order also requires OIRA to make available to the public at the conclusion of the rulemaking process all documents exchanged between OIRA and the agency during the review process.

In September 1996, we testified on the implementation of Executive Order 12866.[3] This report responds to your request that we update and look more deeply into an issue addressed in that testimony—the transparency of the regulatory review process. You specifically asked that we focus our review

[1]Significant rules are defined by Executive Order 12866 as ones that may (1) have an annual effect of $100 million or more on the economy or have other economic effects; (2) create a serious inconsistency or interfere with an action planned or taken by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or alter the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues.

[2]Throughout this report we use OIRA, instead of OMB, when discussing OMB responsibilities that have been delegated to OIRA.

[3]Regulatory Reform: Implementation of the Regulatory Review Executive Order (GAO/T-GGD-96-185, Sept. 25, 1996).

on OIRA and four regulatory agencies: the Departments of Housing and Urban Development (HUD) and Transportation (DOT), the Department of Labor's Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA). The objectives of our review were to determine whether (1) the regulatory agencies had identified for the public the substantive changes made to their regulations between the draft submitted to OIRA and the regulatory actions[4] subsequently announced, (2) the regulatory agencies had identified for the public the changes made to their regulations at the suggestion or recommendation of OIRA, and (3) OIRA had made available to the public all documents exchanged between OIRA and the selected agencies during OIRA's review. To answer these questions, we focused on regulatory actions related to significant rules that were developed by the four agencies and that were reviewed by OIRA before publication as final rules between January 1, 1996, and March 1, 1997.

Results in Brief

EPA, DOT, HUD, and OSHA had complete documentation available to the public of all of the substantive changes made to their rules between the draft submitted to OIRA and the actions subsequently announced for about 26 percent of the 122 regulatory actions that we reviewed. For about 30 percent of the regulatory actions, the agencies had some documentation available to the public indicating that changes had been made to the rules while at OIRA, but the information did not indicate whether all such changes had been documented. For the remaining 44 percent of the regulatory actions, the agencies had no documentation available to the public of changes made during OIRA's review. Because Executive Order 12866 does not specifically require agencies to document that no changes were made to rules while they were under review at OIRA, the absence of documentation does not necessarily mean that the agencies were not complying with the order. However, it was unclear whether the absence of documentation meant that no changes had been made to the rules or whether changes had been made but they had not been recorded.

The agencies had complete documentation available to the public of all of the changes that OIRA had suggested or recommended for about 24 percent of the 122 regulatory actions. For about 17 percent of the regulatory actions, the agencies had some documentation available to the public indicating that OIRA had suggested changes to the rules, but the information did not indicate whether all such changes had been

[4]In Executive Order 12866 and this report, proposed rules and final rules are each considered separate "regulatory actions." The order requires that, after the completion of each such action, the agencies document changes that were made to the rules.

documented. For the remaining 59 percent of the actions, the agencies had no documentation available to the public indicating whether changes had been made at the suggestion or recommendation of OIRA. For some of these actions, the agencies had documentation available indicating that changes had been made to the rules during the rulemaking process, but it was unclear whether any of the changes were at OIRA's suggestion. Again, the absence of documentation does not mean that the agencies were not complying with the order. However, it was unclear whether the absence of documentation meant that changes had not been made at OIRA's suggestion or whether documentation of such changes was missing.

Even those rules for which the agencies had complete documentation of all changes made while they were at OIRA and at the suggestion of OIRA, the documents were not always available to the public or easy to locate. Some agencies did not include this information in their public rulemaking dockets. Other agencies had the information in their dockets but the dockets had no indexes; therefore, the public would have to review the entire docket to find any documentation of rule changes. In contrast, some agencies' dockets were well-organized, with a consistently structured index for all rules and specific sections for information related to OIRA's review. Several agencies had also begun to automate their dockets so that both indexes and eventually the entire rulemaking record could be accessed electronically by the public.

We could not identify all of the documents that had been exchanged between the agencies and OIRA during the regulatory review process, so we could not determine whether OIRA had made all such documents available to the public. OIRA officials said that most of OIRA's interactions with the agencies during the regulatory review process are by telephone or in face-to-face meetings, not by exchanging documents. They said that any documents that are exchanged are usually drafts of the rules themselves and any related economic analyses. Nearly all of the draft rules and analyses that the agencies' dockets indicated had been sent to OIRA were in OIRA's public files, but memorandums and other documents that the agencies' dockets indicated had been exchanged were often not in the OIRA files.

Background

Executive Order 12291, which was issued by President Reagan in 1981, authorized OMB to review all proposed and final federal regulations, except

those of independent regulatory agencies.[5] The order also required OMB to monitor agencies' compliance with the order's requirements and to coordinate its implementation. OIRA's reviews under this order were highly controversial, with critics contending that OIRA exerted too much control over the development of rules and that decisions were being made without appropriate public scrutiny.

Executive Order 12866 revoked Executive Order 12291 but continued the basic framework of the regulatory review process. It also reaffirmed the legitimacy of OIRA's centralized review function and its responsibility for providing guidance to the agencies.[6] However, Executive Order 12866 also made changes to address criticisms of the regulatory program under Executive Order 12291. In its recent draft report to Congress on the costs and benefits of federal regulations, OMB said that one of these changes was "to increase the openness and accountability of the review process."[7] Specifically, section 6 of Executive Order 12866 requires OIRA to "make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section." Section 6 of the order also requires agencies to (1) "[i]dentify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced" and (2) "[i]dentify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." The order does not require agencies to document when no changes are made during OIRA's review or at the suggestion or recommendation of OIRA.

In October 1993, the OIRA Administrator issued guidance to the heads of executive departments and agencies regarding the implementation of Executive Order 12866. The section of that guidance on "Openness and Public Accountability" that discussed the order's transparency requirements essentially repeated those requirements without elaboration.

In previous reports on the implementation of Executive Order 12866, OIRA has cited increased openness and accountability as a major success of the executive order. Also, at the September 1996 hearing on the implementation of the order, the OIRA Administrator said the following:

[5]For a description of and statistics relating to OIRA's review process under Executive Order 12291, see Regulatory Review: Information on OMB's Review Process (GAO/GGD-89-101FS, July 14, 1989).

[6]Section 2(b) of Executive Order 12866 states that, "[t]o the extent permitted by law, OMB shall provide guidance to agencies . . . ," and that OIRA "is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency . . . ."

[7]Draft Report to Congress on the Costs and Benefits of Federal Regulations, OMB, Federal Register, Vol. 62, No. 140, July 22, 1997.

"Executive Order 12866 created a more open and accountable review process. The order called for more public involvement, and it specifically delineated who is responsible for what and when, so that interested parties would know the status and results of the Executive review. I have since heard no complaints about accountability and transparency—and I take that as a success."

However, in response to our testimony at the same hearing that EPA and DOT frequently had not documented the changes made to their rules that had been suggested or recommended by OIRA, the Administrator acknowledged that agencies had not "been scrupulously attentive" to that requirement in the order.

S. 981, the proposed "Regulatory Improvement Act of 1997," includes several provisions to strengthen and clarify the executive order's requirements for public disclosure of and access to information on regulatory review actions. One section of the bill requires agencies to include in the rulemaking record (1) a document identifying in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA and the rule subsequently announced; (2) a document identifying changes in the rule made at the suggestion or recommendation of OIRA; and (3) all written communications exchanged between OIRA and agencies during the review. The bill differs from the order in that it requires (1) agencies (not OIRA) to include in the rulemaking record all written communications (not "documents") exchanged between OIRA and the agencies[8] and (2) agencies to identify changes made to rules while they were at OIRA and changes made at the suggestion of OIRA in a single document.[9]

Objectives, Scope, and Methodology

Our first two objectives were to determine whether EPA, DOT, HUD, and OSHA had (1) identified for the public the substantive changes between the draft submitted to OIRA for review and the regulatory action subsequently announced and (2) identified for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA. Our third objective was to determine whether OIRA had made available to the public all documents exchanged between OIRA and the agency during the review process.

[8]"Written communications" may or may not be broader than "documents." Executive Order 12866 does not indicate whether "documents" includes all types of "written communications."

[9]For our comments on certain provisions in this bill, see Regulatory Reform: Comments on S. 981—The Regulatory Improvement Act of 1997 (GAO/T-GGD/RCED-97-250, Sept. 12, 1997).

We included in our review all of the four agencies' regulations that were reviewed by OIRA before publication as final rules between January 1, 1996, and March 1, 1997. We obtained a list of all such rules and any related notices of proposed rulemaking from the Regulatory Information Service Center (RISC).[10] We deleted from the list all rules that were withdrawn by the agencies and all proposed rules that were reviewed by OIRA before Executive Order 12866 was issued on September 30, 1993.[11] The proposed rules and final rules comprised the universe of regulatory actions that we reviewed. Table 1 shows the number of proposed rules, final rules, and the total number of regulatory actions that we examined in each agency.

Table 1: The Number of Proposed Rules, Final Rules, and Total Regulatory Actions for Each Agency

Agency	Proposed rules	Final rules	Total
HUD	2	23	**25**
OSHA	1	2	**3**
DOT	12	27	**39**
EPA	25	30	**55**
Total	**40**	**82**	**122**

Source: RISC.

We asked officials in each agency how to locate the information that is required by Executive Order 12866 for these rules. In almost all cases, the agencies said that the information was in their public rulemaking dockets.[12] We then reviewed those dockets and other agency files to determine the extent to which documentation of changes made while under review at OIRA met the requirements of executive order. The order says that the agencies must "identify for the public, in a complete, clear, and simple manner, the substantive changes made" between the draft submitted to OIRA for review and the regulatory action subsequently announced. However, the order does not define these terms or provide criteria for determining whether agencies have complied with these provisions.

[10]RISC is part of the General Services Administration and works closely with OMB to provide information to the president, Congress, and the public about federal regulations. Its primary role is to coordinate the development of the Unified Agenda of Federal Regulatory and Deregulatory Actions, which is a comprehensive listing of proposed and final regulations. RISC maintains a database that includes information on all regulatory actions reviewed by OIRA.

[11]We excluded rules that were withdrawn by the agencies because Executive Order 12866 only requires agencies to make information about changes to regulatory actions available to the public if they are published in the Federal Register or otherwise issued to the public.

[12]As will be discussed later in this report, one agency indicated that the required information was not in its public rulemaking docket, but was "available to the public." In this report, we refer to these few instances of documentation that were "available" as being in the rulemaking docket.

To describe differences in the extent of documentation available to the public in the agencies' files, we coded each regulatory action into one of the following three categories: (1) complete documentation, which could be a "redline/strikeout" version of the rule showing all changes made during the review, a memorandum to the file listing all of the changes, or a memorandum indicating that there were no such changes; (2) some documentation, which means we found indications of changes that had been made during OIRA's review (e.g., memorandums or redline/strikeout versions), but the files did not indicate whether all such changes had been documented; and (3) no documentation, which means that there were no changes made during the review or that changes were made, but were not documented. The last two descriptive categories do not necessarily indicate whether the agencies have complied with the executive order. However, the categories do provide a relative sense of how transparent a regulatory review is to the interested public. If the agencies' files indicated that all changes had been documented, we did not verify that assertion.

We followed the same general procedure to describe the extent to which the agencies had documented for the public the changes made to the regulatory actions at the suggestion or recommendation of OIRA. The OIRA Administrator's October 1993 guidance on the implementation of Executive Order 12866 indicated that the changes made to a regulatory action at the suggestion or recommendation of OIRA were a subset of changes made during the period of OIRA's review. However, in this review we examined the implementation of these requirements separately because changes made at OIRA's suggestion or recommendation are not necessarily a subset of changes made during the period of OIRA's review. Both OIRA and agency officials have said that OIRA frequently comments on draft rules before they are formally submitted for review. Changes made to rules as a result of those comments would not be the same as changes made "between the draft submitted to OIRA for review and the regulatory action subsequently announced." Therefore, in this part of the review we looked for documentation of changes that were made at the suggestion or recommendation of OIRA whenever they occurred.

We also noted the extent to which the agencies' documents for the regulatory actions that we reviewed were actually accessible to the public in the agencies' public dockets or elsewhere. Both EPA and DOT had a number of public dockets, generally corresponding with different subunits in the agencies. For example, within DOT we examined files in the dockets of eight departmental units: the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Federal Highway

Administration (FHWA), the Maritime Administration (MARAD), the National Highway Traffic Safety Administration (NHTSA), the Research and Special Programs Administration (RSPA), the United States Coast Guard (USCG), and the Office of the Secretary of Transportation (OST). In HUD, there was one public docket covering all of the rules in our review. In OSHA, the information for our review was not part of the public docket, but was provided by agency officials.

As part of the second objective, we also examined EPA and DOT actions after September 1996 to document changes suggested by OIRA. In our September 1996 testimony, we reported that EPA and DOT frequently had not documented changes to their rules that OIRA had suggested or recommended. As a result of that testimony, both EPA and DOT issued guidance to certain employees emphasizing the executive order's requirement for documenting such changes. We examined EPA and DOT actions after the hearing to determine whether the agencies' staff were better documenting OIRA-suggested changes. We also determined whether OIRA had taken any actions after the hearing to require agencies to document changes made at OIRA's suggestion.

Regarding the third objective, which was to determine whether OIRA had made available to the public all of the documents exchanged between OIRA and the agencies during the reviews by OIRA, we first noted any evidence in the agencies' files that documents had been exchanged between the agencies and OIRA during the rulemaking process. In this review, we defined "documents" to include not only drafts of the rule sent to OIRA, but also letters, faxes, memorandums of telephone conversations, and decision memorandums. We then examined OIRA's public files for each final action for which the agencies' files indicated documents had been exchanged. In addition, we reviewed OIRA's files for selected other final actions for which the agencies' files did not indicate that documents had been exchanged. These actions were selected to obtain dispersion across the agencies and, when combined with the files we were already examining, to review at least one-half of the 82 final regulatory actions. We did not examine OIRA files for any of the related proposed rules because OIRA had already sent most of these older files out to be archived. We coded each of the actions on the basis of whether (1) OIRA and agency files had the same documents, (2) OIRA files did not have documents that we found in the agency files, (3) OIRA files had documents that were not in the agency files, or (4) both OIRA and the agency had documents not found in the other's files.

We conducted this review between March and December 1997 in the Washington, D.C., headquarters offices of each of the four regulatory agencies and OIRA in accordance with generally accepted government auditing standards. We provided a draft of this report to the Director of OMB and the Secretaries of HUD, Labor, and DOT, and the Administrator of EPA for their review and comment. Their comments are reflected in the agency comments section of this report.

Agencies Often Did Not Document Whether Changes Were Made to Rules While at OIRA

Executive Order 12866 directs agencies to "identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced." The 4 agencies had complete documentation of the changes for about 26 percent of the 122 regulatory actions that we reviewed. The agencies had some documentation of changes made during OIRA's review for another 30 percent of the actions, but the files did not indicate whether all such changes had been documented. The remaining 44 percent of the actions had no documentation available to the public indicating whether changes were made to the draft rule submitted to OIRA.

We considered agencies to have completely documented the changes made to the rules during OIRA's review if the docket included memorandums to the file listing all of the changes made, drafts of the rules indicating all changes that had been made, or agency certifications that no changes had been made. For example, OSHA's records for its two final rules contained a memorandum to the file that summarized telephone contacts and a meeting between OSHA and OIRA during the review, and all of the changes that were made to the rule resulting from these contacts. The memorandum also indicated whether the changes were in the body of the regulation or in its preamble, and identified some changes as simply minor word adjustments. Some of the DOT dockets, particularly those in FAA and OST, contained a certification signed by a senior agency official indicating that no changes had been made to the rules.

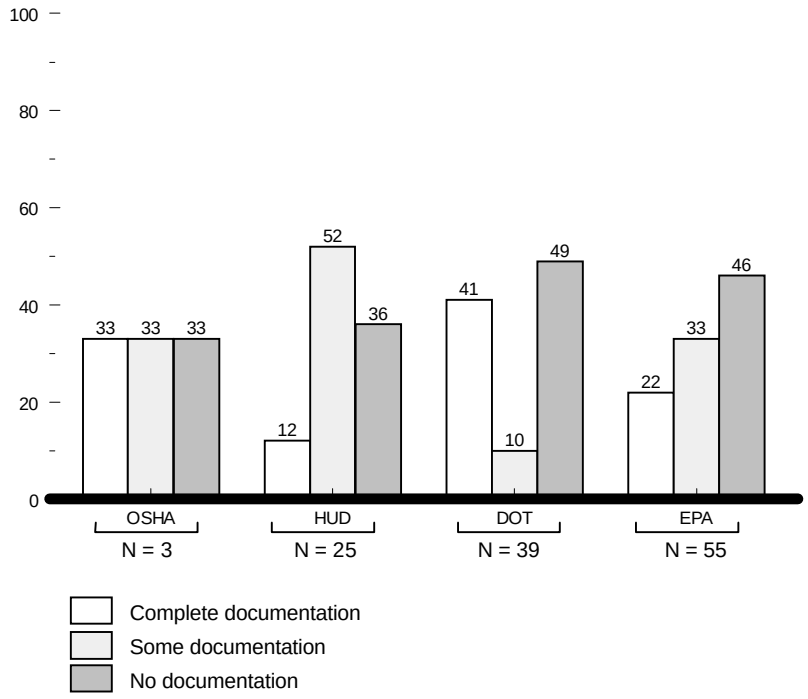
The dockets for the regulatory actions that had only some documentation contained memorandums and other records in the files indicating that certain changes had been made to the rules in question, but it was unclear whether all of the changes made during OIRA's review had been recorded. For example, in EPA's Air and Radiation docket three documents identified changes that had been made to one of the final rules as a result of communications with OIRA at different phases of the review process. However, it was not clear whether these three documents reflected all of

the changes that had been made to the rule during OIRA's review, or whether other changes had been made but not documented.

The dockets for other regulatory actions had no documentation of changes made during OIRA's review. For example, NHTSA's public rulemaking docket contained a great deal of information related to the development of the four NHTSA rules included in our review. However, the docket did not contain any documents indicating that the rules had been submitted to OIRA, or that changes had been made during or as a result of OIRA's review. Some of the HUD files contained documents that had been submitted to OIRA, but did not indicate whether any changes were made to the rules.

As figure 1 shows, some differences existed among the four agencies in the degree to which they had documented changes made to rules during OIRA's review. Although all four of the agencies had at least some documentation for over one-half of their regulatory actions, the agencies differed in the degree to which the documentation was complete. Two of the agencies (DOT and EPA) had no documentation for about one-half of their regulatory actions. The remaining agencies (HUD and OSHA) had no documentation for about one-third of their regulatory actions.

Figure 1: Differences Among Agencies in Documentation of Changes During OIRA's Review



Note: Numbers may not add to 100 percent because of rounding.

Source: GAO analysis.

Agencies Often Did Not Document Whether Changes Were Made to Rules at the Suggestion or Recommendation of OIRA

Executive Order 12866 also directs agencies to identify changes to each regulatory action made at the suggestion or recommendation of OIRA. About 24 percent of the regulatory actions that we examined in the four agencies had complete documentation of these changes. Another 17 percent of the actions had some documentation of changes that had been made to the rules, but the files did not indicate whether all such changes had been made at OIRA's suggestion or whether all OIRA-suggested changes had been documented. The remaining 59 percent of the regulatory actions had no documentation of changes that had been suggested or recommended by OIRA.

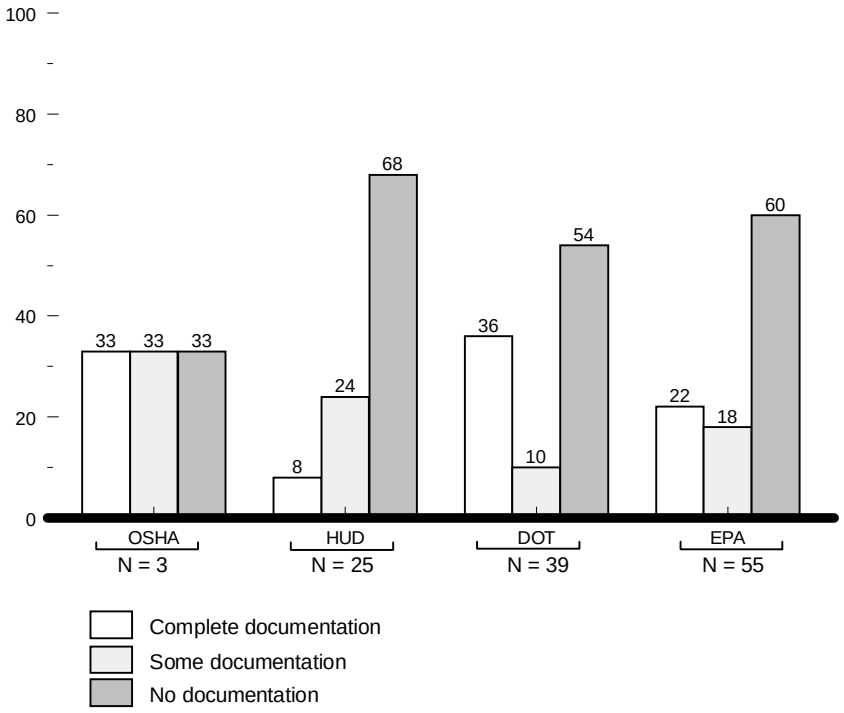
The manner in which the agencies completely documented the changes made to the rules at OIRA's suggestion included memorandums to the file

listing all such changes, drafts of the rules indicating all changes made because of OIRA, and agency certifications that no OIRA-directed changes had been made. For example, the public docket for the two FRA actions that we examined had memorandums to the file detailing changes made to the draft "pursuant to meetings of appropriate OMB staff and FRA staff." One of the HUD regulatory actions had a clear, simple memorandum to the file documenting not only the changes the agency made to the rule at the suggestion of OIRA, but also OIRA-suggested changes that the agency decided not to make. For an FAA final regulatory action, changes were noted in a redline/strikeout copy of the rule that identified them as "OMB changes." An accompanying certification form indicated that all information required by the order was included, so we considered the documentation to be complete.

Agencies' public rulemaking dockets for other regulatory actions had some documentation of OIRA-suggested changes. For some of these actions, the dockets indicated that changes had been made to the rules in question, but it was unclear which specific changes could be traced to OIRA. In other cases, it was unclear whether all OIRA-suggested changes had been documented. For example, OSHA's file for its methylene chloride final rule contained 10 documents indicating that a number of issues had been raised during the months that the rule had been reviewed at OIRA. Some of the documents indicated that specific changes had been made to the rule at OIRA's suggestion, but the files did not indicate whether these documents reflected all of the changes that OIRA had suggested or recommended. Other documents indicated that OIRA had suggested certain changes to the rule, but it was unclear whether those changes had been made.

As figure 2 shows, the agencies differed somewhat in the degree to which they documented OIRA-suggested changes. Also, a comparison of figures 1 and 2 indicates that HUD, DOT, and EPA were less likely to have any documentation of OIRA-suggested changes than documentation of changes made during OIRA's review.

Figure 2: Differences Among Agencies in Documentation of Changes Made at the Suggestion or Recommendation of OIRA



Note: Numbers may not add to 100 percent because of rounding.

Source: GAO analysis.

EPA and DOT Documentation of OIRA-Suggested Changes Improved Little After Congressional Hearing

In our September 1996 testimony on the implementation of Executive Order 12866, we reported that only a few of the rules that we examined at EPA and DOT had information in the agencies' public rulemaking dockets that clearly indicated what changes had been made to the rules at the suggestion or recommendation of OIRA. As a result of our review, both agencies sent guidance to certain staff instructing them to better document OIRA-suggested changes to their rules. In September 1996, EPA's Director of Regulatory Management and Information sent a memorandum to the agency's steering committee representatives and regional regulatory contacts instructing them to ensure that the order's transparency requirements were satisfied for all rules then under development. He suggested using redline/strikeout versions of the draft rule to satisfy these requirements.

In a November 1996 memorandum, DOT's Assistant General Counsel for Regulation and Enforcement reminded regulatory officers throughout the Department of their responsibilities under section 6 of Executive Order 12866 to identify for the public the drafts of rulemaking actions provided to OIRA and the substantive changes between the draft submitted to OIRA for review and the action subsequently announced. The memorandum also said that a signed, standard form certifying that these executive order requirements had been met would have to accompany any rules accepted in the rulemaking docket from OST. Those completing the form were required to indicate that the rule was not reviewed by OIRA, that no substantive changes had been made after the rule was submitted, or that the required information was attached. Although the certification form was required only for OST rules, the Assistant General Counsel suggested that other units within DOT use the same form.

We examined documentation for EPA and DOT regulatory actions both before and after the September 1996 hearing to determine whether the agencies had better complied with Executive Order 12866 requirements on documenting OIRA-suggested changes. From January through September 1996, OIRA reviewed 18 EPA and 15 DOT final rules. In the period between October 1996 and March 1997, OIRA reviewed 12 EPA and 12 DOT final rules. As shown in table 2, the percentage of EPA rules with no documentation in the rulemaking dockets decreased in the later period, and the percentage of rules with some (but not complete) documentation increased. The percentage of DOT rules with no documentation also decreased, but the percentage with complete documentation increased. Although DOT did not issue its guidance until November 1996, use of the certification form suggested in that the guidance resulted in more rules with complete documentation in the later period.

Table 2: Percentage of EPA and DOT Final Rules Reviewed Before and After September 30, 1996, That Had Complete, Some, and No Documentation

	EPA		DOT	
Documentation	**Before 9/30/97**	**After 9/30/97**	**Before 9/30/97**	**After 9/30/97**
Complete	28%	17%	27%	42%
Some	11	33	13	8
None	61	50	60	50
Total	**100%**	**100%**	**100%**	**100%**

Source: GAO analysis.

The rulemaking docket for all but one of the six FAA rules that we reviewed had the certification form that the DOT Assistant General Counsel for Regulation and Enforcement had suggested to indicate compliance with Executive Order 12866. However, in each case these certifications were added to the rulemaking dockets the day of or the day before our review of those dockets. Therefore, it appeared that the certifications were added for our benefit, not as a result of DOT's guidance.

OIRA Has Not Issued Guidance on Transparency Requirements Since the September 1996 Hearing

As of December 1, 1997, OIRA had not taken any action since the September 1996 hearing to require agencies to document changes made pursuant to OIRA's suggestion or recommendation. In fact, the OIRA Administrator has indicated that she does not support this transparency requirement. For example, in testimony before the Senate Governmental Affairs Committee on September 12, 1997, the OIRA Administrator said she opposed including a similar provision in S. 981 because "[b]ased on my four-and-a-half years overseeing the regulatory review process, I strongly believe that this provision is counterproductive to everything we have sought to achieve in carrying out meaningful review." She also said that "in our review process, it is very often not entirely clear who suggests or recommends a change in a regulation" and that having this requirement may "result in resistance to change lest the 'record' reflect a series of 'gotchas' by OMB."

Information About Changes in Regulations Was Sometimes Not Readily Available to the Public

One purpose of Executive Order 12866's transparency requirements is to make information about the rulemaking process available to the public. However, some documents clearly identifying changes made during the OIRA review or at the suggestion of OIRA were not in the public rulemaking dockets. More frequently, however, documents describing changes to the rules were in the public dockets, but they were difficult to locate because the dockets either did not have indexes or had indexes that were difficult to use without special expertise.

Some Documents Were Not in the Public Dockets

Some documents identifying changes made during OIRA's review or at the suggestion of OIRA existed, but they were not available to the public. For example, two of the seven USCG regulatory actions that were included in our review had some documentation of changes made during OIRA's review or at the suggestion or recommendation of OIRA in the agency's rulemaking docket. However, it was unclear whether all such changes had been documented. Although, USCG had prepared detailed summaries for agency

decisionmakers of all of the changes made during OIRA's review, USCG officials said these summaries were internal communications and, therefore, not available to the public.

OSHA had complete documentation of the changes made at the suggestion of OIRA for one of its three regulatory actions included in our review, and had some documentation for another action. However, OSHA maintained the information in files separate from the public rulemaking docket to ensure that it did not become part of the official rulemaking record and, therefore, subject to litigation. OSHA officials said that they would make the documentation available to the public upon request. However, for individuals to request the information, they must first know that the documents exist.

Some Documents Were Difficult to Find in the Public Dockets

The agencies' public rulemaking dockets varied in the degree to which they could be easily used to find the information about changes in regulatory actions that Executive Order 12866 requires be identified for the public. The information in the dockets for some of the rules was quite voluminous, with numerous documents added to the files during the years in which the rules were being developed. Furthermore, many of the dockets did not have an index to the documents in the files, making it difficult to locate the information mandated by the order within those files. For example, the docket for 1 rule at FRA contained 19 folders of material related to the development of the rule, some of which were nearly a foot thick. FRA did not have a public index to this or other files in its docket, although the agency did have an internal listing of the contents of these folders. FRA officials said the agency's internal index would become a part of a public, electronic index when the agency moves onto a DOT automated system that was under development at the time of our review. Several other dockets, including those at FAA, USCG, and HUD, did not have indexes for their rulemaking records.

Even in the dockets that had indexes to the documents in the files, the indexes were not always very useful in identifying documents related to the OIRA review. Some of the agencies' indexes (e.g., NHTSA's index) were simply chronological lists of documents in the files. Although a chronological list is better than no list at all, these lists were often extensive, and the documents in the list were not always clearly identified. For example, in EPA's Toxic Substances Control Act (TSCA) docket, the file index for one of the rules in our review identified communications between EPA and OIRA staff by the name of the OIRA staff member who was

responsible for the review (e.g., "Memo from John Doe"). Therefore, a user of this index would have to know that "John Doe" was the name of an OIRA staff member to use the index to identify the documents reflecting OIRA-suggested changes.

In contrast, other agencies have implemented procedures and practices that make locating and using information in their dockets much easier for the public. For example, EPA's Air and Radiation docket had a consistently structured index for all of its rules, with specific sections in which information related to OIRA's reviews could be found. OST also had a consistently structured index for rules in its dockets and had automated its docket so that both the indexes and the full text of many documents on the rulemaking process could be accessed electronically. Using the automated index greatly facilitated our access to information about documents in the rulemaking dockets. DOT officials told us that the automated system will eventually be extended across the entire Department and that all DOT dockets will be available on the Internet. EPA has also taken some steps to automate its dockets.

OIRA Made Some Documents Exchanged During the Review Process Available to the Public

Executive Order 12866 requires OIRA, at the conclusion of each regulatory action, to make available to the public all documents exchanged between OIRA and regulatory agencies during the review process. To determine whether OIRA had complied with this requirement, we first had to determine what documents had been exchanged between OIRA and the agencies during the review. Therefore, during our examination of the regulatory agencies' files in relation to the first two transparency requirements, we also noted any evidence of documents that had been exchanged.

Relatively few of the agencies' files contained any indication that documents had been exchanged between the agencies and OIRA. This could indicate that documents are usually not exchanged during the review process or that documents are exchanged, but they are often not recorded in the agency files (because the order does not require the agencies to do so). OIRA officials said that there are relatively few documents exchanged during the review process, other than the rules themselves and any related economic analyses. Officials in one agency told us that most of OIRA's interactions with the agency during the review process are by telephone or in face-to-face meetings, not by exchanging documents.

Because we could not be sure that we had identified all of the documents that had been exchanged between the agencies and OIRA during the regulatory review process, we could not conclusively determine the extent to which OIRA had made such documents available to the public. However, the agencies' files seemed to support the OIRA's observations that the documents exchanged are most commonly the draft rules and draft economic analyses. Other documents that the agencies' files indicated had been exchanged included letters, faxes, and memorandums documenting telephone calls or meetings with OIRA staff summarizing the issues discussed, questions raised, and positions taken by the agencies and OIRA.

We examined OIRA's public files for (1) each final action for which the agencies' files indicated documents had been exchanged and (2) selected other final actions for which the agencies' files did not indicate that documents had been exchanged. In total, we reviewed the files for 42 of the 82 final regulatory actions that we examined in the agencies. For 25 of these 42 actions, the OIRA files had the same documents that the agencies' files indicated had been exchanged or had more documents that had been exchanged than the agencies' files had indicated. For 17 of the 42 actions, the OIRA files did not have certain documents that the agencies files said had been exchanged (although in 7 of these cases, the OIRA files also had documents that were not in the agencies' files). The OIRA files nearly always contained the draft rules that the agencies' files indicated had been exchanged. However, OIRA less frequently had the other types of documents that the agencies' files indicated had been exchanged (e.g., letters, faxes, and memorandums).

Conclusions

Executive Order 12866 requires federal agencies to make the regulatory review process more transparent by identifying for the public "in a complete, clear, and simple manner" the substantive changes made to regulatory actions while under review at OIRA, and to identify the changes made at the suggestion or recommendation of OIRA. We believe that these public disclosure requirements, combined with the administration's assertion of their effectiveness, can result in a public perception that information on changes made to regulations while at OIRA and at the suggestion of OIRA is readily available. However, our review of the information available to the public at four agencies indicated that this was usually not the case.

The public rulemaking dockets for many of the 122 regulatory actions that we examined did not contain complete documentation of the changes

made during OIRA's review or at OIRA's suggestion. Some of the files in those dockets indicated that certain OIRA-suggested changes had been made to the rules in question, but these files did not indicate whether all such changes had been documented. Other files contained no documentation of changes made during OIRA's review or at OIRA's suggestion. It was unclear whether this absence of documentation meant that no changes had been made to the rules or that the changes were made, but they had not been documented. Some agencies had prepared or collected documentation of these changes, but the documents were not in the public rulemaking dockets. Some of the files in the dockets were extremely voluminous, and, without indexes to the documents in those files, it was difficult to locate the information that the order requires be made available to the public.

On the other hand, about 26 percent of the 122 regulatory actions that we reviewed in the 4 agencies had complete documentation available to the public of the changes made to rules while at OIRA, and about 24 percent had documentation of changes made at OIRA's suggestion. Some of the dockets were well-organized, with clear indexes indicating where changes made during OIRA's review and at OIRA's suggestion could be found. Several agencies had begun to automate their dockets so that both indexes and eventually the entire rulemaking record could be accessed electronically by the public. These best practices illustrate both how agencies can satisfy the order's transparency requirements, and how they can organize their dockets to facilitate public access and disclosure.

As the agency charged with providing guidance and central review of the regulatory process, OIRA is in a position to tell the regulatory agencies how to improve the transparency of the regulatory review process. However, OIRA's October 1993 guidance on this issue essentially repeated the requirements of the executive order. OIRA did not issue any further guidance on this issue after we noted in September 1996 that EPA and DOT frequently had not documented changes made to rules at OIRA's suggestion. One resource that OIRA could use in the development of additional guidance on the order's transparency requirements could be the best practices that we found in some of the agencies that we reviewed.

OIRA's October 1993 guidance indicated that the changes made at the suggestion or recommendation of OIRA are a subset of the changes made during the period of OIRA's formal review. However, OIRA frequently comments on draft rules before they are formally submitted for review.

Under OIRA's current guidance, any changes made to the rules as a result of these comments would not need to be documented for the public.

S. 981 contains public disclosure requirements that, if enacted into law, would provide a statutory foundation for the public's right to regulatory review information. We believe that the bill's requirement that rule changes be described in a single document is a good idea because it would make understanding regulatory changes much easier for the public. However, even if a statute is not enacted, the agencies would still benefit from guidance on how to improve the transparency of the regulatory review process under the order.

Recommendation

We recommend that the Administrator of OIRA provide the agencies with guidance on how to implement Executive Order 12866 transparency requirements. The guidance should require agencies to include a single document in the public docket for each regulatory action that (1) identifies all substantive changes made during OIRA's review and at the suggestion or recommendation of OIRA or (2) states that no changes were made during OIRA's review or at OIRA's suggestion or recommendation. The guidance should also indicate that agencies should document changes made at OIRA's suggestion whenever they occur, not just during the period of OIRA's formal review. Finally, the guidance should point to best practices in some agencies to suggest how other agencies can organize their dockets to best facilitate public access and disclosure.

Agency Comments and Our Evaluation

We sent a draft of this report for review and comment to the Director of OMB; the Secretaries of HUD, Labor, and DOT; and the Administrator of EPA. HUD officials said they had no comments on the draft report. The other agencies provided the following comments.

EPA, DOT, and OSHA Comments

On October 30, 1997, EPA's Director of the Office of Regulatory Management and Evaluation told us that he believed the draft report was factually correct for EPA rules and highlighted the need for improved agency compliance with the docketing requirements of Executive Order 12866. He said that EPA will re-examine the content and implementation of its initial guidance and will issue new guidance or implementation methods to improve compliance with the requirements.

Also on October 30, 1997, we discussed the draft report with DOT officials, including the Assistant General Counsel for Regulation and Enforcement. The Assistant General Counsel suggested that we make several changes in the final report. Specifically, he said the report should more clearly

- state that Executive Order 12866 does not require agencies to document instances where no changes were made to rules during OIRA review, and that the absence of documentation of changes made to a rule does not mean that an agency had not complied with the order's transparency requirements;
- note that the November 1996 guidance he issued regarding certification of compliance with the executive order applied only to OST and was suggested guidance for the rest of DOT; and
- reflect the extent of DOT's efforts to develop best practices for improving transparency of regulatory decisionmaking, particularly in the area of automation.

DOT officials also suggested that we modify our recommendation to state that the OIRA guidance should specifically require agencies to document for the record when no changes were made during the OIRA review or at the suggestion or recommendation of OIRA. We agreed with all of these suggestions and made the appropriate changes in this report.

On November 4, 1997, we met with OSHA officials, including OSHA's Director of Regulatory Analysis, to discuss the draft report. We noted that we had changed the draft to address a question raised earlier by an OSHA official. This official had pointed out that one of the OSHA-proposed rules included in our review had been reviewed by OIRA before the issuance of Executive Order 12866 and should not have been subject to the requirements of the order. We deleted this proposed rule from our analysis, thereby reducing the number of OSHA regulatory actions from four to three. We also deleted 6 proposed rules in DOT that had been reviewed by OIRA before the issuance of the order, thereby reducing the number of DOT regulatory actions from 45 to 39. We then recalculated all related statistics and figures to account for these changes. (None of the HUD or EPA proposed rules was reviewed by OIRA before the issuance of the order.) OSHA officials also suggested that we provide additional clarification regarding our criteria for distinguishing between actions characterized as having "complete documentation" and those having "some documentation." In this report, we clarified the definition of "some documentation," emphasizing that the term referred to those agencies' files that did not indicate whether all changes had been documented.

Finally, OSHA officials said that we should make our recommendation more specific to indicate that the OIRA guidance should require agencies to document all changes made during the OIRA review and at the suggestion or recommendation of OIRA in a single, summary memorandum to the file. We agreed with this suggestion and made appropriate changes to the recommendation.

OMB Comments

On November 10, 1997, we received a letter commenting on the draft report from the Administrator of OIRA. (See app. I for a reprint of those comments.) The Administrator said that OIRA staff were not surprised by and agreed with several of the issues raised in the draft report. For example, she said that she was not surprised that there may not be a "one-to-one equivalence" between agencies' files and OIRA files because of differences in Executive Order 12866 requirements between the agencies and OIRA. She said that OIRA's database indicated that no changes were made to about 40 percent of the regulatory actions in the four agencies, which she suggested was why documentation did not exist in about 40 percent of the actions that we reviewed (because, as she confirmed, the order itself does not require documentation of no changes). She also said that providing an interested individual with a copy of the draft rule submitted for review and the draft on which OIRA concluded its review was an effective way to permit that individual to identify changes made to the draft rule.

However, the Administrator also indicated that OIRA disagreed with the draft report in at least three respects. First, she said that OIRA disagreed with the draft report's recommendation that OIRA issue guidance to agencies on how to organize their rulemaking dockets to best facilitate public access and disclosure. She said agencies have developed their own methods of organizing their rulemaking dockets and "it is not the role of OMB to advise other agencies on general matters of administrative practice." Second, she said that OMB interprets some of the transparency requirements in the order differently than we did. We believe that the order requires agencies to document OIRA-suggested changes whenever they occur. The Administrator said that the order requires agencies to document only OIRA-suggested changes made during the formal period of OIRA's review, not any changes made at OIRA's suggestion before that period. Third, the Administrator said that she believes that the requirement that agencies document the changes made at the suggestion of OIRA is "counterproductive," and that it is irrelevant who gets the "credit" for suggesting changes.

The OIRA Administrator's statement, in response to our recommendation, that it is not OMB's role to advise agencies on general matters of administrative practice seems to run counter to the requirements placed on the agency in Executive Order 12866. Section 2(b) of the order states that "[t]o the extent permitted by law, OMB shall provide guidance to agencies . . . ," and that OIRA "is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency . . . ." Furthermore, as the Administrator pointed out, OIRA has already provided agencies with general guidance on the implementation of the order, including the transparency requirements. Therefore, we retained our recommendation, and, as suggested by DOT and OSHA, made it more specific by suggesting that the guidance require agencies to include a single document in the public docket for each regulatory action that (1) identifies all substantive changes made during OIRA's review and at the suggestion or recommendation of OIRA or (2) states that no changes were made during OIRA's review or at OIRA's suggestion or recommendation.

Executive Order 12866 requires that agencies identify for the public (1) the substantive changes that are made to rules while under review at OIRA and (2) the changes that are made at the suggestion or recommendation of OIRA. We believe the Administrator's view that the second of these transparency requirements only applies to suggestions or recommendations made during the period of OIRA's formal review reflects a narrow interpretation of the order, and is inconsistent with the intent of the order's transparency requirements. In her letter, the Administrator said that OIRA tries to consult with agencies "early and often" in the rulemaking process because OIRA can become "deeply" involved in important agency rules "before an agency has become invested in its decision." However, her interpretation of the order that agencies do not have to document any changes made at OIRA's suggestion or recommendation during this period would result in agencies' failing to document OIRA's early involvement in the rulemaking process. The transparency requirements were included in the order because of concerns during previous administrations that the public could not determine what changes OIRA was making to agencies' rules. Limiting the disclosure of OIRA-suggested or OIRA-recommended changes only to those made during the relatively narrow window of OIRA's formal review, and specifically excluding changes made during a period in which the Administrator said OIRA can have its greatest impact, is not consistent with the order's transparency objective.

Furthermore, the OIRA Administrator's comment that "an interested individual" can identify changes made to a draft rule by comparing drafts of the rule seems to change the focus of responsibility as it is stated in Executive Order 12866. The order requires agencies to identify for the public changes made to draft rules. It does not place the responsibility on the public to identify changes made to agency rules. Also, comparison of a draft rule submitted for review with the draft on which OIRA concluded review would not indicate which of the changes were made at OIRA's suggestion, which is a specific requirement of the order.

Finally, the Administrator's position that the order's requirement that agencies document the changes made at OIRA's suggestion is "counterproductive" is unpersuasive for several reasons. First, this transparency requirement was put in place because of criticisms that OIRA exerted too much control over the development of rules and that decisions were being made without appropriate public scrutiny. Therefore, the purpose of this requirement is to allow the public to be able to understand why certain changes were made during the rulemaking process; it has nothing to do with who gets the "credit" for those changes. Second, the Administrator cites no evidence of a counterproductive effect of the requirement that agencies document OIRA-suggested changes. Even if evidence of negative effects were presented, those effects would need to be weighed against the transparency and public disclosure that the requirement permits. Finally, if the Administrator believes that this requirement is counterproductive and will result in resistance to change, she could recommend that the President revise the executive order and delete this requirement. Four years after the issuance of the order and the imposition of this requirement, the Administrator has not done so. In response to this comment, we clarified our interpretation of the order's requirements in the body of the report and specified that OIRA's guidance should indicate that agencies should document changes made at OIRA's suggestion whenever they occur.

We are sending copies of this report to the Director of OMB; the Secretaries of HUD, Labor, and DOT; and the Administrator of EPA. We are also sending this report to the Chairmen and Ranking Minority Members of (1) the House Committee on Government Reform and Oversight; (2) that Committee's Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs; and (3) the House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law. We will make copies available to others on request.

Major contributors to this report are listed in appendix II. Please contact me on (202) 512-8676 if you or your staff have any questions concerning this report.

L. Nye Stevens
Director, Federal Management
and Workforce Issues

Comments From the Office of Management and Budget

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

NOV 10 1997

Mr. L. Nye Stevens
Director, Federal Management
and Workforce Issues
General Government Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Stevens:

Thank you for sending us your draft report, entitled "Regulatory Reform: Changes Made to Agencies' Rules Not Always Clearly Documented," on October 20, 1997. This draft report reviews how certain agencies and Office of Information and Regulatory Affairs (OIRA) have complied with particular disclosure requirements and provides a recommendation for OIRA. I have read this draft report with interest, and am pleased to have the opportunity to provide our comments.

In this draft report, you recommend that:

> "[T]he Administrator of OIRA provide the agencies with guidance on how to implement the transparency requirements, pointing to best practices in how to document both changes made while rules are under review by OIRA and changes made at the suggestion of OIRA, and how to organize their dockets to best facilitate public access and disclosure." (pp. 27-28)

In order to discuss this draft report and your recommendation, it will be helpful to provide some background. In Executive Order No. 12866, (E.O.) "Regulatory Planning and Review" (September 30, 1993), President Clinton directed OIRA to make certain documents available to the public:

> "After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section." (Sec. 6(b)(4)(D)).

President Clinton also directed regulatory agencies to make available certain information to the public:

"After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall:

"(i) Make available to the public the information set forth in subsections [6](a)(3)(B) and (C) [essentially, the "text of the draft regulatory action," and the assessments and related analyses provided by the agency];

"(ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

"(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." (Sec. 6(a)(3)(E)).

Shortly after President Clinton issued E.O. 12866, the OMB Director issued a Memorandum for Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, entitled "Guidance for Implementing E.O. 12866" (OMB Memorandum M-94-3, October 12, 1993), to which was attached my memorandum providing more detailed "Guidance for Implementing E.O. 12866." In discussing "Openness and Public Accountability" in my guidance, I pointed out to the agencies that:

"After the regulation is published, OIRA is making available to the public the documents exchanged between OIRA and the issuing agency. These materials will also be made public even if the agency decides not to publish the regulatory action in the Federal Register. In addition, the Order directs that, after a regulatory action has been published in the Federal Register or otherwise released, each agency is to make available to the public the text submitted for review, and the required assessments and analyses (Sec. 6(a)(3)(E)[i]). In addition, after the regulatory action has been published in the Federal Register or otherwise issued to the public, each agency is to identify for the public, in a complete, clear, and simple manner, the substantive changes that it made to the regulatory action between the time the draft was submitted to OIRA for review and the action was subsequently publicly announced, indicating those changes that were made at the suggestion or recommendation of OIRA (Sec. 6(a)(3)(E)(ii) & (iii)). Should you have any questions about these matters, please call the Administrator or one of your OIRA Desk Officers." (pp. 8-9)

With this background, I would like to comment on various issues that you raised in your draft report.

Agency compliance with Sec. 6(a)(3)(E)(i) and OIRA compliance with Sec. 6(b)(4)(D). At page 24 of your draft report, you state that there are relatively few documents exchanged during the review process other than the rules themselves and any related economic analyses. You go on to point out, at page 25, that in some cases, OIRA files had the same or more

documents than the agency files; in other cases, agency files had the same or more documents than the OIRA files; and in yet other cases, both an OIRA and a related agency file contained documents that the other did not.

We are not surprised that in many, if not most, cases the public files would contain only the draft rules and any related analyses that OIRA reviewed. For the most part, but depending on the nature of the rulemaking, there has been little need for either OIRA or the agency to create any other documents. We are also not surprised that there may not be one-to-one equivalence of the material in an OIRA file and the related agency file. Under the Order, the material that an agency is to make available to the public is not the same material that OIRA is to make available. As I point out in my guidance, under E.O. 12866, an agency is to make available "the text submitted for review, and the required assessments and analyses (Sec. 6(a)(3)(E)[i])", while OIRA is to make available "the documents exchanged between OIRA and the issuing agency [(Sec. 6(b)(4)(D)]." Thus under the Executive Order, an agency is obligated to disclose fewer kinds of documents than OIRA. However, under specific statutes applicable to various regulatory programs and the Administrative Procedure Act (with all the administrative practices and procedures adopted by the agencies), an agency may disclose more material related to a rulemaking than E.O. 12866 requires OIRA to disclose.

Agency compliance with Sec. 6(a)(3)(E)(ii) & (iii). (1) You observe that "[i]n some cases it was difficult to determine whether changes made to the agencies' rules were 'substantive' [referring to a change from "would" to "should"]." (p. 14). We agree that it may be difficult to determine whether a particular agency change is substantive or not. The answer to that question may depend on the interest of the person affected by the rule. The same word in the same rule may be viewed by some members of the public as substantive, while others may view it as not substantive. That is another reason that OIRA has, for over 10 years, provided copies of the various draft regulations reviewed by OIRA. In that way, the interested person can identify the changes of interest to that person, and evaluate the nature and importance of the change on its own merits.

(2) You also distinguish subparagraphs (ii) and (iii) in Sec. 6(a)(3)(E) in the following way:

> "These two transparency requirements may not be the same. For example, a change made to a rule at the suggestion of OIRA may occur before or after the period in which the rule is formally under review at OIRA." (footnote 2 at p. 2; see text at p. 2 related to footnote 2; and text at p. 6 related to footnote 7).

In the guidance that OMB issued on October 12, 1993, we interpret subparagraphs (ii) and (iii) differently than you. Our guidance states that each agency is "to *identify* for the public, in a complete, clear, and simple manner, the *substantive changes* that it made to the regulatory action *between the time the draft was submitted to OIRA for review and the action was subsequently publicly announced*, indicating those changes that were made at the suggestion or recommendation of OIRA (Sec. 6(a)(3)(E)(ii) & (iii))." In effect, we read the two subparagraphs

as an integrated whole. This interpretation begins the time-period for disclosure at the "time the draft was submitted to OIRA for review," limits the changes that agencies need to identify to "substantive changes," and includes within those limits of time and substance "those changes that were made at the suggestion or recommendation of OIRA." Thus, given this guidance that we have issued, it is not unexpected that there may be no documentation of the changes that agencies made before the draft rule was submitted for OIRA review.

It is important to remember that critics of Executive review have consistently noted that if our only input is at the end of the rulemaking process, then our suggestions, no matter how pertinent, will not be well received. As a result, we try to consult with the agencies early and often. As I testified before the Senate Committee on Governmental Affairs on September 25, 1996:

> "Moreover, with our focus on reviewing only the most important regulations in this less adversarial environment, we can become involved earlier and more deeply in an agency rulemaking -- before the agency has completed all of its own evaluation and its internal and/or inter-agency coordination, and has become invested in its decision." (p. 6)

(3) Your draft report points out that of the 129 actions that you reviewed at EPA, DOT, HUD, and OSHA, "slightly less than 25 percent had complete documentation in the related public rulemaking dockets," "[a]bout 35 ... had some information ... indicating that changes had been made to the rules while at OIRA," and that "[t]he remaining 40 percent of the regulatory actions had no documentation of changes made during OIRA's review" (p. 3). In other places in your draft report, you point out that certain agency rulemaking dockets contained information indicating that changes had been made to the rules while at OIRA, "but we could not determine whether all such changes had been recorded in the dockets." (p. 3; see also, pp. 9, 10, 12, 13, 16, 17, and 20.)

In general terms, your findings are consistent with what we would expect. You found that EPA, DOT, HUD, and OSHA had documented changes to a little less than 60% of the 129 rules that you reviewed. According to our computerized records for the same agencies for the same time period (January 1, 1996 to February 28, 1997), we concluded review on 163 proposed and final rules, with changes to 96 of those rulemakings -- 59%. For the remaining 41%, where there was no change made during the OIRA review, there is no requirement either in the Executive Order or in any statute that we are aware of that an agency fill out another piece of paper just to indicate no change was made.

(4) Your draft report observes that, on September 12, 1997, I testified before the Senate Governmental Affairs Committee (the requestors for this report) opposing the legislative codification of a provision that a regulatory agency is to include in the rulemaking record a document identifying the changes in the rule "that were made at the suggestion or recommendation" of OMB. I did so testify as to the codification of Section 6(a)(3)(E)(iii), and I stand behind that testimony. As I stated in my written statement, at pages 17-18:

> "First, in our review process, it is very often not entirely clear who suggests or recommends a change in a regulation. For example, OMB may raise a question about a proposed approach and suggest an alternative. The agency may oppose the suggested alternative, but agree with the concern that prompted it, and decide to clarify or modify its own language. Was this a change 'made at the suggestion or recommendation of [OMB]'? And, even more critically, will having this requirement enhance the review process, or will it result in resistance to change lest the 'record' reflect a series of 'gotchas' by OMB? Based on my four-and-a-half years overseeing the regulatory review process, I strongly believe that this provision is counterproductive to everything we have sought to achieve in carrying out meaningful review. The public would not be disadvantaged without this provision because [of the provision] that the public will have access to the draft submitted to OMB for review and the final published rule. Who gets 'credit' for suggesting these changes is irrelevant."

I also pointed out that I had taken this position -- publicly -- almost as soon as we had experience with implementing E.O. 12866. In our report to the President, which was published in the Federal Register, we stated: "After an extended [rulemaking and review] process, it is not clear that identifying changes made at the suggestion of OIRA is accurate (if the only choice is OIRA suggestions or agency proposals) or meaningful (if OIRA suggestions are only those suggestions originating at OIRA rather than at another agency)." (OMB's "Report on Executive Order No. 12866, Regulatory Planning and Review," 59 Fed. Reg. 24276, 24289 (May 10, 1994)). A few years later, I also discussed this issue before the Senate Committee on Governmental Affairs:

> "Apparently GAO found it hard to track the source of specific changes to an agency rule. That's not surprising. We have consciously tried to adopt a more collegial, constructive relationship with the agencies, and are not in the business of playing "gotcha" with them. My staff works with agency staff to help them do what's right -- to develop higher-quality regulations, better supported by relevant data and analysis, more carefully reasoned, and more reflexive of a fair balancing of the competing concerns involved. The informal exchange and interplay of ideas and suggestions in which we and agencies engage does not lend itself to a formal presentation of arguments, counter-arguments, rebuttal, and sur-rebuttal -- with each position locked up and labeled as to source and authority." (September 25, 1996, p. 5)

(5) Your draft recommendation concludes that OIRA should issue guidance to agencies on "how to organize their [rulemaking] dockets to best facilitate public access and disclosure." (p. 28).

That recommendation raises a number of concerns. As I point out above, over the past 50 years, agencies have developed their individual administrative practices and procedures to comply with the Administrative Procedure Act and to the administrative procedures set forth in specific statutes applicable (sometimes uniquely) to their various regulatory programs. The

organization of agency rulemaking dockets -- what material is included; when is it included; how is it organized -- is an issue that lies at the heart of administrative law and regulatory practice. It is not the role of OMB to advise other agencies on general matters of administrative practice.

* * *

Let me stress that we are fully supportive of openness and accountability in the regulatory review process. We believe that providing an interested individual the draft rule submitted for review and the draft on which OIRA concluded review has served as an effective way to permit that individual to "identify" changes made to the draft rule. In that way, regardless of the nature of that person's interest, that person is able to see the changes in the text that the agency made during that time period. In addition, we believe that is useful to the agencies to determine how best to provide relevant information to those interested in their rulemakings. Each agency has more experience than we in working with the various constituencies and groups that are interested in a particular agency's rulemaking, and each agency is more knowledgeable as to the administrative practices, procedures, customs, and traditions that are expected from, and acceptable to, those constituencies and interest groups.

In conclusion, I request that you include this letter in an appropriate place in your report. If you have any questions concerning these comments, please let me know. For your convenience, I have enclosed copies of my congressional testimony of September 25, 1996, and September 12, 1997.

Sincerely,

Sally Katzen

Sally Katzen

Enclosures

Major Contributors to This Report

General Government Division, Washington, D.C.	Curtis Copeland, Assistant Director, (202) 512-8101 Elizabeth Powell, Senior Evaluator Thomas Beall, Technical Advisor
Office of the General Counsel, Washington, D.C.	Alan Belkin, Assistant General Counsel Susan Michal-Smith, Senior Attorney

Ordering Information

The first copy of each GAO report and testimony is free. Additional copies are $2 each. Orders should be sent to the following address, accompanied by a check or money order made out to the Superintendent of Documents, when necessary. VISA and MasterCard credit cards are accepted, also. Orders for 100 or more copies to be mailed to a single address are discounted 25 percent.

Orders by mail:

U.S. General Accounting Office
P.O. Box 37050
Washington, DC 20013

or visit:

Room 1100
700 4th St. NW (corner of 4th and G Sts. NW)
U.S. General Accounting Office
Washington, DC

Orders may also be placed by calling (202) 512-6000 or by using fax number (202) 512-6061, or TDD (202) 512-2537.

Each day, GAO issues a list of newly available reports and testimony. To receive facsimile copies of the daily list or any list from the past 30 days, please call (202) 512-6000 using a touchtone phone. A recorded menu will provide information on how to obtain these lists.

For information on how to access GAO reports on the INTERNET, send an e-mail message with "info" in the body to:

info@www.gao.gov

or visit GAO's World Wide Web Home Page at:

http://www.gao.gov

United States
General Accounting Office
Washington, D.C. 20548-0001

Bulk Rate
Postage & Fees Paid
GAO
Permit No. G100

Official Business
Penalty for Private Use $300

Address Correction Requested