



**Statement of  
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**Before**

**The Committee on the Judiciary  
Subcommittee on Commercial and Administrative Law  
House of Representatives**

**July 27, 2010**

**on**

**“Federal Rulemaking and the Regulatory Process”**

**Mr. Chairman and Members of the Subcommittee:**

Thank you for inviting me to testify at today’s hearing on “Federal Rulemaking and the Regulatory Process.” You asked me to present the results of a CRS report<sup>1</sup> that I wrote on the implementation of the Congressional Review Act (CRA, 5 U.S.C. §§ 801-808), which was enacted to reestablish a measure of congressional authority over agency rulemaking.

***Monitoring of CRA Rule Submission Requirement***

The first sentence of the CRA (Section 801(a)(1)(A)) generally requires federal agencies to submit all of their final rules to both houses of Congress and the Government Accountability Office (GAO) before they can take effect.<sup>2</sup> Since the CRA was enacted in March 1996, GAO has received more than 53,000 rules, and maintains a public database of those rules.<sup>3</sup> At its own initiative, GAO has periodically compared the rules it receives with those published in the *Federal Register* to determine whether any rules covered by the CRA had not been submitted.

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<sup>1</sup> CRS Report RL40997, *Congressional Review Act: Rules Not Submitted to GAO and Congress*, by Curtis W. Copeland.

<sup>2</sup> The CRA delays the effective dates of rules that OIRA considers “major” even further—until 60 days after the date that the rules are published in the *Federal Register* or submitted to Congress, whichever is later. Among other things, the CRA defines a major rule as one that has or is expected to have an annual impact on the economy of \$100 million or more.

<sup>3</sup> The GAO database is available at <http://www.gao.gov/fedrules/>.

Because the definition of a “rule” in the CRA is broader than those required to be published in the *Federal Register*, this check can reveal some, but not necessarily all, of the covered rules that have not been submitted.

GAO did the first of these checks in 1997, determining whether all of the rules published from October 1, 1996, to July 31, 1997, had been submitted to Congress and GAO.<sup>4</sup> GAO ultimately concluded that 279 covered rules published during this 10-month period had not been submitted, and in November 1997 provided a list of these rules to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).<sup>5</sup> GAO said that OIRA distributed this list to the affected agencies and told them to contact GAO if they had any questions.

In February 1998, because many of the rules remained unfiled, GAO said that it followed up with each agency that still had missing rules. In March 1998 testimony before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform and Oversight, GAO said that 264 of the 279 missing rules had subsequently been submitted.<sup>6</sup> GAO also said the following:

We do not know if OIRA ever followed up with the agencies to ensure compliance with the filing requirement; we do know that OIRA never contacted GAO to determine if all rules were submitted as required.... In our view, OIRA should have played a more proactive role in ensuring that agencies were both aware of the CRA filing requirements and were complying with them.<sup>7</sup>

In December 1998, GAO published a notice in the *Federal Register* identifying “rules published by Federal agencies in the *Federal Register* that were not received by [GAO] prior to the announced effective dates.”<sup>8</sup> The notice included all final and interim final rules covered by the CRA that were published between October 1, 1996, and December 31, 1997. GAO reported that more than 300 of these rules were not submitted to GAO prior to their effective dates. The Departments of Agriculture and Transportation, and the Federal Emergency Management Agency, issued about 60% of the rules that had not been submitted.<sup>9</sup> By the date of GAO’s *Federal Register* notice (nearly one year after the end of the time period covered by the review), GAO said that it had received all of the rules.

## OIRA Guidance on the CRA

In 1998, Congress directed OMB to issue guidance on certain requirements in the CRA, including the requirements in Section 801(a)(1)(A) regarding the submission of rules.<sup>10</sup> On January 12, 1999, the Director of OMB issued a memorandum to the heads of federal departments and agencies on “Submission of Rules under the Congressional Review Act” in which he noted that the CRA requires agencies to submit each new final rule to both houses of Congress and to GAO

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<sup>4</sup> U.S. General Accounting Office, *Congressional Review Act: Implementation and Coordination*, GAO/T-OGC-98-38, March 10, 1998, pp. 2-3.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid., p. 3.

<sup>8</sup> U.S. General Accounting Office, “Federal Agency Rules Filed Under Congressional Review Act Following General Accounting Office Review of Unfiled Rules,” 63 *Federal Register* 71672, December 29, 1998. Until 2004, GAO was the General Accounting Office.

<sup>9</sup> The Department of Agriculture rules were primarily issued by the Federal Crop Insurance Corporation. The Department of Transportation rules were primarily issued by the Federal Aviation Administration. The Federal Emergency Management Agency’s rules primarily involved flood elevation determinations.

<sup>10</sup> This requirement was included as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999 (P.L. 105-277, 112 Stat. 2681-495, October 21, 1998).

“before the rule can take effect.”<sup>11</sup> The memorandum also included a form that OMB and GAO developed to facilitate the submission of agency rules.

On March 30, 1999, the OMB Director issued another memorandum to the heads of federal departments and agencies on “Guidance for Implementing the Congressional Review Act.”<sup>12</sup> In that guidance, OMB said that “In order for a rule to take effect, you must submit a report to each House of Congress and GAO containing the following: a copy of the rule; a concise general statement related to the rule, including whether the rule is a ‘major rule;’ and the proposed effective date of the rule.” According to OMB, this guidance is still in effect.<sup>13</sup>

## **GAO Letters to OIRA: 1999 through 2008**

GAO continued to check agencies’ compliance with the CRA in subsequent years, and repeatedly notified OIRA of rules that had not been submitted. For example:

- On September 21, 1999, GAO sent a letter to the Deputy Administrator of OIRA identifying 31 substantive regulations that were published in the *Federal Register* during calendar year 1998 that “have not been filed with us and, presumably, have also not been filed with the Congress.”<sup>14</sup>
- On July 3, 2003, GAO sent a similar letter to the Deputy Administrator of OIRA identifying 322 substantive regulations that were published during calendar years 2001 and 2002 but had not been filed with GAO.<sup>15</sup>
- On March 21, 2005, GAO sent another letter to the Deputy Administrator of OIRA identifying 460 substantive regulations that were published during calendar years 2003 and 2004 but were not filed with GAO.<sup>16</sup>
- On May 27, 2008, GAO sent a letter to the Administrator of OIRA identifying 116 substantive regulations that were published during fiscal year (FY) 2007 but “have not been submitted to us as required by Section 801(a)(1)(A).”<sup>17</sup>

In each of these letters, GAO noted the rule submission requirement in Section 801(a)(1)(A) of the CRA, and said “We trust that your office will use this information to ensure that executive agencies fully comply with [CRA] requirements by filing regulations with both the Congress and GAO.”<sup>18</sup> GAO officials said that OIRA did not respond to GAO with regard to any of these

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<sup>11</sup> OMB Memorandum M-99-07, January 12, 1999, available from the author.

<sup>12</sup> OMB Memorandum M-99-13, March 30, 1999, available from the author.

<sup>13</sup> E-mail from Steven D. Aitken, Deputy General Counsel, OMB, November 9, 2009, available from the author.

<sup>14</sup> Letter from Kathleen E. Wannisky, Associate General Counsel for Operations, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, September 21, 1999, available from the author.

<sup>15</sup> Letter from Kathleen E. Wannisky, Managing Associate General Counsel, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, July 3, 2003, available from the author.

<sup>16</sup> Letter from Kathleen E. Wannisky, Managing Associate General Counsel, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, March 21, 2005, available from the author.

<sup>17</sup> Letter from Robert J. Cramer, Associate General Counsel, GAO, to Susan E. Dudley, Administrator, OIRA, May 27, 2008, available from the author.

<sup>18</sup> GAO said that it sent other letters and lists of rules to OIRA for other years between 1998 and 2008, but could not provide copies of those documents to CRS. GAO provided a copy of an April 10, 2001, letter to OIRA, but a referenced list of unfiled substantive rules (covering the period from January 1, 2000, through December 31, 2000) was not included.

letters, and GAO and OIRA officials said they were not aware of any effort by OIRA to contact federal agencies regarding the missing rules during the time periods covered by these letters.<sup>19</sup>

## GAO’s May 2009 Letter to OIRA

On May 26, 2009, GAO sent a letter to the Acting Administrator of OIRA stating that “a number of regulations have not been submitted to us as required by section 801(a)(1)(A) [of the CRA].”<sup>20</sup> Enclosed with the letter was a list of 101 substantive rules that were published in the *Federal Register* during FY2008 (i.e., October 1, 2007, through September 30, 2008) and that had not been submitted to GAO. As indicated in **Table 1** below, many different federal departments and agencies had issued the missing rules. However, the Departments of Agriculture, Commerce, Defense, Homeland Security, and Transportation, as well as the General Services Administration, each had more than five missing rules on the list, and collectively accounted for more than 60% of the missing rules.

**Table 1. Number of Substantive Final Rules Not Received by GAO, FY2008**

Department/Agency	Number of Rules Not Received
Department of Agriculture (USDA)	20
Department of Commerce (DOC)	8
Department of Defense (DOD)	7
Department of Health and Human Services (HHS)	3
Department of Homeland Security (DHS)	7
Department of Housing and Urban Development (HUD)	1
Department of the Interior (DOI)	3
Department of State (DOS)	4
Department of Transportation (DOT)	12
Department of the Treasury	5
Department of Veterans Affairs (DVA)	1
Executive Office of the President (EOP)	2
General Services Administration (GSA)	9
Peace Corps	2
Pension Benefit Guarantee Corporation	2
Small Business Administration (SBA)	3
Other agencies (one rule each)	12
Total	101

**Source:** Letter from GAO to OIRA, May 24, 2009.

<sup>19</sup> Telephone conversations with GAO and OIRA officials, November 2009. One former OIRA official said he had a vague recollection of contacting federal agencies and telling them to submit missing rules, but he could not provide any details. Telephone conversation with Donald Arbuckle, November 9, 2009.

<sup>20</sup> Letter from Robert J. Cramer, Managing Associate General Counsel, GAO, to Kevin F. Neyland, Acting Administrator, OIRA, May 26, 2009, available from the author.

The subjects covered by the 101 missing rules from FY2008 were also varied, and included the following:

- A November 2007 rule that was issued by DHS entitled “Appendix to Chemical Facility Anti-Terrorism Standards,” which had been required by Section 550 of the Department of Homeland Security Appropriations Act of 2007 (P.L. 109-295, October 4, 2006).<sup>21</sup> Among other things, the rule made final a list of “chemicals of interest” (COI), adjusted the “screening threshold quantities” for certain COI, and defined the specific security issue or issues implicated by each COI.
- An October 2007 rule that was issued by the Food and Nutrition Service within USDA on “Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs.”<sup>22</sup> According to the rule summary, it made “changes in a school food authority’s responsibilities for proper procurement procedures and contracts, limits a school food authority’s use of nonprofit school food service account funds to costs resulting from proper procurements and contracts, and clarifies a State agency’s responsibility to review and approve school food authority procurement procedures and contracts.”<sup>23</sup>
- An October 2007 rule that was issued by the Fish and Wildlife Service within DOI on “Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Guaj[oacute]n (Eleutherodactylus cooki).”<sup>24</sup> According to the rule summary, it designated critical habitat for the guajon (a rock frog endemic to Puerto Rico) under the Endangered Species Act of 1973, as amended.
- A November 2007 rule that was issued by the Farm Service Agency (FSA) within USDA on “Regulatory Streamlining of the Farm Service Agency’s Direct Farm Loan Programs.”<sup>25</sup> According to the rule summary, it “simplifies and clarifies FSA’s direct loan regulations; implements the recommendations of the USDA Civil Rights Action Team; meets the objectives of the Paperwork Reduction Act of 1995; and separates FSA’s direct Farm Loan Programs regulations from the Rural Development mission area’s loan program regulations.”<sup>26</sup>
- A December 2007 rule that was issued by the Equal Employment Opportunity Commission (EEOC) on “Age Discrimination in Employment Act: Retiree Health Benefits.”<sup>27</sup> According to the rule summary, it allowed employers to “create, adopt, and maintain a wide range of retiree health plan designs, such as Medicare bridge plans and Medicare wrap-around plans, without violating the

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<sup>21</sup> U.S. Department of Homeland Security, “Appendix to Chemical Facility Anti-Terrorism Standards,” 72 *Federal Register* 65396, November 20, 2007. For detailed information on this issue, see CRS Report R40695, *Chemical Facility Security: Reauthorization, Policy Issues, and Options for Congress*, by Dana A. Shea.

<sup>22</sup> U.S. Department of Agriculture, Food and Nutrition Service, “Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs,” 72 *Federal Register* 61479, October 31, 2007.

<sup>23</sup> *Ibid.*, p. 61479.

<sup>24</sup> U.S. Department of the Interior, Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Guaj[oacute]n (Eleutherodactylus cooki),” 72 *Federal Register* 60068, October 23, 2007.

<sup>25</sup> U.S. Department of Agriculture, Farm Service Agency, “Regulatory Streamlining of the Farm Service Agency’s Direct Farm Loan Programs,” 72 *Federal Register* 63242, November 8, 2007.

<sup>26</sup> *Ibid.*, p. 63242.

<sup>27</sup> U.S. Equal Employment Opportunity Commission, “Age Discrimination in Employment Act: Retiree Health Benefits,” 72 *Federal Register* 72938, December 26, 2007.

Age Discrimination in Employment Act of 1967 (ADEA). To address concerns that the ADEA may be construed to create an incentive for employers to eliminate or reduce retiree health benefits, EEOC is creating a narrow exemption from the prohibitions of the ADEA for the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program.”<sup>28</sup>

- A December 2007 rule that was issued by the Office of Thrift Supervision (OTS) within the Department of the Treasury on “Permissible Activities of Savings and Loan Holding Companies.”<sup>29</sup> One of the stated purposes of the rule is to “expand the permissible activities of savings and loan holding companies (SLHCs) to the full extent permitted under the Home Owners’ Loan Act (HOLA).” The rule also amended the agency’s existing requirements “to conform the regulation to the statute that it is intended to implement, and to set forth standards that OTS will use to evaluate applications submitted pursuant to the statutory application requirement.”<sup>30</sup>
- A February 2008 rule that was issued by the National Oceanic and Atmospheric Administration (NOAA) within DOC on “Endangered and Threatened Species: Final Threatened Listing Determination, Final Protective Regulations, and Final Designation of Critical Habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon.”<sup>31</sup> According to the rule summary, it was a “final determination to list the Oregon Coast coho salmon (*Oncorhynchus kisutch*) evolutionarily significant unit (ESU) as a threatened species under the Endangered Species Act (ESA).” The agency said it was “also issuing final protective regulations and a final critical habitat designation for the Oregon Coast coho ESU.”<sup>32</sup>
- A February 2008 rule that was issued by the Bureau of Land Management (BLM) within DOI on “Oil and Gas Leasing: National Petroleum Reserve – Alaska” (NPR-A).<sup>33</sup> According to the summary, the rule “amends the administrative procedures for the efficient transfer, consolidation, segregation, suspension, and unitization of Federal leases in the NPR-A. The rule also changes the way the BLM processes lease renewals, lease extensions, lease expirations, lease agreements, exploration incentives, lease consolidations, and termination of administration for conveyed lands in the NPR-A. Finally, the rule makes the NPR-A regulation on additional bonding consistent with the regulations that apply outside of the NPR-A.”<sup>34</sup>
- An April 2008 rule issued by NOAA’s National Marine Fisheries Service on “Endangered and Threatened Species: Designation of Critical Habitat for North

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<sup>28</sup> Ibid., p. 72938.

<sup>29</sup> U.S. Department of the Treasury, Office of Thrift Supervision, “Permissible Activities of Savings and Loan Holding Companies,” *72 Federal Register* 72235, December 20, 2007.

<sup>30</sup> Ibid, p. 72235.

<sup>31</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, “Endangered and Threatened Species: Final Threatened Listing Determination, Final Protective Regulations, and Final Designation of Critical Habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon,” *73 Federal Register* 7816, February 11, 2008.

<sup>32</sup> Ibid, p. 7816.

<sup>33</sup> U.S. Department of the Interior, Bureau of Land Management, “Oil and Gas Leasing: National Petroleum Reserve – Alaska,” *73 Federal Register* 6430, February 4, 2008.

<sup>34</sup> Ibid., p. 6430.

Pacific Right Whale.”<sup>35</sup> According to the rule summary, the “North Pacific right whale was recently listed as a separate, endangered species, and because this was a newly listed entity, we were required to designate critical habitat for it.”<sup>36</sup>

- A June 2008 rule that was issued by the Office of the Secretary within DHS on “Procedures for Transportation Workplace Drug and Alcohol Testing Programs.”<sup>37</sup> According to the summary, the rule amends certain provisions of its drug and alcohol testing procedures to “change instructions to collectors, laboratories, medical review officers, and employers regarding adulterated, substituted, diluted, and invalid urine specimen results. These changes are intended to create consistency with specimen validity requirements established by the U.S. Department of Health and Human Services and to clarify and integrate some measures taken in two of our own Interim Final Rules. This Final Rule makes specimen validity testing mandatory within the regulated transportation industries.”<sup>38</sup>
- A July 2008 rule that was issued by the Transportation Security Administration within DHS on “False Statements Regarding Security Background Checks.”<sup>39</sup> According to the rule summary, it codifies statutory provisions that “prohibit public transportation agencies, railroad carriers, and their respective contractors and subcontractors from knowingly misrepresenting Federal guidance or regulations concerning security background checks for certain individuals.”<sup>40</sup>
- A September 2008 rule issued by the National Highway Traffic Safety Administration (NHTSA) within DOT on “Nonconforming Vehicles Decided to be Eligible for Importation.”<sup>41</sup> According to the rule summary, it “revises the list of vehicles not originally manufactured to conform to the Federal motor vehicle safety standards (FMVSS) that NHTSA has decided to be eligible for importation.”<sup>42</sup>

## OIRA’s Reaction to GAO’s May 2009 Letter

When contacted by CRS in October 2009, OIRA initially said that it had no record of having received the May 2009 letter from GAO.<sup>43</sup> However, on November 12, 2009, the Deputy Administrator of OIRA sent an e-mail to federal agencies saying that it “had come to my attention that your agency may not have submitted final rules to Congress and to [GAO] as required by the

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<sup>35</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, “Endangered and Threatened Species; Designation of Critical Habitat for North Pacific Right Whale,” 73 *Federal Register* 19000, April 8, 2008.

<sup>36</sup> *Ibid.*, p. 19000.

<sup>37</sup> U.S. Department of Homeland Security, Office of the Secretary, “Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 73 *Federal Register* 35961, June 25, 2008.

<sup>38</sup> *Ibid.*, p. 35961.

<sup>39</sup> U.S. Department of Homeland Security, Directorate of Border and Transportation Security, Transportation Security Administration, “False Statements Regarding Security Background Checks,” 73 *Federal Register* 44665, July 31, 2008.

<sup>40</sup> *Ibid.*, p. 44665.

<sup>41</sup> U.S. Department of Transportation, National Highway Traffic Safety Administration, “List of Nonconforming Vehicles Decided to be Eligible for Importation,” 73 *Federal Register* 56741, September 30, 2008.

<sup>42</sup> *Ibid.*, p. 56741.

<sup>43</sup> Telephone conversation with OIRA and OMB officials, November 6, 2009. However, GAO officials subsequently told CRS that GAO had evidence that OIRA had received the list of missing rules by at least June 2009.

Congressional Review Act.” He urged the agencies to “contact the GAO to determine which rules they have not yet received from your agency.” (The Deputy Administrator did not, however, provide the agencies with a list of the missing rules, either overall or for their agency.) He also noted in the e-mail that “agencies must submit all final rules to Congress before they can take effect,” and provided the agencies with a copy of OMB’s 1999 guidance on the CRA.

The following week, representatives from GAO’s Office of the General Counsel told CRS that federal agencies had begun submitting some of the missing rules listed in the May 2009 letter.<sup>44</sup> Nevertheless, as of July 13, 2010, GAO’s database indicated that 49 of the 101 rules listed in GAO’s May 2009 letter still had not been submitted. Many of the rules that had been submitted were not received at GAO until 2010 — in some cases more than two years after they were published in the *Federal Register*.

## **GAO’s January 2010 Letter to OIRA**

On January 19, 2010, GAO sent a letter to the OIRA Administrator identifying 31 substantive regulations that were published during FY2009 and that had not been submitted to GAO.<sup>45</sup> In the letter, GAO said “we appreciate recent efforts made by your office to encourage executive agencies to comply with the requirements of 5 U.S.C. § 801(a)(1)(A), and would be pleased to discuss ways in which we can work together to ensure that agencies comply fully with CRA requirements by submitting rules both to Congress and to GAO.” GAO also reportedly sent separate letters to each of the agencies that had missing rules, along with a listing of the rules that had not been received from each agency. GAO said it did so to avoid having to respond to subsequent inquiries from the agencies about what rules were missing.<sup>46</sup>

The list of rules enclosed with the letter indicated that 14 of the 31 missing rules had been issued by USDA, including 4 rules each from the department’s Commodity Credit Corporation and Forest Service. Seven other missing rules had been issued by SBA; however, the agency reportedly contended that it had previously submitted the rules, and later submitted other copies to GAO.<sup>47</sup> Other departments and agencies with rules on the GAO list included DOT (three rules); and DOC, DOE, HUD, DOL, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Social Security Administration (one rule each).

Although the CRA requires agencies to submit all of their covered rules to GAO and Congress before they can take effect, GAO said that the list of 31 missing rules included only “substantive” regulations, and “does not include items such as technical amendments to regulations previously published in the *Federal Register*.” Several of the missing rules were considered “significant” under Executive Order 12866 (a priority category higher than “substantive”),<sup>48</sup> and therefore had been reviewed by OIRA before being published in the *Federal Register*.<sup>49</sup> These included:

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<sup>44</sup> GAO said it was not aware that OIRA had previously urged agencies to contact GAO regarding their missing rules. Telephone conversation with Shirley Jones, Assistant General Counsel, Government Accountability Office, November 18, 2009.

<sup>45</sup> Letter from Robert J. Cramer, Managing Associate General Counsel, GAO, to Cass R. Sunstein, Administrator, OIRA, January 19, 2010. A copy of this letter is available from the author.

<sup>46</sup> Telephone conversation with Sabrina Stregle, GAO’s Office of the General Counsel, February 24, 2010.

<sup>47</sup> *Ibid.*

<sup>48</sup> In the Unified Agenda of Federal Regulatory and Deregulatory Actions, rules are placed into one of five priority categories. From highest to lowest, those categories are: (1) economically significant (which is essentially the same as “major” under the CRA); (2) other significant; (3) substantive, nonsignificant; (4) routine and frequent; and (5) informational or administrative.

<sup>49</sup> The President, Executive Order 12866, “Regulatory Planning and Review,” 58 *Federal Register* 51735, October 4, 1993. Section 3(f) of the order defines a “significant” rule as one that may “(1) Have an annual



- A December 2008 rule issued by the USDA Commodity Credit Corporation that extended the Milk Income Loss Contract (MILC) Program from October 1, 2007, through September 30, 2012.<sup>50</sup> USDA said that the rule also adjusted the milk price support program regulations to specify that support purchases will only be made from manufacturers and not from third parties such as brokers. Expenditures under the program for the authorized period were estimated at between \$300 million and \$400 million.
- A December 2008 SBA rule on the “lender oversight program” that (among other things) codified the agency’s process of risk-based oversight, including “accounting and reporting requirements; off-site reviews/monitoring; on-site reviews and examinations; and capital adequacy requirements.”<sup>51</sup>

Other missing rules appeared substantive in nature, even though they were not considered “significant” under the executive order. One such rule, issued by the Animal and Plant Health and Inspection Service within USDA in October 2008, amended and republished the “list of select agents and toxins that have the potential to pose a severe threat to animal or plant health, or to animal or plant products.”<sup>52</sup> The action was required by the Agricultural Bioterrorism Protection Act of 2002 (P.L. 107-188).

## OIRA’s Response to GAO’s Letter

In March 2010, a representative from GAO’s office of the general counsel said that OIRA had not responded to GAO’s January 2010 letter to the OIRA Administrator.<sup>53</sup> She also said that GAO was unaware of any actions by OIRA to contact agencies regarding the missing rules. However, OIRA officials said that after receiving GAO’s January 2010 letter, the Deputy Administrator of OIRA sent another e-mail to federal agencies that reminded them of their obligation to submit their rules to GAO and Congress, and provided another copy of OMB’s 1999 guidance on the CRA.<sup>54</sup> They also said that OIRA planned to send similar e-mails twice each year to agency regulatory officials, and planned to give GAO a list of those agency officials so that GAO could resolve any concerns about unsubmitted rules more quickly. Finally, OIRA officials said that they

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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 this Executive order.”

<sup>50</sup> U.S. Department of Agriculture, Commodity Credit Corporation, “Milk Income Loss Contract Program and Price Support Program for Milk,” *73 Federal Register* 73764, December 4, 2008.

<sup>51</sup> U.S. Small Business Administration, “Lender Oversight Program,” *73 Federal Register* 75498, December 11, 2008.

<sup>52</sup> U.S. Department of Agriculture, Animal and Plant Health Inspection Service, “Agricultural Bioterrorism Protection Act of 2002; Biennial Review and Republication of the Select Agent and Toxin List,” *73 Federal Register* 61325, October 16, 2008.

<sup>53</sup> E-mail from Sabrina Streagle, Office of the General Counsel, GAO, March 15, 2010.

<sup>54</sup> Telephone conversation with Michael Fitzpatrick, OIRA associate administrator, and Kevin Neyland, OIRA deputy administrator, March 15, 2010.

planned to raise the issue of compliance with the CRA at meetings of the Regulatory Working Group.<sup>55</sup>

As of July 23, 2010 — more than six months after GAO’s January 2010 letter to OIRA — 3 of the 31 rules listed as missing in GAO’s January 2010 letter had still not been submitted to GAO. The three rules were the following:

- A November 2008 rule issued by the Veterans Employment and Training Service within DOL that (among other things) revised the requirement that federal contractors track and annually report the number of employees in their workforces who are veterans covered under the law.<sup>56</sup>
- A December 2008 rule issued by the USDA’s Rural Utilities Service that established a “unified guaranteed loan platform for the enhanced delivery of four existing Rural Development guaranteed loan programs — Community Facility; Water and Waste Disposal; Business and Industry; and Renewable Energy Systems and Energy Efficiency Improvement Projects.”<sup>57</sup> The rule also incorporated provisions “that will enable the Agency to better manage the risk associated with making and servicing guaranteed loans and that will reduce the cost of operating the guaranteed loan programs.”<sup>58</sup> This rule was considered “significant” under Executive Order 12866 and was reviewed by OIRA.
- A September 2009 rule issued by HUD on the department’s Home Equity Conversion Mortgage (HECM) program.<sup>59</sup> Among other things, the rule established “testing standards to qualify individuals as HECM counselors eligible to provide HECM counseling to prospective HECM borrowers.” According to the department, HECM counseling enables elderly homeowners to make more informed decisions when considering mortgage options and whether to pursue a HECM loan.

## **Concluding Observations**

Agency regulations generally start with an act of Congress, and are the means by which statutes are implemented and specific requirements are established. Therefore, Congress has a vested interest in overseeing the regulations that agencies issue pursuant to those statutes. Because congressional authority over agency rulemaking was believed to have waned in recent decades (while presidential authority over rulemaking had increased), the CRA was enacted in an attempt to reclaim a measure of congressional control.<sup>60</sup> Although Congress can learn about the issuance of agency rules in many ways, the requirement in Section 801(a)(1)(A) of the CRA that agencies submit all of their final rules to GAO and Congress before they can take effect helps to ensure that Congress will have an opportunity to review, and possibly disapprove of, agency rules.

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<sup>55</sup> The Regulatory Working Group was established by Section 4(d) of Executive Order 12866, and is composed in part of representatives from each agency that the OIRA administrator determines to have “significant regulatory responsibility.”

<sup>56</sup> U.S. Department of Labor, Veterans Employment and Training Service, “Annual Report from Federal Contractors,” 73 *Federal Register* 65766, November 5, 2008.

<sup>57</sup> U.S. Department of Agriculture, Rural Utilities Service, “Rural Development Guaranteed Loans,” 73 *Federal Register* 76698, December 17, 2008.

<sup>58</sup> *Ibid.*

<sup>59</sup> U.S. Department of Housing and Urban Development, “Home Equity Conversion Mortgage (HECM) Counseling Standardization and Roster,” 74 *Federal Register* 45311, September 2, 2009.

<sup>60</sup> Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3686 (daily ed. April 18, 1996), at 142 *Cong. Rec.* S3683.

Notwithstanding this requirement, GAO said that it did not receive more than 1,000 final rules between 1999 and 2009. It is possible that some of these rules were submitted by the rulemaking agencies, and were missing because of problems with the receipt of the rules by GAO or Congress. However, because neither GAO nor either house of Congress received many of these rules,<sup>61</sup> it seems more likely that the agencies did not submit them as required by the CRA.

The CRA says that a Member of Congress can introduce a joint resolution of disapproval regarding a rule “beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress.”<sup>62</sup> Therefore, by not submitting these rules to Congress, the rulemaking agencies have arguably prevented Congress from using the expedited disapproval authority that is provided for in the CRA.<sup>63</sup> The fact that Congress has used the CRA to disapprove only one rule since the legislation was enacted<sup>64</sup> does not lessen agencies’ responsibilities to submit their rules in accordance with the act’s requirements.

## Effective Dates and Judicial Review

As noted previously, Section 801(a)(1)(A) of the CRA says that covered rules cannot take effect until they are submitted to both GAO and both Houses of Congress. A key sponsor of the legislation, Representative David McIntosh, explained during the floor debate on the bill that would become the CRA (H.R. 3136 in the 104<sup>th</sup> Congress) that “Under Section 8(a)(1)(A), covered rules may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress.”<sup>65</sup> The same day, Senator Don Nickles, another sponsor of the bill, said that “Upon issuing a final rule, a Federal agency must send to Congress and GAO a report containing a copy of the rule.”<sup>66</sup> A separate joint statement by the principal sponsors of the CRA that was published in the *Congressional Record* shortly after enactment stated that “any covered rule not submitted to Congress and the Comptroller General will remain ineffective until it is submitted pursuant to subsection 801(a)(1)(A).”<sup>67</sup>

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<sup>61</sup> CRS examined the House and Senate executive communication databases on October 26, 2009, which indicated that 80 of the 101 rules that GAO identified in its May 2009 letter to OIRA had not been received by the House of Representatives, and 81 had not been received by the Senate.

<sup>62</sup> 5 U.S.C. §802(a).

<sup>63</sup> Congress can also use its regular legislative procedures to overturn agency rules, and has also prevented certain rules from being issued or made final through appropriations restrictions. See CRS Report RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by Curtis W. Copeland. Most of the expedited procedures in the CRA are only applicable to the Senate.

<sup>64</sup> In 2001, Congress disapproved a rule on ergonomics in the workplace. See U.S. Department of Labor, Occupational Safety and Health Administration, “Ergonomics Program,” 65 *Federal Register* 68261, November 14, 2000. Although the CRA has been used to disapprove only one rule, it may have other, less direct or discernable effects (e.g., keeping Congress informed about agency rulemaking and preventing the publication of rules that may be disapproved).

<sup>65</sup> 142 *Cong. Rec.* H3005 (daily ed. March 28, 1996).

<sup>66</sup> 142 *Cong. Rec.* S3120 (daily ed. March 28, 1996).

<sup>67</sup> Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3684 (daily ed. April 18, 1996). The Justice Department has suggested that such post-enactment legislative history should not carry any weight. (See letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at 10 n.14.) Similarly, the Supreme Court has said that “less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment.” (*Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102 (1980). In this case, the “subsequent legislative history” was a conference report for legislation that was being considered after the enactment of an earlier statute.) On the other hand, the Supreme Court has also described post-enactment statements by legislative sponsors as an

Nevertheless, it appears that agencies have implemented some, if not all, of the missing rules. Some of the rules have not been submitted for years. For example, of the 31 missing rules that GAO identified in its 1999 letter to OIRA, 24 were not listed in the GAO database in November 2009—more than 10 years after they were published and scheduled to go into effect. Of the seven rules that were later submitted, some were not received at GAO until years after they were published and scheduled to go into effect.

Section 805 of the CRA states that “No determination, finding, action, or omission under this chapter shall be subject to judicial review.” The joint statement said that this provision meant that “the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter.” The joint statement went on to say that “The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).”<sup>68</sup> The issue of whether a court may prevent an agency from enforcing a covered rule that was not reported to Congress has not been resolved conclusively.<sup>69</sup>

Some of the missing rules were interim final or direct final rules, or were final rules in which the agencies specifically invoked the “good cause” exception to the notice and comment requirements in the Administrative Procedure Act.<sup>70</sup> Section 808 of the CRA states that agencies can make their rules effective “at such time as the Federal agency promulgating the rule determines” when the agency invokes the good cause exception. Therefore, in these cases, the agencies would appear to be able to put the rules into effect even though they had not been submitted to GAO and Congress. However, the joint statement by the sponsors of the CRA that was published in the *Congressional Record* shortly after enactment states that even these rules must be submitted to GAO and Congress “as soon as practicable after promulgation” to permit the congressional review period to begin.<sup>71</sup>

## OIRA and GAO Actions

The CRA currently assigns both GAO and OIRA limited roles in the rule submission process. OIRA is required to determine which rules are “major,” and GAO is to write a report on each major rule within 15 calendar days. GAO has voluntarily taken on the task of determining whether it has received all of the rules published in the *Federal Register*, and has periodically

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“authoritative guide to the statute’s construction.” (See, for example, *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982) (citing a bill summary placed in the *Congressional Record* by the bill’s sponsor after passage, and explanatory remarks made two years later by the same sponsor); *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190, 211 n. 23 (1983) (relying on a 1965 explanation by “an important figure in the drafting of the 1957 [Atomic Energy Act]”); and *Grove City College v. Bell*, 465 U.S. 555, 567 (1984) (remarks of sponsors deemed authoritative when they are consistent with the language of the legislation).)

<sup>68</sup> Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3686 (daily ed. April 18, 1996).

<sup>69</sup> For an analysis of the legal uncertainty adhering to an agency’s failure to report a covered rule to Congress, see CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by Morton Rosenberg, pp. 28-34.

<sup>70</sup> See 5 U.S.C. §553(b)(3)(B). When agencies use the good cause exception, the act requires that they explicitly say so and provide a rationale for the exception’s use when the rule is published in the *Federal Register*. A federal agency’s invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review.

<sup>71</sup> Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3684 (daily ed. April 18, 1996).

notified OIRA of any missing rules. However, OIRA did not respond directly to GAO regarding most of these letters. Also, GAO has not sent Congress copies of its letters to OIRA, or otherwise informed Congress about the scope of this issue. It has also not provided the public with a list of these missing rules since 1998.

## ***Congressional Options***

Congress may conclude that agencies' non-submission of rules as required by the CRA is not a serious issue, or that it is an issue that can be left to GAO, OIRA, and federal agencies to resolve. Also, GAO's January 2010 letter to OIRA listed only 31 missing rules during FY2009, indicating that the problem may be getting better as a result of recent administrative actions. However, should Congress decide to address this issue, several options are available.

## **Current Legislation**

On June 16, 2009, the House of Representatives passed H.R. 2247, the "Congressional Review Act Improvement Act," which you sponsored, Mr. Chairman. The bill would amend the CRA and eliminate the requirement that federal agencies submit their covered rules and related reports to both Houses of Congress before such rules can take effect. On June 17, 2009, the bill was referred to the Senate Committee on Homeland Security and Governmental Affairs. No action has been taken regarding the legislation since that date.

If H.R. 2247 is enacted, covered rules and reports would still have to be submitted to GAO, and GAO would be required to submit to each House a weekly report containing a list of the rules received, including a notation identifying each major rule. The Speaker of the House of Representatives would be required to publish the GAO report in the *Congressional Record*. The House of Representatives passed identical legislation during the 110th Congress (H.R. 5593), but the Senate did not act on the bill before the end of the 110th Congress.

According to the report on H.R. 2247 by the House Committee on the Judiciary, the bill "would reduce reporting requirements for agencies that submit information to the legislative branch under the Congressional Review Act (CRA)."<sup>72</sup> Currently, agencies "must often resort to hand-delivering the required materials by courier to the House and Senate, in order to comply with the CRA and the standards regarding communications transmitted to Congress. Materials are frequently returned to the promulgating agency for failure to comply with the CRA or these other congressional requirements, delaying implementation of the rule."<sup>73</sup>

It is possible that elimination of the requirement that agencies submit their rules and related reports to the House and the Senate could increase the ability and willingness of agencies to submit their rules to GAO, either electronically or otherwise.<sup>74</sup> However, fewer FY2008 missing

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<sup>72</sup> U.S. Congress, House Committee on the Judiciary, *Congressional Review Act Improvement Act*, report to accompany H.R. 2247, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 111-150 (Washington: GPO, 2009), p. 5.

<sup>73</sup> *Ibid.*, p. 3.

<sup>74</sup> GAO has said that it has been able to receive CRA-covered rules and reports electronically since 1999, but that most agencies do not do so because they must submit paper copies to the House and the Senate. See U.S. Government Accountability Office, *Congressional Review Act*, GAO-08-268, November 6, 2007, p. 3. Also, in its May 27, 2008, letter to the Administrator of OIRA, GAO noted that Congress was considering amendments to the CRA that would eliminate the requirement that agencies submit rules to the Senate and the House of Representatives (H.R. 5593, 110<sup>th</sup> Congress), and said if the bill was enacted into law, "we would welcome the opportunity to work with your office and federal agencies to implement the law and make greater use of electronic submission of rules to our Office." Letter from Robert J. Cramer, Associate General Counsel, GAO, to Susan E. Dudley, Administrator, OIRA, May 27, 2008, available from the author.

rules were submitted to GAO than to either the House or the Senate.<sup>75</sup> Therefore, enactment of H.R. 2247 could have little effect on agencies' compliance with the CRA's reporting requirements.

## Other Options

Should Congress want to take other actions to improve reporting of covered rules, it could (among other things) (1) require GAO to continue to compare the rules it receives with the rules that are published in the *Federal Register*, (2) require GAO to continue to report any missing rules to OIRA, and (3) require OIRA or GAO to take other action to encourage agencies to comply with the CRA's reporting requirements. For example, GAO has said in the past that it follows up with the agencies regarding any major rules that are missing.<sup>76</sup> Congress could require GAO to contact the agencies for the missing non-major rules as well, or could require OIRA to contact the agencies. GAO and OIRA have each taken action in the past to contact individual agencies regarding these missing rules, and could be required to do so again.<sup>77</sup> Both GAO and OIRA have, however, indicated to CRS that they currently have limited resources to take on additional responsibilities for CRA compliance enforcement.

OIRA played a somewhat similar role in improving agencies' compliance with the Paperwork Reduction Act (PRA), which specifically requires OIRA to provide direction and oversee agencies' information collection requests.<sup>78</sup> In its annual reports to Congress on the implementation of the PRA in the late 1990s and early 2000s, OIRA reported that there were hundreds of violations of the act each year (i.e., agencies collecting information without OIRA approval, or collecting information after such approvals had expired). For example, OIRA reported that there were 872 violations of the PRA in FY1998, and 710 in FY1999. GAO included information on these violations in its annual testimonies on the implementation of the PRA.<sup>79</sup> In 2001, OIRA began a concerted effort to drive down the number of violations, requiring agencies to establish procedures to ensure that information was not collected without OIRA authorization.<sup>80</sup> By 2003, OIRA reported that there were only 18 PRA violations government-wide.<sup>81</sup>

OIRA is described in Executive Order 12866 as "the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory priorities."<sup>82</sup> The executive order also says that the Administrator of OIRA "shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law..."<sup>83</sup> OIRA is also uniquely positioned both within OMB (with its budgetary influence) and within the federal rulemaking process (reviewing and commenting on rules just before they are published in the *Federal Register*) to enable it to

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<sup>75</sup> As noted previously, 80 of the 101 rules that GAO identified in its May 2009 letter to OIRA had not been received by the House of Representatives, and 81 had not been received by the Senate

<sup>76</sup> See U.S. Government Accountability Office, *Congressional Review Act*, GAO-08-268, November 6, 2007, p. 3.

<sup>77</sup> As noted earlier in this report, GAO said that it and OIRA contacted individual agencies regarding missing rules in 1998.

<sup>78</sup> 44 U.S.C. §3504(a)(1)(B).

<sup>79</sup> See, for example, U.S. General Accounting Office, *Paperwork Reduction Act: Burden Increases at IRS and Other Agencies*, GAO/T-GGD-00-114, April 12, 2000.

<sup>80</sup> See <http://www.whitehouse.gov/omb/assets/omb/inforeg/pramemo111401.pdf>.

<sup>81</sup> See [http://www.whitehouse.gov/omb/assets/omb/inforeg/compliance\\_pra092704.pdf](http://www.whitehouse.gov/omb/assets/omb/inforeg/compliance_pra092704.pdf).

<sup>82</sup> The President, Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, Section 2(b).

<sup>83</sup> *Ibid.*, Section 6(b).

exert maximum influence on federal agencies. In 1998, Congress directed OIRA to issue guidance on the implementation of the CRA, and that guidance is still in effect. Therefore, OIRA could play an integral role in ensuring compliance with the CRA and implementation of the President's and Congress' regulatory priorities.

Also, GAO could be required to provide a copy of its CRA compliance reports to Congress, publish the reports in the *Federal Register*, or both. Providing the reports of missing rules to Congress would give Congress a clearer sense of how the CRA is being implemented, and could permit Congress to conduct oversight of agencies compliance with the act. Publishing the lists of missing rules in the *Federal Register* could provide an incentive to the agencies to comply with the CRA.

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Mr. Chairman, that concludes my prepared testimony. I would be happy to answer any questions that you or other Members of the Subcommittee might have.