

GAO

Testimony

Before the Subcommittee on Commercial and  
Administrative Law, Committee on the Judiciary, House of  
Representatives

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For Release on Delivery  
Expected at 10:00a.m. EST  
Tuesday, November 1, 2005

FEDERAL RULEMAKING

Past Reviews and  
Emerging Trends Suggest  
Issues That Merit  
Congressional Attention

Statement of J. Christopher Mihm  
Managing Director, Strategic Issues





Highlights of [GAO-06-228T](#), a testimony before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

## Why GAO Did This Study

Federal regulation is one of the basic tools of government used to implement public policy. Agencies publish thousands of regulations each year to achieve goals such as ensuring that workplaces, air travel, and food are safe; that the nation's air, water, and land are not polluted; and that the appropriate amount of taxes are collected. Because regulations affect so many aspects of citizens' lives, it is crucial that rulemaking procedures and practices be effective and transparent.

GAO, at the request of Congress, has prepared over 60 reports and testimonies during the past decade that review aspects of federal rulemaking procedures and practices. This testimony summarizes some of the general findings and themes that have emerged from GAO's body of work on federal regulatory processes and procedures, including areas on which Congress might consider taking legislative action or sponsoring further study. GAO's prior reports and testimonies contain a variety of recommendations to improve various aspects of rulemaking procedures and practices.

[www.gao.gov/cgi-bin/getrpt?GAO-06-228T](http://www.gao.gov/cgi-bin/getrpt?GAO-06-228T).

To view the full product, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or [mihmj@gao.gov](mailto:mihmj@gao.gov).

## FEDERAL RULEMAKING

# Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention

## What GAO Found

GAO's prior evaluations highlighted both benefits and weaknesses of rulemaking procedures and practices in areas such as (1) regulatory analysis and accountability requirements, (2) presidential and congressional oversight of agency rulemaking, and (3) notice and comment rulemaking procedures under the Administrative Procedure Act (APA).

GAO's reviews identified at least four overall benefits associated with existing regulatory analysis and accountability requirements: encouraging and facilitating greater public participation in rulemaking; improving the transparency of the rulemaking process; increasing the attention directed to rules; and increasing expectations regarding the analytical support for proposed rules. On the other hand, GAO identified at least four recurring reasons why such requirements have not been more effective: unclear key terms and definitions; limited scope and coverage; uneven implementation by agencies; and a predominant focus on just one part of the regulatory process.

With regard to executive branch and congressional oversight of agencies' rulemaking, GAO has noted that efforts to increase presidential influence and authority over the regulatory process, through mechanisms such as the Office of Management and Budget's reviews of agencies' rulemaking, have become more significant over the years. However, mechanisms intended to increase congressional influence, such as procedures for disapproval of regulations under the Congressional Review Act, appear to have been less able to influence changes in agencies' rules to date.

GAO's reviews of agencies' compliance with rulemaking requirements under APA pointed out that agencies often did not published notices of proposed rulemaking (to solicit public comments) before issuing final rules, including some major rules with an impact of \$100 million or more on the economy. APA provides exceptions to notice and comment requirements for "good cause" and other reasons, but GAO noted that agencies' explanations for use of such exceptions were sometimes unclear. Also, several analytical requirements for proposed rules do not apply if an agency does not publish a proposed rule. However, some of the growth in final rules without proposed rules appeared to reflect increased use of "direct final" and "interim final" procedures intended for noncontroversial and expedited rulemaking.

The findings and emerging issues reported in GAO's body of regulatory work suggested four areas on which Congress might consider taking action or studying further: (1) generally reexamining rulemaking structures and processes, (2) addressing previously identified weaknesses of existing statutory requirements, (3) promoting additional improvements in the transparency of agencies' rulemaking actions, and (4) opening a broader examination of how developments in information technology might affect the notice and comment rulemaking process.

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Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to contribute to your overview of administrative law, process, and procedure, including issues associated with federal rulemaking. In my statement today, I will summarize some of the general findings and themes that have emerged from our body of work on federal regulatory processes and procedures, including areas on which the subcommittee might consider taking legislative action or sponsoring further study.

In brief, our prior work identified important benefits of laws and executive orders designed to enhance federal rulemaking, such as enhanced transparency of the process. But we have also pointed out potential weaknesses and impediments to realizing expected improvements in the process, such as a lack of clarity in key terms and definitions associated with some regulatory analysis and accountability requirements. In addition, some trends and changes in the rulemaking environment that have emerged over the years might merit closer congressional attention and consideration of whether adjustments in federal rulemaking procedures and practices are needed to keep pace.

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## Prior GAO Work Identified Benefits and Weaknesses of Rulemaking Procedures and Practices

Federal regulation, like taxing and spending, is one of the basic tools of government used to implement public policy. Agencies publish thousands of regulations each year to achieve goals such as ensuring that workplaces, air travel, and food are safe; that the nation's air, water, and land are not polluted; and that the appropriate amounts of taxes are collected. Because regulations affect so many aspects of citizens' lives, it is crucial that rulemaking procedures and practices be effective and transparent. Over the last decade, at the request of Congress, we have prepared over 60 reports and testimonies reviewing crosscutting aspects of those rulemaking procedures and practices.<sup>1</sup>

I would like to focus my remarks on topics or themes emerging from this work that are most relevant to this subcommittee's oversight agenda. These include: (1) regulatory analysis and accountability requirements, (2) presidential and congressional oversight of agency rulemaking, and

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<sup>1</sup>Attached to this statement are the highlights pages from some of those reports and testimonies. We have also included a more extensive list of related GAO products at the end of this statement.

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(3) notice and comment rulemaking procedures under the Administrative Procedure Act (APA).<sup>2</sup>

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## Regulatory Analysis and Accountability Requirements

Congress has frequently asked us to evaluate the effectiveness of requirements that were initiated over the past 25 years to improve the federal regulatory process. Among the goals of these requirements are reducing regulatory burdens, requiring more rigorous regulatory analysis, and enhancing oversight of agencies' rulemaking. We have paid repeated attention to agencies' compliance with some of these requirements, such as ones in the Paperwork Reduction Act (PRA),<sup>3</sup> Regulatory Flexibility Act (RFA),<sup>4</sup> Unfunded Mandates Reform Act (UMRA),<sup>5</sup> Congressional Review Act (CRA),<sup>6</sup> and Executive Order 12866 on regulatory planning and review.<sup>7</sup>

Our reviews identified at least four overall benefits associated with existing regulatory analysis and accountability requirements:

- *Encouraging and facilitating greater public participation in rulemaking*—Some initiatives have encouraged and facilitated greater public participation and consultation in rulemaking. Opportunities for the public to communicate with agencies by electronic means have expanded and requirements imposed by some regulatory reform initiatives encouraged additional consultation with the parties that might be affected by rules under development by federal agencies.
- *Improving the transparency of the rulemaking process*—The initiatives implemented over the past 25 years have helped to make the rulemaking process more open by facilitating public access to information, providing more information about the potential effects of rules and

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<sup>2</sup>Pub. L. No. 404, 60 Stat. 237 (1946), codified in 1966 in scattered sections of title 5, United States Code.

<sup>3</sup>44 U.S.C. §§ 3501-3520.

<sup>4</sup>5 U.S.C. §§ 601-612.

<sup>5</sup>Pub. L. No. 104-4, 109 Stat. 48 (1995), codified as amended in scattered sections of title 2, United States Code.

<sup>6</sup>5 U.S.C. §§ 801-808.

<sup>7</sup>Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

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available alternatives, and requiring more documentation and justification of agencies' decisions. Although we have often recommended that more could be done to increase transparency, we have also highlighted the valuable contribution made when agencies had particularly clear and complete documentation supporting their rulemaking.

- *Increasing the attention directed to rules and rulemaking*—Our reports have pointed out that oversight of agencies' rulemaking from various sources—including Congress, the administration, and GAO, among others—can result in useful changes to rules. Furthermore, we noted that agencies' awareness of this added scrutiny may provide an important indirect effect, potentially leading to less costly, more effective rules.
- *Increasing expectations regarding the analytical support for proposed rules*—The analytical requirements that have been added over the years have raised the bar regarding the information and analysis needed to support policy decisions underlying regulations. Such requirements have also prompted agencies to provide more data on the expected benefits and costs of their rules and encouraged the identification and consideration of available alternatives.

On the other hand, we also identified at least four recurring reasons why the requirements imposed by such initiatives have not been more effective:

- *Lack of clarity and other weaknesses in key terms and definitions*—Unclear terms and definitions can affect the applicability and effectiveness of certain requirements. For example, we have frequently cited the need to clarify key terms in RFA. RFA's analytical requirements, which are intended to help address concerns about the impact of rules on small entities, do not apply if an agency head certifies that a rule will not have a "significant economic impact on a substantial number of small entities." However, RFA neither defines this key phrase nor places clear responsibility on any party to define it consistently across the government. Not surprisingly, we found that agencies' compliance with RFA varied widely from one agency to another and agencies had different interpretations of RFA's requirements. In another example, our review of agencies' compliance with a requirement to adjust civil monetary penalties for inflation under the Federal Civil

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Penalties Inflation Adjustment Act (Inflation Adjustment Act),<sup>8</sup> indicated that both a lack of clarity and apparent shortcomings in some of the Act's provisions appeared to have prevented agencies from keeping their penalties in pace with inflation.<sup>9</sup> Although we recommended changes to address these shortcomings, to date Congress has not acted on our recommendations.

- *Limited scope and coverage of various requirements*—Simply put, some rulemaking requirements apply to few rules or require little new analysis for the rules to which they apply. For example, we pointed out last year that the relatively small number of rules identified as containing mandates under UMRA could be attributed in part to the 14 different exemptions, exclusions, and other restrictions on the identification of regulatory mandates under the Act. We also observed unintended “domino” effects of making certain requirements contingent on other requirements. For example, some requirements only apply to rules for which an agency published a notice of proposed rulemaking, but, as I will discuss later, we found that agencies issue many final rules without associated proposed rules. In addition, the requirement for “look back” reviews of existing regulations under section 610 of RFA only applies if the agency determined that its rule would have a significant economic impact on a substantial number of small entities. When RFA was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA)<sup>10</sup> to require additional actions, such as preparing compliance guides and convening advocacy review panels for certain rules, this appeared to prompt a reduction in the number of rules that the Environmental Protection Agency identified as affecting small entities (and would therefore trigger the new requirements).
- *Uneven implementation of the initiatives’ requirements*—Sometimes, agencies’ implementation of various requirements serves to limit their effectiveness. For example, a recurring message in our reports over the

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<sup>8</sup>28 U.S.C. § 2461 note.

<sup>9</sup>GAO, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, [GAO-03-409](#) (Washington, D.C.: Mar. 14, 2003). We also addressed issues regarding civil penalties in GAO, *Tax Administration: Systematic Information Sharing Would Help IRS Determine the Deductibility of Civil Settlement Payments*, [GAO-05-747](#) (Washington, D.C.: Sept. 15, 2005).

<sup>10</sup>5 U.S.C. § 601 note.

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years is that some agencies' economic analyses need improvement. Our reviews have found that economic assessments that analyze regulations prospectively are often incomplete and inconsistent with general economic principles.<sup>11</sup> Moreover, the assessments are not always useful for comparisons across the government, because they are often based on different assumptions for the same key economic variables.<sup>12</sup> In our recent report on UMRA, we noted that parties from various sectors expressed concerns about the accuracy and completeness of agencies' cost estimates, and some also emphasized that more needed to be done to address the benefits side of the equation.<sup>13</sup> Our reviews have found that not all benefits are quantified and monetized by agencies, partly because of the difficulty in estimation. In our recent report on the Paperwork Reduction Act, we noted that the Act requires chief information officers (CIO) to review and certify information collections to help minimize collection burdens, but our analysis of case studies showed that CIOs provided these certifications despite often missing or inadequate support from the program offices sponsoring the collections.<sup>14</sup>

- *A predominant focus on just one part of the regulatory process*—More analytical and procedural requirements have focused on agencies' development of rules than on other phases of the regulatory process, from the underlying statutory authorization, through effective implementation and monitoring of compliance with regulations, to the evaluation and revision of existing rules. While rulemaking is clearly an important point in the regulatory process, these other phases also help determine the effectiveness of federal regulation.

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<sup>11</sup>See GAO, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, [GAO/RCED-98-142](#) (Washington, D.C.: May 26, 1998), and *Clean Air Act: Observations on EPA's Cost-Benefit Analysis of Its Mercury Control Options*, [GAO-05-252](#) (Washington, D.C.: Feb. 28, 2005).

<sup>12</sup>See also GAO, *Economic Performance: Highlights of a Workshop on Economic Performance Measures*, [GAO-05-796SP](#) (Washington, D.C.: July 2005).

<sup>13</sup>GAO, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, [GAO-05-454](#) (Washington, D.C.: Mar. 31, 2005).

<sup>14</sup>GAO, *Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public*, [GAO-05-424](#) (Washington, D.C.: May 20, 2005).

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## Oversight of Agency Rulemaking

Closely related to regulatory analysis and accountability requirements are efforts to enhance the oversight of agencies' rulemaking by Congress, the President, and the judiciary. In general, efforts to increase presidential influence and authority over the regulatory process, primarily through the mechanism of Office of Management and Budget (OMB) review of agencies' rulemaking, have become more significant and widely used over the years. However, our reviews suggest that mechanisms to increase congressional influence, such as procedures for Congress to disapprove proposed rules, appear to have been less able to influence changes in agencies' rules to date. We have not done work that directly addresses issues regarding judicial review of agencies' rulemaking.

In our September 2003 report on OMB's role in reviews of agencies' rules, we recounted the history of centralized review of agencies' regulations within the Executive Office of the President.<sup>15</sup> We noted the expansion of OMB's role in the rulemaking process over the past 30 years under various executive orders. Although not without controversy, this expansion of a centralized regulatory review function has become well established. OMB's role in the rulemaking process has been further enhanced by provisions in various statutes (such as the Information Quality Act,<sup>16</sup> PRA, and UMRA) that placed additional oversight responsibilities on OMB. The formal process by which OMB currently reviews agencies' proposed and final rules has essentially remained unchanged since Executive Order 12866 was issued in 1993, but we reported on several changes in OMB policies in recent years that affected the process, such as increased emphasis on economic analysis, stricter adherence to the 90-day time limit for reviews of agencies' draft rules, and improvements in the transparency of the OMB review process (although some elements of the transparency of that process are still unclear). Based on our review of OMB and agency dockets on 85 rules reviewed by OMB during a 1-year period, we also showed that OMB's reviews sometimes result in significant changes to agencies' draft rules.

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<sup>15</sup>GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929 (Washington, D.C.: Sept. 22, 2003).

<sup>16</sup>The Information Quality Act is also known as the Data Quality Act. Consolidated Appropriations—Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763A to 2763A-154 (2001).

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The Congressional Review Act was enacted as part of SBREFA in 1996 to better ensure that Congress has an opportunity to review, and possibly reject, rules before they become effective. CRA established expedited procedures by which members of Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's rule. However, this disapproval process has only been used once, in 2001, when Congress disapproved the Department of Labor's rule on ergonomics.<sup>17</sup> CRA also requires agencies to file final rules with both Congress and GAO before the rules can become effective. Our role under CRA is to provide Congress with a report on each major rule (for example, those with a \$100 million impact on the economy) that includes GAO's assessment of the issuing agency's compliance with the procedural steps required by various acts and executive orders governing the rulemaking process. Although we reported that agencies' compliance with CRA requirements was inconsistent during the first years after its enactment, compliance improved.<sup>18</sup>

Congress also passed the Truth in Regulating Act<sup>19</sup> (TIRA) in 2000 to provide a mechanism for it to obtain more information about certain rules. TIRA contemplated a 3-year pilot project during which GAO would perform independent evaluations of "economically significant" agency rules when requested by a chairman or ranking member of a committee of jurisdiction of either House of Congress. However, during the 3-year period contemplated for the pilot project, Congress did not enact any specific appropriation to cover TIRA evaluations, as called for in the Act, and the authority for the 3-year pilot project expired on January 15, 2004. Therefore, we have no information on the potential effectiveness of this mechanism.

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<sup>17</sup>Pub. L. No. 107-5, 115 Stat. 7 (Mar. 20, 2001).

<sup>18</sup>As noted in [GAO-04-637](#), our Office of General Counsel also takes several steps to assure the completeness of the list of major rules identified in GAO's compilation of reports on major rules. GAO's Federal Rules Database is publicly available at [www.gao.gov](http://www.gao.gov) under Legal Products.

<sup>19</sup>Pub. L. No. 106-312, 114 Stat. 1248 (Oct. 17, 2000), 5 U.S.C. § 801 note.

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## Rulemaking Procedures under the Administrative Procedure Act

Some of our reviews have touched on agencies' compliance with APA. APA established the most long-standing and broadly applicable federal requirements for informal rulemaking, also known as notice and comment rulemaking.<sup>20</sup> Among other things, APA generally requires that agencies publish a notice of proposed rulemaking (NPRM) in the *Federal Register*.<sup>21</sup> After giving interested persons an opportunity to comment on the proposed rule, and after considering the public comments, the agency may then publish the final rule. However, APA provides exceptions to these requirements, including cases when, for "good cause," an agency finds that notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest," and interpretive rules.<sup>22</sup> When agencies use the "good cause" exception, APA requires that they explicitly say so and provide a rationale for the exception's use when the rule is published in the *Federal Register*. An agency's claim of an exception to notice and comment procedures is subject to judicial review. The legislative history of APA, and associated case law, generally reinforce the view that the "good cause" exception should be narrowly construed. In addition, the Administrative Conference of the United States (ACUS) encouraged agencies to use notice and comment procedures where not strictly required by APA and recommended that Congress eliminate or narrow several of the exceptions in APA.

In various reports over the years, we noted that agencies had not issued NPRMs before publishing certain final rules.<sup>23</sup> When we reported on this issue in 1998, we estimated that about half of all final actions published in 1997 had been issued without an associated NPRM.<sup>24</sup> Although many of those final actions without proposed rules were minor actions, 11 of the 61

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<sup>20</sup>5 U.S.C. § 553.

<sup>21</sup>APA includes exceptions to notice and comment procedures for categories of rules such as those dealing with military or foreign affairs and also agency management and personnel. 5 U.S.C. § 553(a).

<sup>22</sup>5 U.S.C. § 553(b).

<sup>23</sup>An earlier study concluded that NPRMs were not published for about one-third of final regulatory actions published in the *Federal Register*. See Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 Admin. L. J. 317 (1989).

<sup>24</sup>GAO, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126 (Washington, D.C.: Aug. 31, 1998).

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major rules (for example, those with an impact of \$100 million or more) did not have NPRMs.<sup>25</sup> While we have not studied this issue in depth since 1998, we continued to find the prevalence of final rules without proposed rules during our reviews. For example, during our review of the identification of federal mandates under UMRA in 2001 and 2002, we found that 28 of the 65 major rules that imposed new requirements on nonfederal parties did not have NPRMs.<sup>26</sup>

We have also reported that agencies' explanations for use of APA's "good cause" exception were sometimes unclear, for example, simply stating that notice and comment would delay rules that were, in some general way, in the public interest. We noted that, when agencies publish final rules without NPRMs, the public's ability to participate in the rulemaking process is limited. Also, several regulatory reform requirements that Congress has enacted during the past 25 years—such as RFA's and UMRA's analytical requirements—use as their trigger the publication of an NPRM. Therefore, it is important that agencies clearly explain why notice and comment procedures are not followed.

At the same time, the number of final rules without proposed rules appears to reflect, at least in part, agencies' acceptance of procedures for noncontroversial and expedited rulemaking actions known as "direct final" and "interim final" rulemaking that were previously recommended by ACUS.<sup>27</sup> Although we observed some differences in how agencies implement direct final rulemaking, it generally involves publication of a rule with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (such as 30 days). For example, the Federal Aviation Administration (FAA) has used direct final rulemaking procedures nearly 40 times this year to modify the legal descriptions of controlled airspace at various airports across the country. FAA issued these modifications as direct final rules

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<sup>25</sup>Of the 122 major rules submitted to GAO during the first 2 years of the Congressional Review Act (April 1996 through March 1998), 23 were issued without a previous NPRM. See GAO, *Regulatory Reform: Major Rules Submitted for Congressional Review During the First 2 Years*, [GAO/GGD-98-102R](#) (Washington, D.C.: Apr. 24, 1998).

<sup>26</sup>GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, [GAO-04-637](#) (Washington, D.C.: May 12, 2004).

<sup>27</sup>See recommendation 95-4, 60 Fed. Reg. 43108 (Aug. 18, 1995). In 1993, the National Performance Review also encouraged agencies to use direct final rulemaking for noncontroversial rules.

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because it anticipated no adverse or negative comments. FAA also noted that these regulations only involve an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. If an adverse comment is received on a direct final rule, the agency withdraws the direct final rule and may publish the rule as a proposed rule under normal notice and comment procedures. For interim rulemaking, an agency issues a final rule without an NPRM that is generally effective immediately, but with a postpromulgation opportunity for the public to comment. Public comments may persuade the agency to later revise the interim rule. Although neither direct nor interim final rulemaking are specifically mentioned in APA, both may be viewed as an application of the “good cause” exception in APA.

Direct and interim final rules appear to account for hundreds of the final regulatory actions published each year. In our report on final rules without proposed rules, we identified 718 interim and direct final regulatory actions published by agencies during 1997. A quick search of recent *Federal Register* notices showed that agencies published over 550 notices in 2004 for which the subject rulemaking action was identified as a direct final, interim final, or interim rule. Through October 21 of this year, agencies had published nearly 400 such notices. Direct final rules accounted for almost 60 percent of these notices.

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## Some Issues and Emerging Trends Merit Attention

The findings and emerging issues reported in our body of work on federal rulemaking suggest a few areas on which the subcommittee might consider taking legislative action or sponsor further study:

- generally reexamine rulemaking structures and processes, including the APA;
- address previously identified weaknesses of existing statutory requirements;
- promote additional improvements in the transparency of agencies’ rulemaking actions; and
- open a broader examination of how developments in information technology might affect the notice and comment rulemaking process.

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## Generally Reexamine Rulemaking Structures and Processes, Including the APA

As we have noted in several products this year, we believe that it is appropriate and necessary to begin taking a broad reexamination of what the federal government does and how it does it, especially given the fiscal challenges facing the country.<sup>28</sup> Although the federal rulemaking process does not have much direct impact on the federal budget—given that most costs of regulation fall on regulated parties and their customers or clients—we have testified that it nevertheless should be part of that reexamination. We recognize that a successful reexamination of the base of the federal government will entail multiple approaches over a period of years. No single approach or reform can address all of the questions and program areas that need to be revisited. However, as we have previously stated, federal regulation is a critical tool of government, and regulatory programs play a key part in how the federal government addresses many of the country’s needs. This subcommittee has already begun such a reexamination through its current oversight agenda, and ACUS, if funded, might well play a valuable role in carrying out the detailed research that will be needed.

One emerging trend that any such reexamination should take into account is the evolution of the markets and industries that federal agencies regulate. Changes in the regulatory environment, especially the growing influence of the global economy, have implications for federal rulemaking procedures and practices. For example, agency officials pointed out to us in 1999 the growing importance of international standards and standard-setting bodies, alongside the role of international agreements, in producing certification standards of interest and importance to American businesses. More recently, international developments regarding global harmonization of regulatory standards, chemical risk-assessment requirements, Internet governance issues, and compliance with capital standards and requirements for financial institutions have attracted attention in the regulatory arena.

More specifically, Congress might want to revisit APA in view of changes in agencies’ practices over time, such as greater use of interim and direct final

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<sup>28</sup>See GAO, *21<sup>st</sup> Century Challenges: Reexamining the Base of the Federal Government*, [GAO-05-325SP](#) (Washington, D.C.: Feb. 2005); *21<sup>st</sup> Century Challenges: Transforming Government to Meet Current and Emerging Challenges*, [GAO-05-830T](#) (Washington, D.C.: July 13, 2005); and *Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements*, [GAO-05-939T](#) (Washington, D.C.: July 27, 2005).

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rulemaking for certain regulations. For example, we observed that some agencies differed in their policies and practices regarding direct final rulemaking. Whether there should be one standard approach to such rulemaking by federal agencies is an open question. In addition, although direct final rulemaking had been viewed by ACUS as permissible under the APA, ACUS nevertheless suggested that Congress may wish to expressly authorize the process to alleviate any uncertainty and reduce the potential for litigation. With regard to interim final rulemaking, ACUS had similarly recommended that, when APA is reviewed, Congress amend the Act to mandate use of postpromulgation comment procedures for rules issued under the “good cause” exception.

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### Address Previously Identified Weaknesses of Existing Statutory Requirements

Our prior reviews have identified many opportunities to revisit and refine existing regulatory requirements. Although progress has been made to implement recommendations we raised in past reports, there are still unresolved issues. We still believe, for example, that the promise of RFA may never be realized until key terms and definitions, such as “substantial number of small entities,” are clarified and/or an entity with the authority and responsibility to do so is established. Similarly, we believe that civil penalties are an important element of regulatory enforcement and deterrence, but we found that agencies are unable to fully adjust their penalties for inflation under the provisions of current law. Congressional action is needed to address these issues.

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### Promote Additional Improvements in the Transparency of Agencies’ Rulemaking Actions

As pointed out earlier, we have identified many positive developments regarding the transparency of the regulatory process, but more could be done. For example, additional attention could be paid to agencies’ explanations for statements or certifications that certain requirements do not apply. This is another area that might merit additional study of available options. Some uses of exemptions, such as agencies’ claims that a rule does not contain a federal mandate as defined by UMRA or that a proposed rule has no federalism impacts, do not require the agency to provide any more support than the certification itself. Other uses, such as claims of “good cause” to publish final rules without proposed rules, require agencies to provide a clear statement and explanation (although even here we noted that sometimes agencies’ explanations were vague). This raises the question of whether there should be a more demanding requirement for agencies to essentially “show their work” behind such certifications, and, if so, what form such requirements might take.

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## Open a Broader Examination of How Developments in Information Technology Might Affect the Rulemaking Process

One emerging trend we have observed in our work is the expanded role of technology-based innovations in enhancing the regulatory process. Agencies' use of the Internet and other technologies to enhance the regulatory process has rapidly increased in importance. In about 5 years, we have gone from reporting on and encouraging the early development of some innovative technologies in support of rulemaking to reporting on the implementation of governmentwide e-government initiatives, such as Regulations.gov and the centralized electronic docket for executive branch agencies.<sup>29</sup> The increased use of technology-based innovations may provide opportunities to transform the rulemaking process, not simply to replace "paper" processes with electronic versions. Continued study is therefore warranted of how such initiatives can open additional opportunities for public participation in and access to information about federal rulemaking, as well as how information technology can be used to improve the federal government's ability to analyze public comments.

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Mr. Chairman, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other members of the committee might have at this time.

If additional information is needed regarding this testimony, please contact J. Christopher Mihm, Managing Director, Strategic Issues, at (202) 512-6806 or [mihmj@gao.gov](mailto:mihmj@gao.gov).

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<sup>29</sup>See GAO, *Federal Rulemaking: Agencies' Use of Information Technology to Facilitate Public Participation*, [GAO/GGD-00-135R](#) (Washington, D.C.: June 30, 2000); *Electronic Government: Government Paperwork Elimination Act Presents Challenges for Agencies*, [GAO/AIMD-00-282](#) (Washington, D.C.: Sept. 15, 2000); *Regulatory Management: Communication About Technology-Based Innovations Can Be Improved*, [GAO-01-232](#) (Washington, D.C.: Feb. 12, 2001); *Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved*, [GAO-03-901](#) (Washington, D.C.: Sept. 17, 2003); and *Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System*, [GAO-05-777](#) (Washington, D.C.: Sept. 9, 2005).

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# Related GAO Products

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*Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System.* [GAO-05-777](#). Washington, D.C.: September 9, 2005.

*Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements.* [GAO-05-939T](#). Washington, D.C.: July 27, 2005.

*Economic Performance: Highlights of a Workshop on Economic Performance Measures.* [GAO-05-796SP](#). Washington, D.C.: July 2005.

*Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public.* [GAO-05-424](#). Washington, D.C.: May 20, 2005.

*Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement.* [GAO-05-454](#). Washington, D.C.: March 31, 2005.

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G A O  
Accountability-Integrity-Reliability  
**Highlights**

Highlights of [GAO-05-777](#), a report to the Chairman and Ranking Minority Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate

### Why GAO Did This Study

The E-Government Act of 2002 requires regulatory agencies, to the extent practicable, to ensure there is a Web site the public can use to comment on the numerous proposed regulations that affect them. To accomplish this, the Office of Management and Budget named the Environmental Protection Agency (EPA) as the managing partner for developing a governmentwide e-Rulemaking system that the public can use for these purposes. Issues GAO was asked to address include:

- EPA's basis for selecting a centralized system,
- how EPA collaborated with other agencies and agency views of that collaboration, and
- whether EPA used key management practices when developing the system.

### What GAO Recommends

GAO recommends that, to build on the success of this initiative, the Administrator of EPA, as managing partner of the initiative, take steps to ensure there are written agreements between EPA and participating agencies that include performance measures that address issues such as system performance, maintenance, and cost savings. These measures are necessary to provide criteria for evaluating the effectiveness of the initiative. E-Rulemaking Initiative officials said they agree with GAO's recommendation and they plan to implement it.

[www.gao.gov/cgi-bin/getrpt?GAO-05-777](http://www.gao.gov/cgi-bin/getrpt?GAO-05-777).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Orice Williams (202) 512-5837 or [williamso@gao.gov](mailto:williamso@gao.gov).

September 2005

## ELECTRONIC RULEMAKING

### Progress Made in Developing Centralized E-Rulemaking System

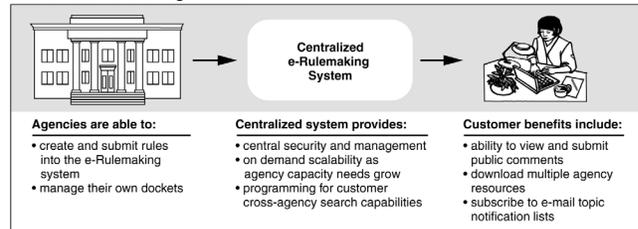
#### What GAO Found

E-Rulemaking officials and the e-Rulemaking Initiative Executive Committee considered three alternative designs and chose to implement a centralized e-Rulemaking system based on cost savings, risks, and security. Officials relied on an analysis of the three alternatives using two cost and risk assessment models and a comparison of the alternatives to industry best practices. Prior to completing this analysis, officials estimated the centralized approach would save about \$94 million over 3 years. They said when they developed this estimate, there was a lack of published information about costs related to paper or electronic rulemaking systems. They used their professional judgment and information about costs for developing and operating EPA's paper and electronic systems, among other things, to develop the estimate.

E-Rulemaking officials extensively collaborated with rulemaking agencies and most officials at the agencies we contacted thought the collaboration was effective. E-Rulemaking officials created a governance structure that included an executive committee, advisory board, and individual work groups that discussed how to develop the e-Rulemaking system. We contacted 14 of the 27 agencies serving on the advisory board and most felt their suggestions affected the system development process. Agency officials offered several examples to support their views, such as how their recommendations for changes to the system's design were incorporated.

While managing the development of the centralized system, e-Rulemaking officials followed all but a few of the key practices for successfully managing an initiative. For example, officials did not have written agreements with participating agencies that included system performance measures. The first agencies began migrating to the centralized system in May 2005 with the public scheduled to have access in September 2005. Eventually, all rulemaking agencies will migrate to the centralized system; however, the schedule is tentative due in part to funding issues. As agencies migrate, e-Rulemaking officials are planning changes to the system including adding capabilities that exist in electronic systems operated by some agencies.

#### Centralized e-Rulemaking Process



Source: GAO.

United States Government Accountability Office

July 13, 2005

## 21ST CENTURY CHALLENGES

### Transforming Government to Meet Current and Emerging Challenges



Highlights of GAO-05-830T, a testimony before the Subcommittee on the Federal Workforce and Agency Organization, Committee on Government Reform, House of Representatives

#### Why GAO Did This Study

The daunting challenges that face the nation in the 21<sup>st</sup> century establish the need for the transformation of government and demand fundamental changes in how federal agencies should meet these challenges by becoming flatter, more results-oriented, externally focused, partnership-oriented, and employee-enabling organizations.

This testimony addresses how the long-term fiscal imbalance facing the United States, along with other significant trends and challenges, establish the case for change and the need to reexamine the base of the federal government; how federal agencies can transform into high-performing organizations; and how multiple approaches and selected initiatives can support the reexamination and transformation of the government and federal agencies to meet these 21<sup>st</sup> century challenges.

[www.gao.gov/cgi-bin/getrpt?GAO-05-830T](http://www.gao.gov/cgi-bin/getrpt?GAO-05-830T).

To view the full product, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or [mihmj@gao.gov](mailto:mihmj@gao.gov).

#### What GAO Found

Long-term fiscal challenges and other significant trends and challenges facing the United States provide the impetus for reexamining the base of the federal government. Our nation is on an imprudent and unsustainable fiscal path driven by known demographic trends and rising health care costs, and relatively low revenues as a percentage of the economy. Unless we take effective and timely action, we will face large and growing structural deficit shortfalls, eroding our ability to address the current and emerging needs competing for a share of a shrinking budget pie. At the same time, policymakers will need to confront a host of emerging forces and trends, such as changing security threats, increasing global interconnectedness, and a changing economy. To effectively address these challenges and trends, government cannot accept all of its existing programs, policies, functions, and activities as "givens." Reexamining the base of all major existing federal spending and tax programs, policies, functions, and activities offers compelling opportunities to redress our current and projected fiscal imbalances while better positioning government to meet the new challenges and opportunities of this new century.

In response, agencies need to change their cultures and create the capacity to become high-performing organizations, by implementing a more results-oriented and performance-based approach to how they do business. To successfully transform, agencies must fundamentally reexamine their business processes, outmoded organizational structures, management approaches, and, in some cases, missions. GAO has hosted several forums to explore the change management practices that federal agencies can adopt to create high-performing organizations. For example, participants at a GAO forum broadly agreed on the key characteristics and capabilities of high-performing organizations, which can be grouped into four themes:

- a clear, well-articulated, and compelling mission;
- focus on needs of clients and customers;
- strategic management of people; and
- strategic use of partnerships.

A successful reexamination of the base of the federal government will entail multiple approaches over a period of years. The reauthorization, appropriations, oversight, and budget processes should be used to review existing programs and policies. However, no single approach or institutional reform can address the myriad of questions and program areas that need to be revisited. GAO has recommended certain other initiatives to assist in the needed transformations. These include (1) development of a governmentwide strategic plan and key national indicators to assess the government's performance, position, and progress; (2) implementing a framework for federal human capital reform; and (3) proposing specific transformational leadership models, such as creating a Chief Operating Officer/Chief Management Official with a term appointment at select agencies.

United States Government Accountability Office



Highlights of GAO-05-424, a report to congressional requesters

### Why GAO Did This Study

Americans spend billions of hours each year providing information to federal agencies by filling out information collections (forms, surveys, or questionnaires). A major aim of the Paperwork Reduction Act (PRA) is to balance the burden of these collections with their public benefit. Under the act, agencies' Chief Information Officers (CIO) are responsible for reviewing information collections before they are submitted to the Office of Management and Budget (OMB) for approval. As part of this review, CIOs must certify that the collections meet 10 standards set forth in the act (see table).

GAO was asked to assess, among other things, this review and certification process, including agencies' efforts to consult with the public. To do this, GAO reviewed a governmentwide sample of collections, reviewed processes and collections at four agencies that account for a large proportion of burden, and performed case studies of 12 approved collections.

### What GAO Recommends

GAO recommends that OMB and the agencies take steps to improve review processes and compliance with the act. Also, the Congress may wish to consider mandating pilot projects to target some collections for rigorous analysis that includes public outreach. In commenting on a draft of this report, OMB and the agencies agreed with parts of the report and disagreed with others.

[www.gao.gov/cgi-bin/getrpt?GAO-05-424](http://www.gao.gov/cgi-bin/getrpt?GAO-05-424).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Linda Koontz at (202) 512-6240 or koontzl@gao.gov.

May 2005

## PAPERWORK REDUCTION ACT

### New Approach May Be Needed to Reduce Government Burden on Public

#### What GAO Found

Governmentwide, agency CIOs generally reviewed information collections and certified that they met the standards in the act. However, GAO's analysis of 12 case studies at the Internal Revenue Service (IRS) and the Departments of Veterans Affairs, Housing and Urban Development, and Labor showed that CIOs certified collections even though support was often missing or partial (see table). For example, in nine of the case studies, agencies did not provide support, as the law requires, for the standard that the collection was developed by an office with a plan and resources to use the information effectively. Because OMB instructions do not ask explicitly for this support, agencies generally did not address it. Further, although the law requires agencies both to publish notices in the *Federal Register* and to otherwise consult with the public, agencies governmentwide generally limited consultation to the publication of notices, which generated little public comment. Without appropriate support and public consultation, agencies have reduced assurance that collections satisfy the standards in the act.

Processes outside the PRA review process, which are more rigorous and involve greater public outreach, have been set up by IRS and the Environmental Protection Agency (EPA), whose missions involve numerous information collections and whose management is focused on minimizing burden. For example, each year, IRS subjects a few forms to highly detailed, in-depth analyses, including extensive outreach to the public affected and the information users. IRS reports that this process—performed on forms that have undergone CIO review and received OMB approval—has reduced burden by over 200 million hours since 2002. In contrast, for the 12 case studies, the CIO review process did not reduce burden. Without rigorous evaluative processes, agencies are unlikely to achieve the PRA goal of minimizing burden while maximizing utility.

Support Provided by Agencies for Paperwork Reduction Act Standards in 12 Case Studies

Standards: The information collection—	Support provided			
	Total*	Yes	Partial	No
Is necessary for the proper performance of agency functions.	12	6	6	0
Avoids unnecessary duplication.	11	2	2	7
Reduces burden on the public, including small entities.	12	5	7	0
Uses language that is understandable to respondents.	12	1	0	11
Will be compatible with respondents' recordkeeping practices.	12	3	0	9
Indicates period for which records must be retained.	6	3	3	0
Gives required information (e.g., whether response is mandatory).	12	4	8	0
Was developed by an office with necessary plan and resources.	11	2	0	9
Uses appropriate statistical survey methodology (if applicable).	1	1	0	0
Makes appropriate use of information technology.	12	8	4	0
<b>Total</b>	<b>101</b>	<b>35</b>	<b>30</b>	<b>36</b>

Source: Paperwork Reduction Act, Pub. L. 104-13, 109 Stat. 173-4, sec. 3506(c)(3).

\*The total is not always 12 because not all certifications applied to all collections.

United States Government Accountability Office



Highlights of [GAO-05-454](#), a report to the Chairman, Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Committee on Homeland Security and Governmental Affairs, U.S. Senate

### Why GAO Did This Study

The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to address concerns about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided federal funding to cover the costs. UMRA generates information about the nature and size of potential federal mandates on nonfederal entities to assist Congress and agency decision makers in their consideration of proposed legislation and regulations. However, it does not preclude the implementation of such mandates.

At various times in its 10-year history, Congress has considered legislation to amend various aspects of the act to address ongoing questions about its effectiveness. Most recently, GAO was asked to consult with a diverse group of parties familiar with the act and to report their views on (1) the significant strengths and weaknesses of UMRA as the framework for addressing mandate issues and (2) potential options for reinforcing the strengths or addressing the weaknesses. To address these objectives, we obtained information from 52 organizations and individuals reflecting a diverse range of viewpoints. GAO analyzed the information acquired and organized it into broad themes for analytical and reporting purposes.

GAO makes no recommendations in this report.

[www.gao.gov/cgi-bin/getrpt?GAO-05-454](http://www.gao.gov/cgi-bin/getrpt?GAO-05-454).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Orice M. Williams at (202) 512-5837, or [williams@gao.gov](mailto:williams@gao.gov).

March 2005

## UNFUNDED MANDATES

### Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement

#### What GAO Found

The parties GAO contacted provided a significant number of comments about UMRA, specifically, and federal mandates, generally. Their views often varied across and within the five sectors we identified (academic/think tank, public interest advocacy, business, federal agencies, and state and local governments). Overall, the numerous strengths, weaknesses and options for improvement identified during the review fell into several broad themes, including UMRA-specific issues such as coverage and enforcement, among others, and more general issues about the design, funding, and evaluation of federal mandates. First, UMRA coverage was, by far, the most frequently cited issue by parties from the various sectors. Parties across most sectors that provided comments said UMRA's numerous definitions, exclusions, and exceptions leave out many federal actions that may significantly impact nonfederal entities and should be revisited. Among the most commonly suggested options were to expand UMRA's coverage to include a broader set of actions by limiting the various exclusions and exceptions and lowering the cost thresholds, which would make more federal actions mandates under UMRA. However, a few parties, primarily from the public interest advocacy sector, viewed UMRA's narrow coverage as a strength that should be maintained.

Second, parties from various sectors also raised a number of issues about federal mandates in general. In particular, they had strong views about the need for better evaluation and research of federal mandates and more complete estimates of both the direct and indirect costs of mandates on nonfederal entities. The most frequently suggested option to address these issues was more post-implementation evaluation of existing mandates or "look backs." Such evaluations of the actual performance of mandates could enable policymakers to better understand mandates' benefits, impacts and costs among other issues. In turn, developing such evaluation information could lead to the adjustment of existing mandate programs in terms of design and/or funding, perhaps resulting in more effective or efficient programs.

Going forward, the issue of unfunded mandates raises broader questions about assigning fiscal responsibilities within our federal system. Federal and state governments face serious fiscal challenges both in the short and longer term. As GAO reported in its February 2005 report entitled *21st Century Challenges: Reexamining the Base of the Federal Government* ([GAO-05-325SP](#)), the long-term fiscal challenges facing the federal budget and numerous other geopolitical changes challenging the continued relevance of existing programs and priorities warrant a national debate to review what the government does, how it does business and how it finances its priorities. Such a reexamination includes considering how responsibilities for financing public services are allocated and shared across the many nonfederal entities in the U.S. system as well.

United States Government Accountability Office

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**Highlights**

Highlights of GAO-03-409, a report to the Senate Committee on Governmental Affairs and the House Committee on Government Reform

**Why GAO Did This Study**

Civil penalties are an important element of regulatory enforcement, allowing agencies to punish violators appropriately and to serve as a deterrent to future violations. In 1996, Congress enacted the Inflation Adjustment Act to require agencies to adjust certain penalties for inflation. GAO assessed federal agencies' compliance with the act and whether provisions in the act have prevented agencies from keeping their penalties in pace with inflation.

**What GAO Recommends**

Congress may wish to consider amending the act to (1) require or permit agencies to adjust their penalties for lost inflation; (2) make the calculation and rounding procedures more consistent with changes in inflation; (3) permit agencies with exempt penalties to adjust them for inflation; and (4) give some agency the responsibility to monitor compliance and provide guidance.

The Department of Justice, the Department of the Treasury, and the Office of Management and Budget did not comment on the first three matters for congressional consideration. The agencies suggested changes to the fourth matter, but we did not make those changes.

[www.gao.gov/cgi-bin/getrpt?GAO-03-409](http://www.gao.gov/cgi-bin/getrpt?GAO-03-409).

To view the full report, including the scope and methodology, click on the link above. For more information, contact Victor Rezendes (202) 512-6806 or rezendesv@gao.gov.

March 2003

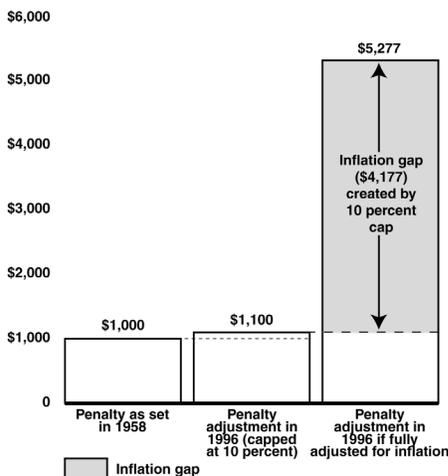
**CIVIL PENALTIES**

**Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law**

**What GAO Found**

As of June 2002, 16 of 80 federal agencies with civil penalties covered by the Inflation Adjustment Act had not made the required initial adjustments to their penalties. Nineteen other agencies had not made required subsequent adjustments, and several other agencies had made incorrect adjustments. The act does not give any agency the authority to monitor compliance or to provide guidance to agencies. More important, several provisions of the act have prevented some agencies from fully adjusting their penalties for inflation. One provision limited the agencies' first adjustments to 10 percent of the penalty amounts, even if the penalties were decades old and hundreds of percent behind inflation. The resultant "inflation gap" can never be corrected under the statute and grows with each subsequent adjustment. (The figure below illustrates the effect of the cap on one agency's \$1,000 penalty set in 1958.) Also, the act's calculation and rounding procedures require agencies to lose a year of inflation each time they adjust their penalties, and can prevent some agencies from making adjustments until inflation increases by 45 percent or more (i.e., 15 years or more at recent rates of inflation). Finally, the act exempts penalties under certain statutes from its requirements entirely. Consequently, more than 100 exempted penalties have declined in value by 50 percent or more since Congress last set them.

Ten Percent Cap on Initial Penalty Adjustments Resulted in Large Inflation Gaps



Source: GAO.

United States General Accounting Office

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