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Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, Committee on Government Reform and Oversight, House of Representatives

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CONGRESSIONAL REVIEW ACT

Implementation and Coordination

Statement of Robert P. Murphy, General Counsel

GAO/T-OGC-98-38

Chairman McIntosh, Mr. Tierney, and Members of the Subcommittee:

I am pleased to appear before you today to discuss the General Accounting Office's experience in fulfilling its responsibilities under the Congressional Review Act (CRA). I will also address our efforts to coordinate implementation of the act with the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). Finally, we will offer some suggestions on how OIRA could more effectively exercise its leadership and guidance responsibilities, as required by Executive Order 12866, to enhance the effectiveness of this act.

Congressional oversight of rulemaking as contemplated by CRA can be an important and useful tool for balancing and accommodating the concerns of American citizens and businesses with federal agency rulemaking. It is important to assure that Executive branch agencies are responsive to citizens and businesses about the reach, cost, and impact of regulations without compromising the statutory mission given to those agencies. CRA seeks to accomplish this by giving the Congress an opportunity to review rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable.

Under CRA two types of rules, major and nonmajor, must be submitted to both Houses of Congress and the GAO before either can take effect. CRA defines a "major" rule as one which has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. CRA specifies that the determination of what rules are major is to be made by OIRA. Major rules cannot be effective until 60 days after publication in the Federal Register or submission to Congress and GAO, whichever is later. Nonmajor rules become effective when specified by the agency, but not before they are filed with the Congress and GAO.

GAO's primary role under CRA is to provide the Congress with a report on each major rule concerning GAO's assessment of the promulgating federal agency's "compliance with the procedural steps" required by various acts and Executive orders governing the regulatory process. These include preparation of a cost-benefit analysis, when required, and compliance with

the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, the Administrative Procedure Act, the Paperwork Reduction Act, and Executive Order No. 12866. GAO's report must be sent to the congressional committees of jurisdiction within 15 calendar days.

Although the law is silent as to GAO's role relating to the nonmajor rules, we believe that basic information about the rules should be collected in a manner that can be of use to Congress and the public. To do this, we have established a database that gathers basic information about the 15-20 rules we receive on the average each day. Our database captures the title, the agency, the Regulation Identification Number, the type of rule, the proposed effective date, the date published in the Federal Register, the congressional review trigger date, and any joint resolutions of disapproval that may be enacted. We have recently made this database available, with limited research capabilities, on the Internet. I will discuss in a minute our belief that this database would have more significant value to the Congress if the Executive branch agencies would file their reports with us in a standard format either electronically or in a manner amenable to modern scanning techniques.

Since the congressional rulemaking review provisions of CRA were enacted on March 29, 1996, our Office has received 115 major and 7,605 nonmajor rules from Executive branch and independent agencies.

Unfiled Rules

As noted earlier, before a rule can become effective, it must be filed in accordance with the statute. GAO conducted a review to determine whether all final rules covered by CRA and published in the Register were filed with the Congress and GAO. We performed this review to both verify the accuracy of our database and to ascertain the degree of agency compliance with CRA. We were concerned that regulated entities may have been led to believe that rules published in the Federal Register were effective when, in fact, they were not unless filed in accordance with CRA.

Our review covered the 10-month period from October 1, 1996, to July 31, 1997. In November 1997, we submitted to OIRA a computer listing of the rules that we found published in the Federal Register but not filed with our Office. This initial list included 498 rules from 50 agencies. OIRA distributed this list to the affected agencies and departments and instructed them to contact GAO if they had any questions regarding the list. Beginning in mid-February, because 321 rules remained unfiled, we followed up with each agency that still had rules which were unaccounted for.

Our Office has experienced varying degrees of responses from the agencies. Several agencies, notably the Environmental Protection Agency and the Department of Transportation, took immediate and extensive corrective action to submit rules that they had failed to submit and to establish fail-safe procedures for future rule promulgation. Other agencies responded by submitting some or all of the rules that they had failed to previously file. Several agencies are still working with us to assure 100 percent compliance with CRA. Some told us they were unaware of CRA or of the CRA filing requirement.

Overall, our review disclosed that:

- 279 rules should have been filed with us; 264 of these have subsequently been filed;
- 182 were found not to be covered by CRA as rules of particular applicability or agency management and thus were not required to be filed;
- 37 rules had been submitted timely and our database was corrected; and
- 15 rules from six agencies have thus far not been filed.

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. As a result of GAO's compliance audit, however, 264 rules now have been filed with GAO and the Congress and are thus now effective under CRA. 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.

Sixty-Day Delay and "Good Cause"

One area of consistent difficulty in implementing CRA has been the failure of some agencies to delay the effective date of major rules for 60 days as required by section 801(a)(3)(A) of the act. Eight major rules have not permitted the required 60-day delay, including the Immigration and Naturalization Service's major rule regarding the expedited removal of aliens. Also, this appears to be a continuing problem since one of the eight rules was issued in January 1998. We find agencies are not budgeting enough time into their regulatory timetable to allow for the delay and are misinterpreting the "good cause" exception to the 60-day delay period found in section 808(2).

Section 808(2) states that, notwithstanding section 801, "any rule which an agency for good cause finds (and incorporates the finding and a brief

statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" shall take effect at such time as the federal agency promulgating the rule determines. This language mirrors the exception in the Administrative Procedure Act (APA) to the requirement for notice and comment in rulemaking. 5 U.S.C. § 553(b)(3)(B). In our opinion, the "good cause" exception is only available if a notice of proposed rulemaking was not published and public comments were not received. Many agencies, following a notice of proposed rulemaking, have stated in the preamble to the final major rule that "good cause" existed for not providing the 60-day delay. Examples of reasons cited for the "good cause" exception include (1) that Congress was not in session and thus could not act on the rule, (2) that a delay would result in a loss of savings that the rule would produce, or (3) that there was a statutorily mandated effective date.

The former administrator of OIRA disagreed with our interpretation of the "good cause" exception. She believed that our interpretation of the "good cause" exception would result in less public participation in rulemaking because agencies would forgo issuing a notice of proposed rulemaking and receipt of public comments to be able to invoke the CRA "good cause" exception. OIRA contends that the proper interpretation of "good cause" should be the standard employed for invoking section 553(d)(3) of the APA, "as otherwise provided by the agency for good cause found and published with the rule," for avoiding the 30-day delay in a rule's effective date required under the APA.

Since CRA's section 808(2) mirrors the language in section 553(b)(B), not section 553(d)(3), it is clear that the drafters intended the "good cause" exception to be invoked only when there has not been a notice of proposed rulemaking and comments received.

Definitions of Rules and Major Rules

One early question about implementation of CRA was whether Executive agencies or OIRA would attempt to avoid designating rules as major and thereby avoid GAO's review and the 60-day delay in the effective date. While we are unaware of any rule that OIRA misclassified to avoid the major rule designation, the failure of agencies to identify some issuances as "rules" at all has meant that some major rules have not been identified.

CRA contains a broad definition of "rule," including more than the usual "notice and comment" rulemakings under the Administrative Procedure Act which are published in the Federal Register. "Rule" means the whole

or part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy.

The legislative history of CRA makes clear that the authors intended a broad interpretation of what constitutes a rule. As Chairman McIntosh noted in his floor statement during the final consideration of CRA,

> "All too often, agencies have attempted to circumvent the notice and comment requirements of the Administrative Procedure Act by trying to give legal effect to general policy statements, guidelines, and agency policy and procedure manuals. Although agency interpretative rules, general statements of policy, guideline documents, and agency and procedure manuals may not be subject to the notice and comment provisions of section 553(c) of title 5, United States Code, these types of documents are covered under the congressional review provisions of the new chapter 8 of title 5."

On occasion, our Office has been asked whether certain agency action, issuance, or policy constitutes a "rule" under CRA such that it would not take effect unless submitted to our Office and the Congress in accordance with CRA. For example, in response to a request from the Chairman of the Subcommittee on Forests and Public Land Management, Senate Committee on Energy and Resources, we found that a memorandum issued by the Secretary of Agriculture in connection with the Emergency Salvage Timber Sale Program constituted a "rule" under CRA and should have been submitted to the Houses of Congress and GAO before it could become effective. Likewise, we found that the Tongass National Forest Land and Resource Management Plan issued by the United States Forest Service was a "rule" under CRA and should have been submitted for congressional review. OIRA stated that, if the plan was a rule, it would be a major rule.

The Forest Service has in excess of 100 such plans promulgated or revised which are not treated as rules under CRA. Many of these may actually be major rules that should be subject to CRA filing and, if major rules, subject to the 60-day delay for congressional review.

In testimony before the Senate Committee on Energy and Natural Resources and the House Committee on Resources regarding the Tongass Plan, the Administrator of OIRA stated that, as was the practice under the APA, each agency made its own determination of what constituted a rule under CRA and by implication, OIRA was not involved in these determinations.

We believe that for CRA to achieve what the Congress intended, OIRA must assume a more active role in guiding or overseeing these types of agency decisions. Other than an initial memorandum following the enactment of CRA, we are unaware of any further OIRA guidance. Because each agency or commission issues many manuals, documents, and directives which could be considered "rules" and these items are not collected in a single document or repository such as the Federal Register, for informal rulemakings, it is difficult for our Office to ascertain if agencies are fully complying with the intent of CRA. Having another set of eyes reviewing agency actions, especially one which has desk officers who work on a daily basis with certain agencies, would be most helpful.

Database Enhancement

We have attempted to work with Executive agencies to get more substantive information about the rules and to get such information supplied in a manner that would enable quick assimilation into our database. An expansion of our database could make it more useful not only to GAO for its use in supporting congressional oversight work, but directly to the Congress and to the public. Attached to this testimony is a copy of a questionnaire designed to obtain basic information about each rule covered by CRA. This questionnaire asks the agencies to report on such items as (1) whether the agency provided an opportunity for public participation, (2) whether the agency prepared a cost-benefit analysis or a risk assessment, (3) whether the rule was reviewed under Executive orders for federalism or takings implications, and (4) whether the rule was economically significant. Such a questionnaire would be prepared in a manner that facilitates incorporation into our database by electronic filing or by scanning.

In developing and attempting to implement the use of the questionnaire, we consulted with Executive branch officials to insure that the requested information would not be unnecessarily burdensome. We circulated the questionnaire for comment to 20 agency officials with substantial involvement in the regulatory process, including officials from OIRA. The Administrator of OIRA submitted a response in her capacity as Chair of the Regulatory Working Group, consolidating comments from all the agencies represented in that group. It is the position of the group that the completion of this questionnaire for each of the 4,000 to 5,000 rules filed each year is too burdensome for the agencies concerned. The group points out that the majority of rules submitted each year are routine or administrative or are very narrowly focused regional, site-specific, or highly technical rules.

We continue to believe that it would further the purpose of CRA for a database of all rules submitted to GAO to be available for review by Members of Congress and the public and to contain as much information as possible concerning the content and issuance of the rules. We believe that further talks with the Executive branch, led by OIRA, can be productive and that there may be alternative approaches, such as submitting one questionnaire for repetitive or routine rules. If a routine rule does not fit the information on the submitted questionnaire, a new questionnaire could be submitted for only that rule. For example, the Department of Transportation could submit one questionnaire covering the numerous air worthiness directives it issues yearly. If a certain action does not fit the overall questionnaire, a new one for only that rule would be submitted.

We note that almost all agencies have devised their own forms for the submission of rules, some of which are as long or almost as extensive as the form we recommend. Additionally, some agencies prepare rather comprehensive narrative reports on nonmajor rules. We are unable to easily capture data contained in such narrative reports with the resources we have staffing this function now. The reports are systematically filed and the information contained in them essentially is lost. Our staff could, however, incorporate an electronic submission or scan a standardized report into our database and enable the data contained therein to be used in a meaningful manner.

Conclusion

CRA gives the Congress an important tool to use in monitoring the regulatory process, and we believe that the effectiveness of that tool can be enhanced. Executive Order 12866 requires that OIRA, among other things, provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law. After almost 2 years' experience in carrying out our responsibilities under the act, we can suggest four areas in which OIRA should exercise more leadership within the Executive branch regulatory community, consistent with the intent of the Executive Order, to enhance CRA's effectiveness and its value to the Congress and the public. We believe that OIRA should:

- require standardized reporting in a GAO-prescribed format that can readily be incorporated into GAO's database;
- establish a system to monitor compliance with the filing requirement on an ongoing basis;

- provide clarification on the "good cause" exception to the 60-day delay provision and oversee agency compliance during its Executive Order 12866 review; and
- provide clarifying guidance as to what is a rule that is subject to CRA and oversee the process of identifying such rules.

Thank you, Mr. Chairman. This concludes my prepared remarks. I would be happy to answer any questions you may have.

United States General Accounting Office

GAO

Federal Rule Questionnaire

Please fill the circles completely with black pen or #2 pencil.

1. Name of Department or Agency

2. Subdivision or Office

3. Rule Title

4. Rule Identification Number (RIN) or other unique identifier

5. Major Rule ◯ **Non-major Rule** ◯ **Other** ◯ _____

6. Final Rule ◯ **Interim Rule** ◯ **Other** ◯ _____

7. Priority of Regulation Economically Significant ◯ Significant ◯ Substantive, Nonsignificant ◯ Routine and Frequent ◯ Informational/Administrative/Other ◯

8. Effective Date

9. Termination date, if any

10. Concise summary of rule attached ◯ stated in rule only ◯

	Yes	No	N/A
A. With respect to this rule, did your agency provide an opportunity for public participation (i.e., notice and comment) in the rulemaking process under the Administrative Procedure Act or agency-specific procedures?	◯	◯	
B. With respect to this rule, did your agency prepare a cost-benefit analysis (any document that your agency considers a cost-benefit analysis regardless of its title)?	◯	◯	
C. With respect to this rule, did your agency prepare a risk assessment?	◯	◯	
If yes, are you submitting the risk assessment to GAO?	◯	◯	◯
D. With respect to this rule, was your agency required to publish a general notice of proposed rulemaking under the Administrative Procedure Act or other law?	◯	◯	
E. With respect to this rule, did your agency			
1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)?	◯	◯	
2. prepare an initial Regulatory Flexibility Analysis under 5 U.S.C. § 603(a)?	◯	◯	
3. convene a review panel under 5 U.S.C. § 609(b)?	◯	◯	
4. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?	◯	◯	

OPR: OGC

GAO Form 416 (11/96)

	Yes	No	N/A
F. With respect to this rule, did your agency publish a small entity compliance guide under § 212 of Public Law 104-121?	○	○	
G. With respect to this rule, did your agency			
1. prepare a statement including an assessment of costs and benefits and other information under § 202 of the Unfunded Mandates Reform Act of 1995?	○	○	
2. consult with small governments in accordance with a plan consistent with § 203 of the Unfunded Mandates Reform Act of 1995?	○	○	
3. consult with State, Local or Tribal governments under a process described in § 204 of the Unfunded Mandates Reform Act of 1995?	○	○	
4. consider the regulatory alternatives under § 205 of the Unfunded Mandates Reform Act of 1995?	○	○	
H. With respect to this rule, did your agency			
1. prepare an environmental assessment under the National Environmental Policy Act (NEPA) or any other Act?	○	○	
2. prepare an environmental impact statement under NEPA or any other Act?	○	○	
I. Does the rule contain a collection of information requiring OMB approval and a control number under the Paperwork Reduction Act of 1995?	○	○	
If yes, did your agency obtain or is it now obtaining OMB approval and a control number?	○	○	○
J. Did your agency assess the rule for family implications as called for by E.O. 12606?	○	○	
If yes, did your agency determine that the rule may have a significant potential negative impact on family well-being?	○	○	○
If yes, did your agency prepare the written certification required by section 2 of the Order?	○	○	○
K. Did your agency assess the rule for federalism implications as called for under E.O. 12612?	○	○	
If yes, did your agency submit the Federalism Assessment to OMB?	○	○	○
L. Did your agency assess the rule for takings implications as called for in E.O. 12630?	○	○	
If yes, did your agency identify and discuss the rule's takings implications in the notice of proposed rulemaking?	○	○	○
M. Was the rule reviewed under E.O. 12866?	○	○	
If yes, was the rule considered economically significant?	○	○	○
N. Did your agency review the rule under E.O. 12988?	○	○	

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