



Testimony

Before the Committee on Oversight and  
Government Reform, House of  
Representatives

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# FEDERAL REGULATIONS

## Opportunities to Improve the Effectiveness and Transparency of Regulatory and Guidance Practices

Statement of Kris Nguyen, Acting Director  
Strategic Issues

# GAO Highlights

Highlights of [GAO-18-436T](#), a testimony before the Committee on Oversight and Government Reform, House of Representatives

## Why GAO Did This Study

Congress has often asked GAO to evaluate the implementation of procedural and analytical requirements that apply to agencies' rulemaking and guidance processes. The importance of improving the transparency of those processes, including providing public participation and sufficient oversight, is a common theme throughout GAO's body of work on federal regulation.

Based on GAO's prior work, this testimony addresses: (1) the extent to which USDA, Education, HHS, and DOL adhered to OMB requirements and internal controls when developing regulatory guidance, and (2) agencies' compliance with the CRA for regulations promulgated during presidential transitions.

## What GAO Recommends

In the April 2015 report on regulatory guidance, GAO made eleven recommendations to USDA, Education, HHS, and DOL to ensure adherence to OMB requirements and applicable elements of internal controls. Three of these recommendations to HHS remain open: 1) to develop written procedures for the approval of significant guidance, 2) strengthen application of internal controls over guidance processes, and 3) improve its website.

In the March 2018 report on rulemaking at the end of presidents' terms, GAO recommended OMB, as part of its regulatory review process, identify economically significant regulations at risk of not complying with the CRA and work with agencies to ensure compliance. OMB staff did not agree or disagree with the recommendation.

View [GAO-18-436T](#). For more information, contact Kris Nguyen at (202) 512-2660 or [nguyentt@gao.gov](mailto:nguyentt@gao.gov).

March 2018

## FEDERAL REGULATIONS

### Opportunities to Improve the Effectiveness and Transparency of Regulatory and Guidance Practices

## What GAO Found

Agencies GAO reviewed—Departments of Agriculture (USDA), Education (Education), Health and Human Services (HHS), and Labor (DOL) did not consistently adhere to Office of Management and Budget (OMB) requirements and internal controls when developing regulatory guidance, as GAO reported in 2015. Unlike regulations, regulatory guidance is not generally legally binding and is subject to different requirements for regulatory oversight. Agencies weighed various factors when they determined whether to issue guidance. The agencies GAO reviewed issued different amounts of guidance for various purposes, such as explaining plans for implementing regulations. Agencies found few of their guidance documents to be "significant," guidance with a broad and substantial impact on regulated entities. USDA and Education had written procedures for the approval of significant guidance as directed by OMB; DOL's procedures needed updating and to be distributed to appropriate agency officials; HHS did not have any. GAO found that USDA, Education, and DOL consistently applied OMB's requirements for public feedback and access, for example public access to guidance through websites, while HHS did not. Agencies can better ensure consistent application of review processes and public access to significant guidance through better adherence to OMB requirements. GAO also found opportunities for agencies to improve adherence to internal controls for guidance that did not meet OMB's definition of "significant." For example, most subagencies GAO reviewed did not have written procedures for the production of guidance and about half did not regularly evaluate whether issued guidance was effective and up-to-date. Adherence to these internal controls could promote quality and consistency in guidance development processes.

GAO found that agencies did not consistently comply with the Congressional Review Act (CRA) for regulations promulgated during the 120-day presidential transition periods (September 23 through January 20), as defined by the Presidential Transitions Improvements Act of 2015. GAO reported that during the transition from the end of one presidential administration to the next, the Clinton, Bush, and Obama administrations published on average roughly 2.5 times more economically significant regulations during transition periods than during nontransition periods; increases are typical during transition periods. For these regulations, agencies more frequently provided advanced notice to the public, thus providing the public opportunities to influence the development of these transition period regulations before they were finalized. In their published regulations, agencies generally reported complying with four of five procedural requirements for promulgating regulations during both transition and nontransition periods. Agencies are required to 1) assess the impact of regulations on small entities, 2) minimize the burden that information collections impose on the public, 3) assess the costs and benefits of regulations that include federal mandates, and 4) for certain agencies, obtain direct input from small entities during rulemaking. Also, a fifth requirement, agencies must comply with CRA, which provides Congress an opportunity to review and possibly disapprove regulations before they take effect. Agencies less often complied with CRA, during both transition and nontransition periods. The most common deficiency was agencies' failure to provide Congress the required time to review regulations, which GAO has also identified as a deficiency in previous work.

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Chairman Gowdy, Ranking Member Cummings, and Members of the Committee:

I am pleased to be here today to discuss federal regulatory and guidance practices, focusing, at your request, on our 2015 report on guidance processes at select agencies, and our recently released report on rulemaking at the end of presidents' terms.<sup>1</sup>

Agencies use federal regulations and guidance to achieve national goals, such as improving the economy and protecting the health and safety of the public. Congress has often asked us to evaluate the implementation of procedural and analytical requirements that apply to agencies' rulemaking and guidance processes. The importance of improving the transparency of those processes is a common theme throughout our body of work on federal regulation. Based on our work, this testimony discusses: (1) the extent to which the Departments of Agriculture (USDA), Education (Education), Health and Human Services (HHS), and Labor (DOL) adhered to Office of Management and Budget (OMB) requirements and internal controls when developing regulatory guidance and (2) agencies' compliance with the Congressional Review Act (CRA) for regulations promulgated during presidential transitions.<sup>2</sup> We consistently found opportunities to improve the transparency and effectiveness of regulatory and guidance practices.

My statement is based on work that we have issued on regulatory and guidance processes prepared at the request of Congress. We made 12 recommendations to agencies on the topics that I plan to address today, eight of which have been implemented to date.<sup>3</sup> We conducted our work for these reports in accordance with generally accepted government

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<sup>1</sup>GAO, *Federal Rulemaking: OMB Should Work with Agencies to Improve Congressional Review Act Compliance during and at the End of Presidents' Terms*, [GAO-18-183](#) (Washington, D.C.: Mar. 13, 2018) and *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, [GAO-15-368](#) (Washington, D.C.: Apr. 16, 2015).

<sup>2</sup>We conducted this work in response to a requirement in Section 5 of the Edward "Ted" Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, which includes a provision for us to assess final significant regulatory actions promulgated by executive departments during specified presidential transition periods. Pub. L. No. 114-136, § 5 130 Stat. 301, 307–308 (2016).

<sup>3</sup>The 12 recommendations are from two reports: [GAO-15-368](#) and [GAO-18-183](#). Because [GAO-18-183](#) issued on March 13, 2018 we would not expect OMB to have implemented the included recommendation at the time of this hearing.

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auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. A more detailed discussion of prior reports' objectives, scope, and methodology, including our assessment of data reliability, is available in the reports cited in the related products list at the end of this statement.

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## Agencies Can Better Ensure Effectiveness of Guidance through Consistent Adherence with OMB Requirements and Internal Controls

First, I will discuss our 2015 report on guidance processes at USDA, Education, HHS, and DOL, specifically (1) how these agencies decide whether to issue regulations or guidance and (2) the extent to which they adhere to OMB requirements and internal controls when developing guidance.<sup>4</sup>

Agency guidance documents, even though they are not generally legally binding as regulations or statutes are, can have a significant effect, both because of their volume and because of their potential to prompt changes in the behavior of regulated parties and the general public.<sup>5</sup> Guidance generally serves different purposes than those of regulations. Agencies also issue regulatory guidance that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statutory or regulatory issue—as illustrated in figure 1 below. The processes by which agencies issue guidance and regulations are governed by statutes, executive orders, and agencies' policies and procedures, with the aim of greater transparency and public participation, enhanced oversight, and reduced regulatory burdens.<sup>6</sup>

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<sup>4</sup>We have also issued a report on Internal Revenue Service (IRS) guidance. See GAO, *Regulatory Guidance Processes: Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance*, [GAO-16-720](#) (Washington, D.C.: Sept. 6, 2016).

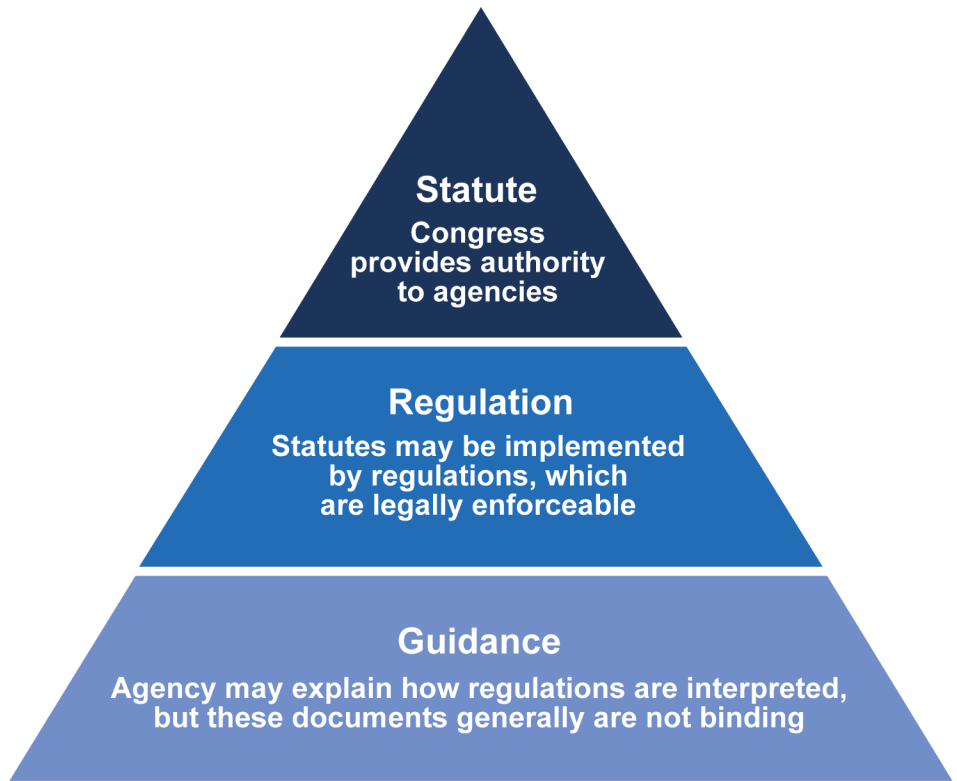
<sup>5</sup>See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 *Cornell L. Rev.* 397, 400 (March 2007).

<sup>6</sup>In particular, the Administrative Procedure Act (APA) establishes broadly applicable requirements for prior notice and public comment. 5 U.S.C. §§ 551–559. However, Congress sometimes enacts laws that direct an agency to issue rules without notice and comment. In addition, the APA recognizes that there are circumstances, such as responding to an emergency situation like a natural disaster, when providing for notice and comment might not be appropriate before issuing a final rule. See GAO, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, [GAO-13-21](#) (Washington, D.C.: Dec. 20, 2012).

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**Figure 1: Hierarchy of Statutory and Regulatory Authority**



Source: GAO analysis of regulatory authority | GAO-18-436T

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### Agencies Weighed Various Factors When Deciding Whether to Issue Regulations or Guidance

Agency officials considered a number of factors before deciding whether to issue guidance or undertake rulemaking. Among these factors at the four agencies included in our analysis, a key criterion was whether officials intended for the document to be binding (in which case they issued a regulation).<sup>7</sup> OMB's Office of Information and Regulatory Affairs (OIRA) staff concurred that agencies understood what types of direction to regulated entities must go through the regulatory process.<sup>8</sup> Officials

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<sup>7</sup>At some agencies certain types of guidance is considered legally binding. The Internal Revenue Service (IRS) has stated that, in addition to statute, and tax regulations, all guidance published in its Internal Revenue Bulletin can be relied upon by taxpayers as authoritative because IRS is bound by it. For more information, see [GAO-16-720](#).

<sup>8</sup>OIRA is the OMB organization responsible for the coordinated review of regulatory actions by executive agencies. OIRA also is responsible for providing meaningful guidance and oversight so that each agency's regulations are consistent with applicable law, the President's priorities, and the principles set forth in executive orders.

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from all four agencies also told us that they understood when guidance was inappropriate and when regulation was necessary. They said that they consulted with legal counsel when deciding whether to initiate rulemaking or issue guidance.

For example, HHS's Administration for Community Living officials told us that they considered a number of factors, including whether the instructions to be disseminated were enforceable or merely good practice. Specifically, when Administration for Community Living officials noticed that states were applying issued guidance related to technical assistance and compliance for the state long-term care ombudsman program differently, they decided it would be best to clarify program actions through a regulation. Officials believed that a regulation would ensure consistent application of program requirements and allow them to enforce those actions. They issued the proposed rule in June 2013 and the final rule in February 2015.<sup>9</sup> In another example, officials at USDA's Food and Nutrition Service told us that the decision to issue guidance or undertake rulemaking depended on (1) the extent to which the proposed document was anticipated to affect stakeholders and the public, and (2) what the subagency was trying to accomplish with the issued document.<sup>10</sup>

The agencies used guidance for multiple purposes and differed in the amount of guidance they issued. The purposes of guidance included explaining or interpreting regulations, clarifying policies in response to questions or compliance findings, disseminating suggested practices or leadership priorities, and providing grant administration information. Guidance documents provide agencies valuable flexibility to help regulated agencies comply with agency regulations, and address new issues and circumstances more quickly than may be possible using rulemaking.

Guidance documents that meet OMB's definition of "significant" are subject to the regulatory practices and requirements established by OMB. OMB defines a significant guidance document as guidance with a broad and substantial impact on regulated entities. An economically significant

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<sup>9</sup>78 Fed. Reg. 36,449 (June 18, 2013) (proposed rule). 80 Fed. Reg. 7704 (Feb. 11, 2015) (final rule).

<sup>10</sup>We reviewed guidance processes at the four departments and 25 of their selected subagencies, or components that (1) were within the requesting committee's jurisdiction and (2) engaged in regulatory or grantmaking activities. For a complete list of subagencies, see [GAO-15-368](#).

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guidance document is a significant guidance document that may reasonably be anticipated to lead to an annual effect on the economy of \$100 million or more, among other factors. Guidance that does not fall under the definition of “significant” is not subject to the OMB Bulletin, and those guidance procedures are left to agency discretion.<sup>11</sup> The four agencies we reviewed considered few of their guidance documents to be significant. As of February 2015, agencies listed the following numbers of significant guidance documents on their websites: Education, 139; DOL, 36; and USDA, 34.<sup>12</sup> We were unable to determine the number of significant guidance documents issued by HHS. All four agencies told us that they did not issue any economically significant guidance. OIRA staff told us they accepted departments’ determinations of which types of guidance meet the definition of significant guidance. Agencies also varied in the amount of guidance they issued, ranging from 10 to more than 100 documents issued in a single year.

Agency officials said that mission or the types of programs administered can affect the number of guidance documents issued. For example, officials from DOL’s Bureau of Labor Statistics told us they rarely issue guidance—about 10 routine administrative memorandums each year related to the operation of two cooperative agreement statistical programs. In contrast, DOL’s Occupational Safety and Health Administration officials told us they have regularly issued guidance to assist with regulatory compliance, and could easily produce 100 new or updated products each year to provide guidance to regulated entities.

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<sup>11</sup>Although the APA does not generally prescribe processes for review of agency guidance, in 2007 OMB issued a Final Bulletin for Agency Good Guidance Practices (OMB Bulletin) that establishes policies and procedures for the development, issuance, and use of “significant” guidance documents. The Bulletin defines “significant guidance document” as a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to (1) lead to an annual 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 Executive Order 12866, as further amended. Guidance that does not fall under the definition of “significant” is not subject to the OMB Bulletin, and those guidance procedures are left to agency discretion. 72 Fed. Reg. 3432 (Jan. 25, 2007).

<sup>12</sup>Education officials noted that their list of significant guidance documents includes documents issued over the past 40 years.



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## Agencies Should Increase Adherence with OMB Requirements and Internal Controls

We found opportunities for agencies to improve regulatory guidance processes by strengthening compliance with OMB requirements for significant guidance and the use of management controls for producing their guidance documents. In 2015, we made 11 recommendations to USDA, HHS, DOL and Education to better ensure the adherence to OMB requirements for approval and public access of regulatory guidance, to strengthen the use of internal controls in guidance processes, and to improve the usability of websites with online guidance, three of which remain open.<sup>13</sup> USDA, DOL and Education have addressed recommendations concerning strengthening the application of management controls—internal controls—and improving their websites to ensure the public can easily find, access, and comment on online guidance. These recommendations for HHS remain open as well as an additional recommendation concerning developing written procedures for agency approval of written guidance. These actions would help to ensure appropriate review and use of these documents, and both could also facilitate opportunities for affected parties and stakeholders to provide feedback on those documents.

## Adherence to OMB Requirements for Significant Guidance

We found that agencies did not always adhere to OMB requirements for significant guidance. The OMB Final Bulletin for Agency Good Guidance Practices establishes standard elements that must be included in significant guidance documents and directs agencies to (1) develop written procedures for the approval of significant guidance, (2) maintain a website to assist the public in locating significant guidance documents, and (3) provide a means for the public to submit comments on significant guidance through their websites. Education and USDA had written procedures for the approval of significant guidance as directed by OMB. While DOL had written approval procedures, they were not available to the appropriate officials, and DOL officials noted that they required updating. HHS did not have any written procedures. We found that Education, USDA, and DOL consistently applied OMB's public access and feedback requirements for significant guidance, while HHS did not.

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<sup>13</sup>[GAO-15-368](#).



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We also found opportunities for agencies to improve access to their guidance.<sup>14</sup> In April 2015, we found that subagencies used different strategies to disseminate guidance and all relied primarily on posting the guidance on their websites.<sup>15</sup> USDA, DOL, and Education posted their significant guidance on a departmental website as directed by OMB; at that time HHS did not, but has since posted such a page on its website in response to our recommendation. On their websites, agencies used several approaches—including organizing guidance by audience or topic and highlighting new or outdated guidance—to facilitate access. However, we identified factors that hindered online access, including long lists of guidance and documents dispersed among multiple web pages.

Opportunities also exist for agencies to use the web metrics they already collect to improve how guidance can be accessed. All agencies and their subagencies that we studied collected web metrics, and many used them to evaluate online guidance dissemination. However, many of these subagencies did not use metrics to improve how they disseminated guidance through their websites. Beyond their websites, subagencies found other ways to disseminate and obtain feedback on issued guidance, including focus groups, surveys, and direct feedback from the public at conferences, webinars, and from monitoring visits.

#### Application of Internal Controls for Guidance Processes

For guidance that does not meet OMB's definition of significant, we found opportunities for agencies to improve guidance development, review, evaluation, and dissemination processes by strengthening their adherence to internal controls. Wider adoption of these practices could better ensure that agencies have internal controls in place to promote quality and consistency of their guidance development processes, and to ensure that guidance policies, processes, and practices achieve desired results, and prevent and detect errors. We recommended that agencies strengthen their application of internal controls to guidance practices by adopting practices, such as:

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<sup>14</sup>Our ability to access and find significant and nonsignificant guidance online varied. We reported in 2015 that agencies can use available guidelines, such as the Guidelines for Improving Digital Services developed by the federal Digital Services Advisory Group, to help them improve their communications and interactions with customers on their websites.

<sup>15</sup>While all components told us they relied primarily on their websites to disseminate guidance, they also used many other dissemination methods, including email and listservs, meetings, social media, and external partners.

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- **Determining Appropriate Level of Review to Manage Risk:** Most subagencies in our study managed risk by determining appropriate levels of review. Agencies face multiple risks when going through the guidance production process, such as legal challenges that issued guidance is asserting binding requirements without having gone through the rulemaking process. Agencies can manage risk by involving agency management in decisions to initiate guidance, prioritize among proposed guidance, and determine the appropriate level of review prior to issuance.
  - **Maintaining Written Policies and Procedures for the Production of Nonsignificant Guidance:** Most subagencies we reviewed did not have written procedures for the production of non-significant guidance. Written procedures for guidance initiation, development, and review help ensure that actions are taken to address risks and enforce management's directives when an agency is developing regulatory guidance. Documented procedures are an important internal control activity to help ensure that officials understand how to adequately review guidance before issuance.
  - **Ensuring Communication during the Guidance Development and Review Process:** Most subagencies we reviewed had methods to ensure communication during the guidance development and review process. Communication procedures provide an opportunity for subagencies to get feedback from agency management, other federal agencies, and the public before the guidance issues. For example, officials told us that they conferred with other affected subagencies or federal departments to ensure consistency of their guidance during the development of guidance.
  - **Regularly Evaluating Whether Issued Guidance is Effective and Up to Date:** Almost half of the subagencies we reviewed regularly evaluated whether issued guidance was effective and up-to-date. Agencies benefit from procedures to continually reassess and improve guidance processes. Without a regular review of issued guidance, agencies can miss the opportunity to revisit whether current guidance could be improved and thereby provide better assistance to regulated entities and grantees.

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## Compliance with the Congressional Review Act Could Be Strengthened

Prior studies have indicated that agencies typically issue a larger number of regulations during the transition from the end of one presidential administration to the beginning of the next administration, relative to comparable periods earlier in the administration, a phenomenon often referred to as “midnight rulemaking.”<sup>16</sup> The Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015 included a provision requiring us to review final significant regulations promulgated by executive departments during the 120-day presidential transition periods (September 23 through January 20) at the end of Presidents Clinton, Bush, and Obama’s administrations and compare them to each other and to regulations issued during the same 120-day period in nontransition years since 1996. Among other objectives, we assessed the extent to which there was variation in (1) the number of regulations and their characteristics, such as the types of rulemaking procedures agencies used; and (2) agencies’ reported compliance with procedural requirements for promulgating the regulations, such as requirements in the Congressional Review Act (CRA).<sup>17</sup> CRA was enacted to better ensure that Congress has an opportunity to review and possibly disapprove regulations, in certain cases, before they take effect.

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<sup>16</sup>The Congressional Research Service, “Midnight Rulemaking: Background and Options for Congress,” (Washington, D.C.: Oct. 4, 2016). In 2012, a report on this topic was prepared for the consideration of the Administrative Conference of the United States: Jack M. Beermann, *Midnight Rules: A Reform Agenda*, Administrative Conference of the United States, May 14, 2012.

<sup>17</sup>Pub. L. No. 114-136, § 5 130 Stat. 301, 307–308 (2016). We did not include rulemaking by independent regulatory agencies that are not under the direct control of the President.

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## Agencies Published More Economically Significant and Significant Final Regulations and Provided More Opportunity for Public Participation

During the transition periods at the end of each of the three administrations we reviewed, agencies published more economically significant and significant final regulations relative to comparable time periods earlier in each administration (see figures 2 and 3).<sup>18</sup> In particular, the Clinton, Bush, and Obama administrations published on average roughly 2.5 times more economically significant regulations during transition periods than during nontransition periods. But agencies more often, relative to nontransition periods, provided the public an opportunity to influence the development of the transition-period regulations by providing advanced notice of their issuance in the Unified Agenda, and opportunities to comment on proposed regulations before they were finalized.<sup>19</sup>

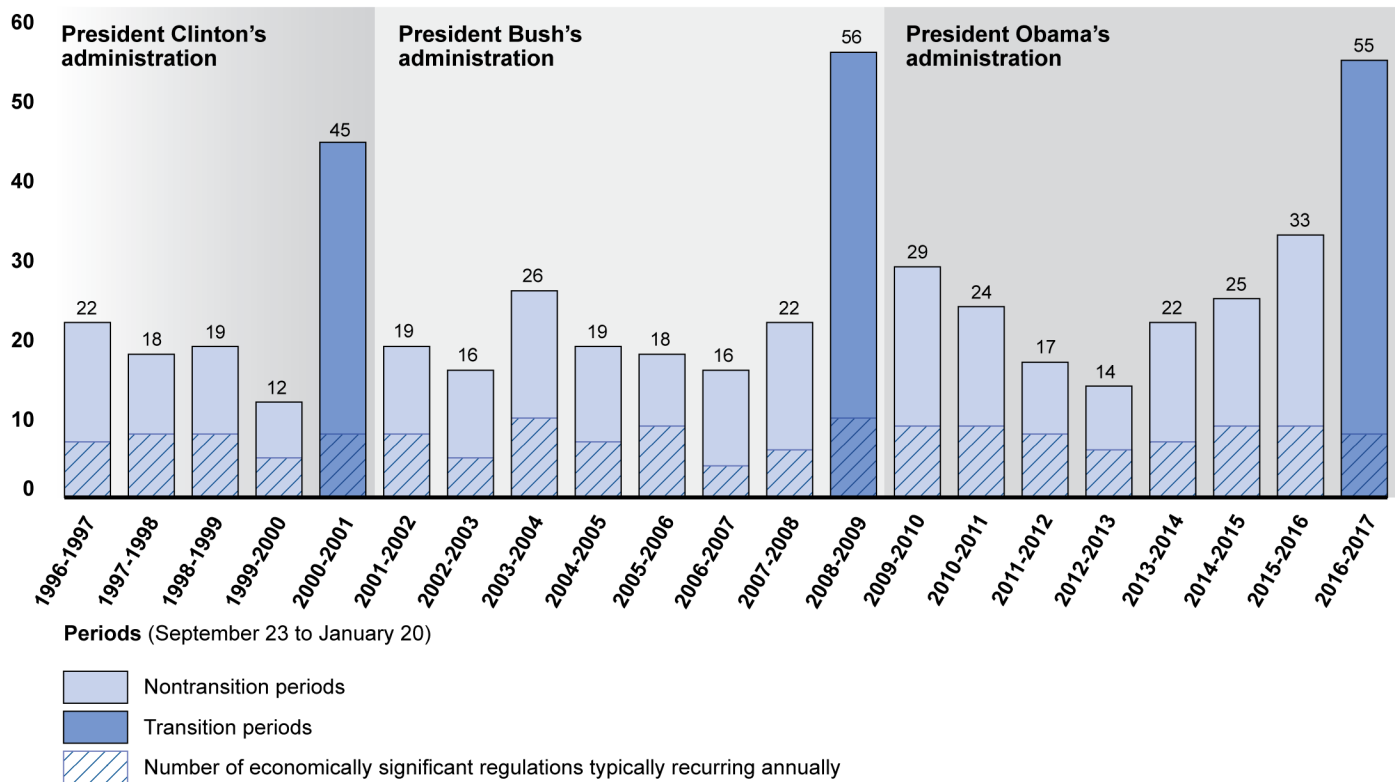
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<sup>18</sup>Under Executive Order 12866, OMB reviews significant proposed and final rules from agencies, other than independent regulatory agencies, before they are published in the *Federal Register*. The order defines significant regulatory actions as those that: (1) have an annual 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 the executive order. For the purposes of [GAO-18-183](#) and this statement, we differentiate between the results for "economically significant" regulations (criterion 1 above, i.e., generally those with annual economic effects greater than \$100 million) and the results for other significant regulations (criteria 2-4 above). We refer to the latter category as "significant regulations." Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>19</sup>The semiannual Unified Agenda was established by Executive Order 12866 and provides uniform reporting of data on those regulatory and deregulatory activities under development or review throughout the federal government.

**Figure 2: Number of Final Economically Significant Regulations Published during Specified Presidential Transition and Nontransition Periods, 1996-2017**

Number of economically significant regulations published

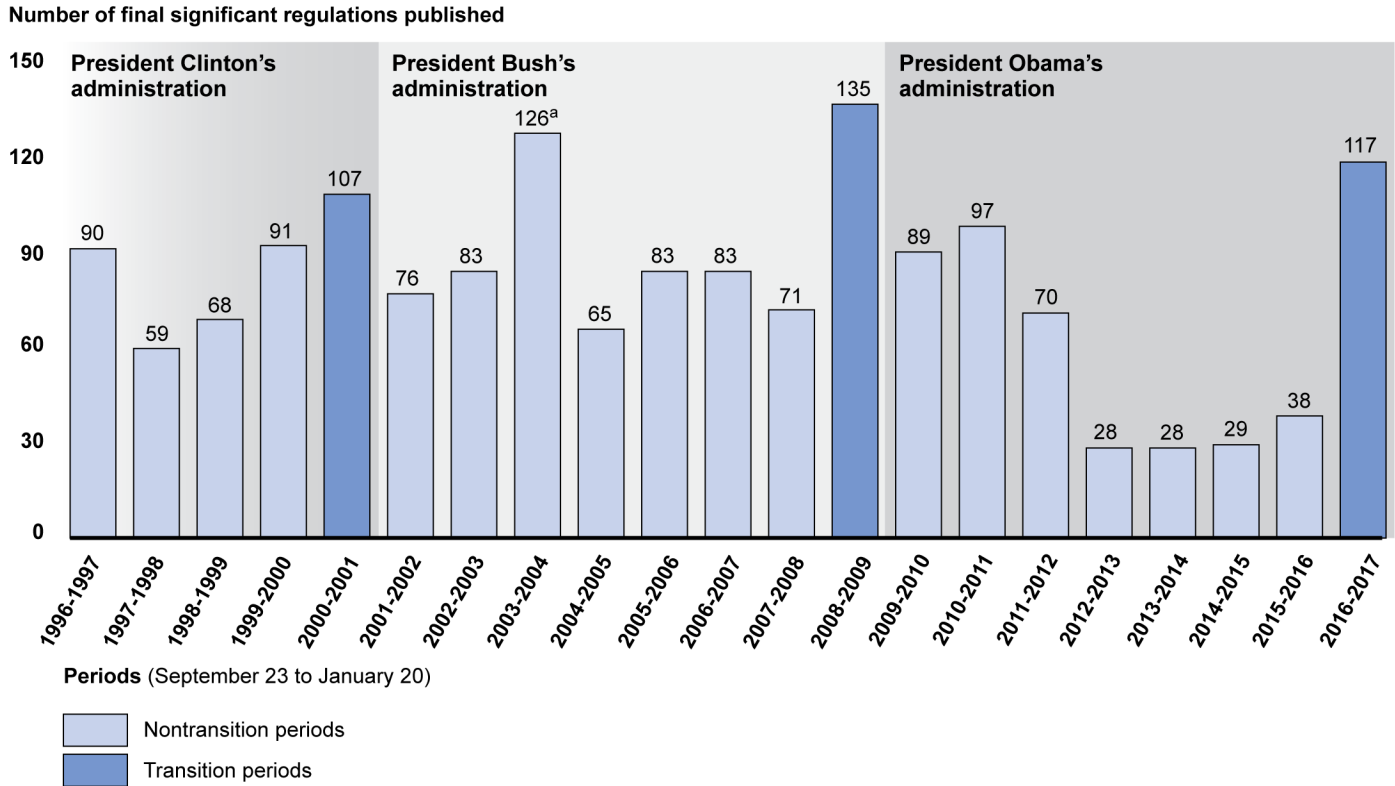


Source: GAO analysis of published regulations. | GAO-18-436T

Note: For the purposes of [GAO-18-183](#) and this statement, we differentiate between the results for “economically significant” regulations (i.e., generally those with annual economic effects greater than \$100 million) and the results for other significant regulations. Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

Agencies typically publish a subset of economically significant regulations every calendar year during the autumn and early winter months, irrespective of whether a President is preparing to leave office. For example, the Department of the Interior updated regulations concerning hunting for migratory birds on federal and tribal lands during 18 of the 21 periods reviewed.

**Figure 3: Number of Final Significant Regulations Published during Specified Presidential Transition and Nontransition Periods, 1996-2017**



Source: GAO analysis of data from Reginfo.gov on the number of draft significant regulations submitted to the Office of Information and Regulatory Affairs for review. | GAO-18-436T

Note: For the purposes of [GAO-18-183](#) and this statement, we differentiate between the results for “economically significant” regulations (i.e., generally those with annual economic effects greater than \$100 million) and the results for other significant regulations (defined as those that create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the executive order). Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

For the 2003-2004 period, 34 agencies submitted separate draft regulations to the Office of Information and Regulatory Affairs concerning government-wide debarment and suspension and requirements for drug-free workplaces. But these agencies published one final regulation on this topic. The OMB data we used for this figure counted this regulation 34 times instead of just once.

### Some Regulations Did Not Comply with the Congressional Review Act

In their published regulations, agencies generally reported complying with four of five procedural requirements for promulgating regulations during both transition and nontransition periods—the Regulatory Flexibility Act (RFA), the Small Business Regulatory Enforcement Fairness Act (SBREFA), the Paperwork Reduction Act (PRA), and the Unfunded

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Mandates Reform Act of 1995 (UMRA). These laws require agencies to consider the impact of regulations on small entities, impose additional requirements on the Environmental Protection Agency and the Occupational Safety and Health Administration to obtain input from small entities for rulemaking efforts that are expected to have a significant economic impact on a substantial number of small entities, require all agencies to minimize the burden on the public of information collections, and require agencies to prepare an assessment of the anticipated costs and benefits for any regulation that includes a federal mandate requiring nonfederal parties to expend resources without being provided funding to cover the costs, respectively.<sup>20</sup> Agencies reported complying for nearly all economically significant regulations and the majority of significant regulations with these four laws. Agencies less often complied with one or more CRA requirements.<sup>21</sup> Over 25 percent of economically significant regulations did not comply with the CRA (see figure 4). We estimated that 15 percent of significant regulations published across all periods reviewed failed to meet at least one of the CRA requirements we reviewed.

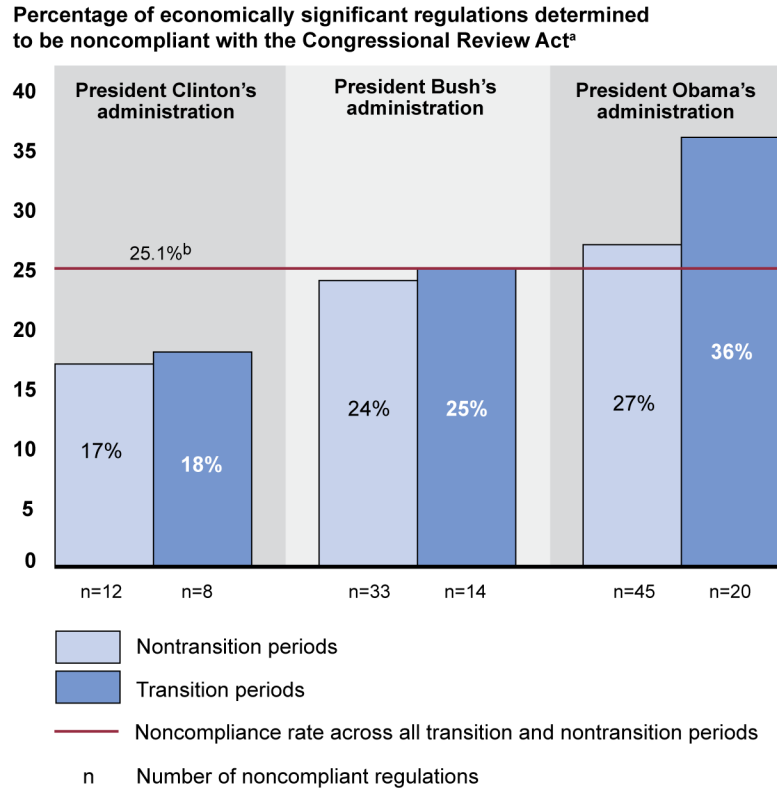
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<sup>20</sup>Later, the Dodd-Frank Wall Street Reform and Consumer Protection Act imposed the SBREFA requirement for obtaining input from small entities on the Consumer Financial Protection Bureau, an independent regulatory agency not covered in [GAO-18-183](#).

<sup>21</sup>CRA requires agencies to submit regulations to Congress and to us and to delay the effective date of certain regulations in order to provide Congress an opportunity to review and possibly disapprove of regulations before they become effective.



**Figure 4: Final Economically Significant Regulations Determined to be Noncompliant with the Congressional Review Act during Specified Presidential Transition and Nontransition Periods, 1996-2017**



Source: GAO analysis of published regulations, GAO major rule reports, and the *Congressional Record*. | GAO-18-436T

<sup>a</sup>The noncompliance rate across all three transition periods combined was 26.9 percent, compared to 24.3 percent during all nontransition periods combined.

<sup>b</sup>For the purposes of [GAO-18-183](#) and this statement, we differentiate between the results for “economically significant” regulations (i.e., generally those with annual economic effects greater than \$100 million) and the results for other significant regulations. Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

The most common CRA deficiency for economically significant regulations was agencies’ failure to provide Congress the required time to review and possibly disapprove regulations, which we had also identified as a deficiency in previous work.<sup>22</sup> Among the most active regulatory agencies for economically significant regulations, the Departments of

<sup>22</sup>GAO, *Congressional Review Act*, [GAO-08-268T](#) (Washington, D.C.: Nov. 6, 2007).

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Health and Human Services and Transportation had higher rates of noncompliance than the government-wide percentages for both the transition and nontransition periods we reviewed. However, noncompliance was not limited to these two agencies; 17 of the 23 agencies that published economically significant regulations during the periods we reviewed had at least one noncompliant regulation.<sup>23</sup>

Though agencies are responsible for complying with CRA, OMB is responsible under Executive Order 12866 for oversight of agencies' rulemaking, consistent with law, and reviews regulations before publication, which provides an opportunity to identify and help agencies avoid potential noncompliance. Economically significant regulations for which OMB completed its review within 3 months before the planned effective date were at high risk of not complying with CRA, thus increasing the risk that agencies would not provide Congress with the required time for its reviews. We recommended that OMB, as part of its regulatory review process, identify economically significant regulations at potential risk of not complying with CRA and work with agencies to ensure compliance. OMB staff did not take a position agreeing or disagreeing with the recommendation.

One of the common themes in our work over several decades is the need for transparency of the regulatory review process and opportunities for increasing public participation and congressional oversight. The potential effects of guidance underscore the need for consistent and well-understood processes for the development, review, dissemination, and evaluation of guidance. Further, we found that while there were increased opportunities for public participation for regulations promulgated at the end of Presidents' terms, there are increasing instances of noncompliance with delay requirements under the Congressional Review Act. Ensuring that agencies consistently provide Congress with the required time to review, and possibly disapprove regulations, is important throughout a President's term, and particularly following a presidential transition when Congress typically has a larger number of regulations to potentially review. Improvements made in transparency of the rulemaking process benefit not only the public, but congressional oversight.

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<sup>23</sup>See [GAO-18-183](#) for a more detailed discussion of the scope and methodology.

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Chairman Gowdy, Ranking Member Cummings, and Members of the Committee, 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.

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## GAO Contact and Staff Acknowledgments

For questions about this statement, please contact me at (202) 512-2660 or [nguyentt@gao.gov](mailto:nguyentt@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this testimony were Tim Bober, Tara Carter, Colleen Corcoran, Robert Cramer, Alix Edwards, Shirley A. Jones, Heather Krause, Barbara Lancaster, Michael O'Neill, and Andrew J. Stephens.

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