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April 16, 2020

Congressional Requesters

## Federal Rulemaking: Information on Selected Agencies' Management of Public Comments

Every year, federal agencies publish thousands of rules affecting various aspects of everyday life. To ensure the public has an opportunity to participate in the rulemaking process, the Administrative Procedure Act (APA) generally requires that agencies notify the public about, and solicit comments on, proposed regulations via a notice of proposed rulemaking in the *Federal Register*.<sup>1</sup> Agencies generally must also give consideration to relevant comments when drafting a final rule. Further, the E-Government Act of 2002 requires regulatory agencies, to the extent practicable, to ensure there is a website the public can use to comment on the numerous proposed regulations that affect them.<sup>2</sup>

While the existence of electronic comment platforms makes it easier for the public to participate in the rulemaking process, they may also make the comment process more susceptible to abuses, such as potentially fraudulent or threatening comments or high volumes of comments intended to flood platforms. According to the Administrative Conference of the United States, agencies, when confronted with large volumes of comments, face challenges in ensuring they adequately consider, analyze, and respond to the comments before finalizing their rules.<sup>3</sup>

You asked us to review the means by which federal agencies receive comments on proposed rulemakings. This report examines overarching questions related to (1) the public comment process at selected agencies and (2) subject matter expert and user groups' views on the transparency and usability of electronic comment platforms for receiving public comments. It addresses eight discrete questions—three questions related to the public comment process at

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<sup>1</sup>5 U.S.C. § 553.

<sup>2</sup>Pub. L. No. 107-347, § 206(c), (d), 116 Stat. 2899, 2916 (2002).

<sup>3</sup>The Administrative Conference of the United States is an independent federal agency comprised of representatives from the public and private sectors to recommend improvements to administrative process and procedure to promote efficiency, participation, and fairness in the promulgation of federal regulations and in the administration of federal programs.

the selected agencies and five questions related to the transparency and usability of selected agencies' electronic comment platforms used by selected agencies.

To address the eight questions, we reviewed the public comment process at 10 agencies that were previously selected as case studies for our June 2019 report on federal rulemaking.<sup>4</sup> Each of these agencies received a high volume of public comments during the course of rulemaking proceedings from January 1, 2013, through December 31, 2017, the most recent data available at that time.<sup>5</sup> The results of our work cannot be generalized to all agencies that receive public comments as part of rulemaking.

Our selection included eight agencies that use Regulations.gov as their online comment platform (participating agencies).<sup>6</sup> Our selection also included two agencies that operate agency-specific comment websites (nonparticipating agencies). We identified agencies based on the number of comments they received, as reported by Regulations.gov or the agency-specific comment sites. Six of the selected agencies are component agencies within a larger department, as indicated below. The selected agencies are as follows:

### **Participating Agencies**

- Bureau of Land Management, Department of the Interior;
- Centers for Medicare & Medicaid Services, Department of Health and Human Services;
- Consumer Financial Protection Bureau;
- Employee Benefits Security Administration, Department of Labor;
- Environmental Protection Agency;
- Fish and Wildlife Service, Department of the Interior;
- Food and Drug Administration, Department of Health and Human Services, and;
- Wage and Hour Division, Department of Labor.

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<sup>4</sup>Audit work for this report, including the selection of case study agencies, time frames, and survey administration, was conducted in conjunction with work for GAO, *Federal Rulemaking: Selected Agencies Should Clearly Communicate Procedures Associated with Identity Information in the Public Comment Process*, [GAO-19-483](#) (Washington, D.C.: June 26, 2019).

<sup>5</sup>We determined that the data from Regulations.gov are sufficiently reliable for the purposes of this report, to provide us with a relative comparison of comment volume between participating agencies. However, in working with these data, we found that, in some cases, the total numbers as reported by Regulations.gov do not accurately reflect the total number of comments submitted to an agency. Therefore, we are not including these total numbers in this report.

<sup>6</sup>As reported by Regulations.gov, the comments submitted to the eight participating agencies we selected represent more than 90 percent of all comments submitted to all agencies participating in Regulations.gov during the time period. Comparable figures were not available for nonparticipating agencies.

## **Nonparticipating Agencies**

- Federal Communications Commission (FCC); and
- Securities and Exchange Commission (SEC).

Within the 10 selected agencies, we identified 52 program offices with regulatory responsibilities that had issued at least one notice of proposed rulemaking from 2013 through 2017.

To assess the public comment process, we developed a survey questionnaire in conjunction with the work for our report on selected agencies' public comment posting practices and sent the program offices the questionnaires.<sup>7</sup> All 52 program offices responded to the questionnaire.

To determine the transparency and usability of the selected agencies' electronic comment platforms and websites, we interviewed five subject matter experts selected for their breadth of experience researching and reporting on issues related to the transparency and usability of Regulations.gov. We also spoke to representatives from three user groups of FCC's electronic comment platform and five user groups of SEC's rulemaking website to obtain information about their experiences accessing, navigating, and providing comments on these platforms. These user groups represent various associations and industry groups that are regular users of these platforms and comment on substantive issues related to their interest areas. We also interviewed a technology company that is a user of one of the platforms.

We identified these user groups through referrals from other subject matter experts and user groups we had interviewed. The information obtained from our interviews cannot be generalized across all subject matter experts and current and former users; however, it provides examples and perspectives on users' experiences with these platforms. We also interviewed relevant information technology officials from the eRulemaking Program Management Office (PMO), FCC, and SEC responsible for the three comment platforms within our scope.

We conducted this performance audit from July 2018 through April 2020 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our

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<sup>7</sup>For additional details about the survey of program offices, see [GAO-19-483](#).

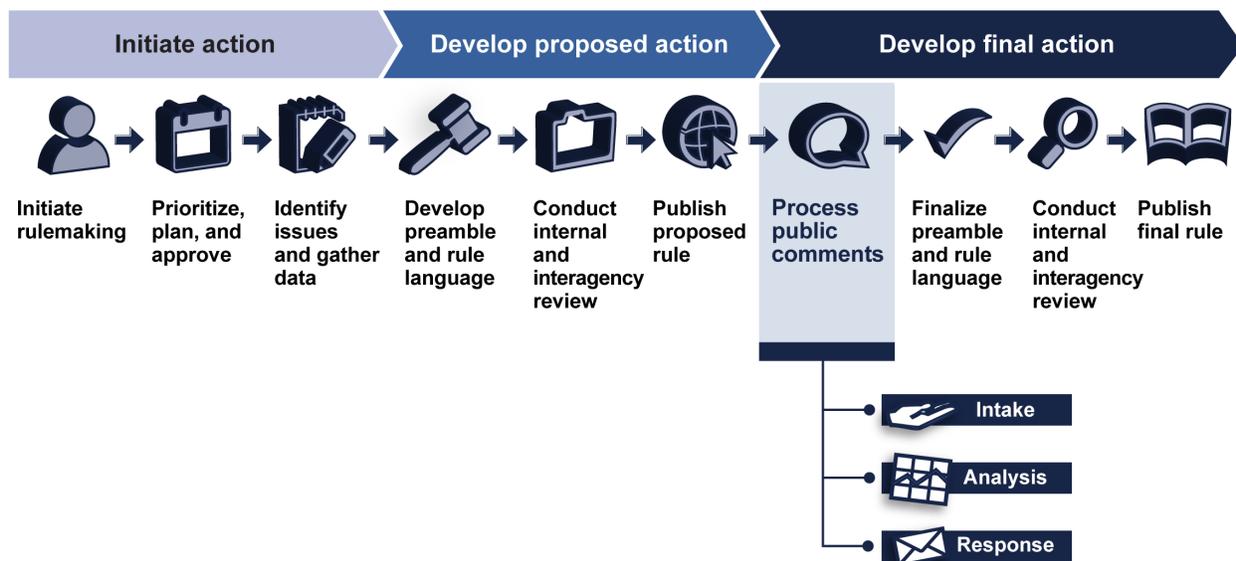
findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## The Public Comment Process

### 1. What is the public comment process under the APA and the E-Government Act of 2002?

The APA establishes procedures and broadly applicable federal requirements for informal rulemaking, also known as notice-and-comment rulemaking.<sup>8</sup> Among other things, the APA generally requires agencies to publish a notice of proposed rulemaking in the *Federal Register* and provide interested persons (commenters) an opportunity to comment on the proposed rule. Most agencies use notice-and-comment rulemaking. Agencies also have their own policies and practices for implementing APA procedures, which have evolved over time. Figure 1 provides an overview of the public comment process.

**Figure 1: The Rulemaking Public Comment Process under the Administrative Procedure Act**



Source: GAO. | GAO-20-383R

<sup>8</sup>15 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 5372, 7521. The APA was originally enacted into law in 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946). The APA describes two types of rulemaking, formal and informal. Formal rulemaking includes a trial-type “on-the-record” proceeding, when rules are required by statute to be made on the record after opportunity for an agency hearing. In such cases, requirements under sections 556–557 apply. Most federal agencies use the informal rulemaking procedures outlined in section 553, which include notice-and-comment rulemaking. The rulemaking process described in this report is informal rulemaking. In addition to the requirements under the APA, an agency may also need to comply with requirements related to rulemaking imposed by other statutes.

The comment process gives the public an opportunity to provide information to agencies on the potential effects of a rule or to suggest alternatives for agencies to consider. Agencies engage in three basic phases when processing public comments during the rulemaking process under the APA. First, they process comments submitted by the public, which may include identifying duplicate comments, posting comments to the agency's public website, and distributing comments to other agency staff. Second, agency staff analyze comments and consider all relevant and substantive comments and information that might prompt a change in the proposed rule. Third, agencies prepare responses to the comments in accordance with any applicable requirements and identify, as appropriate, rule revisions that may be made in response to the comments submitted to be included in the published final rule.

The E-Government Act of 2002 requires agencies, to the extent practical, to accept comments "by electronic means" and to make the public comments and other materials included in the official rulemaking docket (a folder for documents or other information related to an agency's rulemaking activities) available online.<sup>9</sup> To meet these requirements many of the participating agencies use the Federal Docket Management System (FDMS) and the public-facing Regulations.gov.

FDMS is a federal government-wide document management system structured by dockets (or file folders) that offer an adaptable solution to service a wide range of regulatory activities routinely performed by federal agencies. The public-facing website of FDMS is Regulations.gov, which is an interactive website that allows the public to comment on regulatory documents, review comments submitted by others, and access federal regulatory information. Other agencies provide their own agency-specific platforms. For example, FCC uses its Electronic Comment Filing System (ECFS), and SEC uses its agency website in lieu of a stand-alone comment platform.

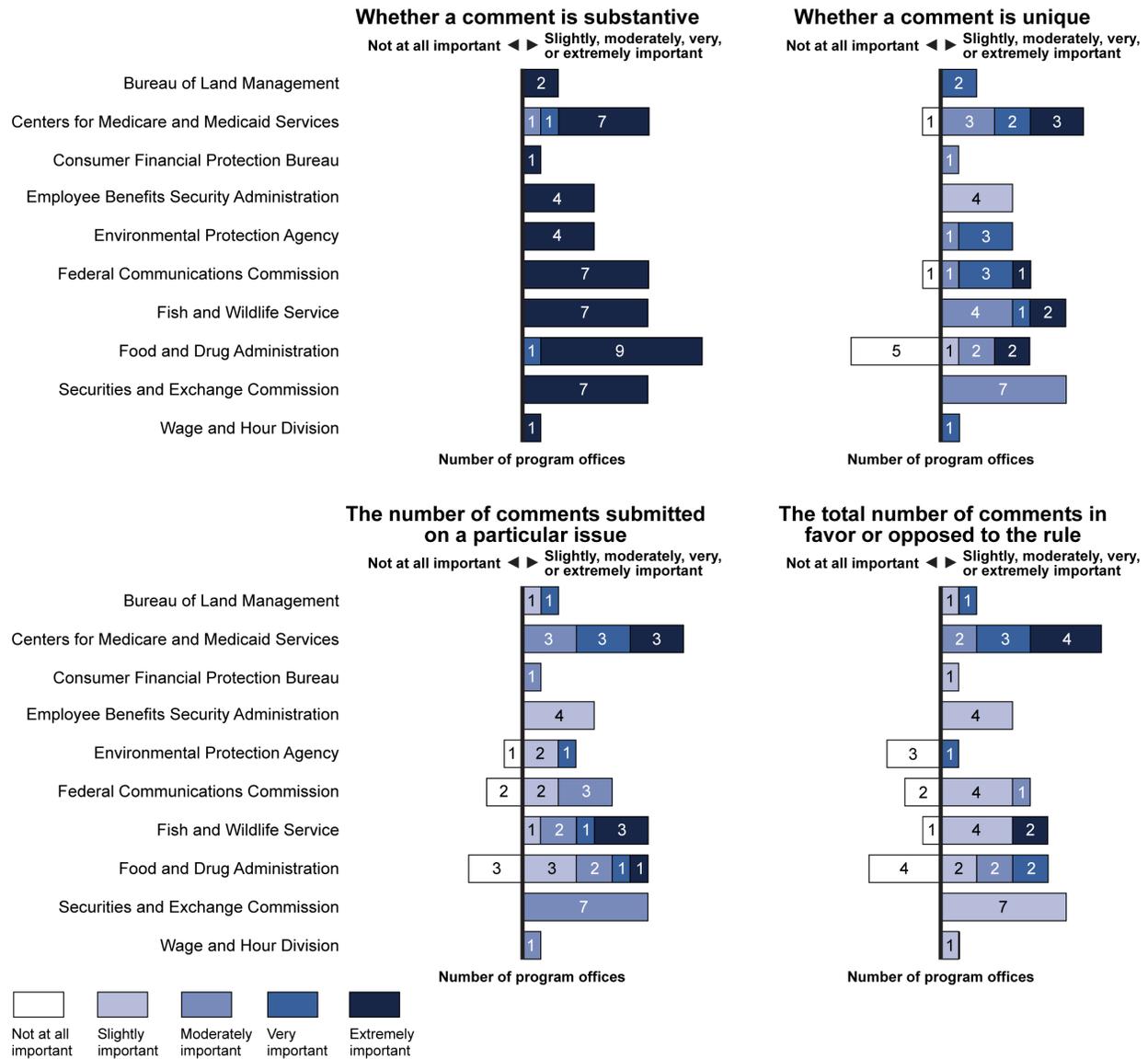
2. What information was important to the 52 program offices surveyed in their analysis of comments received on proposed rules?

The 52 program offices we surveyed rated the following information as being important for their analysis of public comments:

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<sup>9</sup>Pub. L. No. 107-347, § 206(c), (d), 116 Stat. 2899, 2916 (2002).

**Figure 2: Selected Agencies' Views on the Importance of Various Public Comment Elements to Comment Analysis from 2013 through 2017**



Note: One agency responded that the number of comments submitted on a particular issue can, among other things, help identify drafting or compliance concerns related to the rulemaking.

As part of the survey, we also asked the 52 program offices about the importance of the identity of an individual commenter and the importance of a commenter's organizational affiliation to their analysis. In our June 2019 report we stated that none of the program offices responded that the identity of an individual commenter was extremely important to their analysis. However,

at least one program office in each agency reported that both the identity of an individual commenter and the organizational affiliation of a commenter was at least slightly important.<sup>10</sup>

3. How frequently did the 52 program offices surveyed report that comments resulted in changes to final rules?

Forty-nine of the 52 program offices surveyed responded that public comments submitted from 2013 through 2017 resulted in at least some substantive changes to final rules. Twenty-four of the 49 program offices responded that those substantive changes—such as revisions to the environmental impact analysis, paperwork burden estimate, or compliance requirements—were made to “most or all” final rules promulgated during that period. The other 25 program offices reported material changes to “some” or “about half” of all final rules. This does not mean that every comment resulted in substantive changes.

**Views of Selected Subject Matter Experts and User Groups on the Transparency and Usability of Selected Agencies’ Electronic Comment Platforms**

4. What are the perspectives of selected subject matter experts on the transparency and usability of *Regulations.gov* for public users during the public comment process?

The Administrative Conference of the United States (ACUS) has raised concerns about challenges that members of the public interested in participating in the rulemaking process may have when interfacing with Regulations.gov.<sup>11</sup> Challenges raised by ACUS include the inability to (1) reliably search and find certain e-dockets and supporting material due to multiple e-dockets for the same rulemaking; (2) reliably use advanced search filters that were not specific enough to provide desired results; or (3) find relevant materials because they were not always contained in the e-dockets.

Subject matter experts we spoke with told us one of the most significant challenges with Regulations.gov includes the existence of multiple e-dockets for a single rule or, conversely, multiple rulemaking actions under a single e-docket. Further, inconsistent naming conventions for supporting materials may also lead to inefficiencies in the way information is organized and categorized. In addition, we previously reported that agencies’ practices for posting identity information during the comment intake process, particularly regarding posting duplicate

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<sup>10</sup>GAO-19-483 for additional details on the survey results.

<sup>11</sup>Administrative Conference of the United States, *Regulations.gov and the Federal Docket Management System*, (Dec. 1, 2018).

comments, are not always documented or clearly communicated to public users of the websites.<sup>12</sup>

5. What has the eRulemaking Program Management Office done to address any identified challenges related to the transparency and usability of *Regulations.gov*?

Program Management Office (PMO) officials told us they are working to modernize Regulations.gov. As part of that, they said they are considering input from ACUS and other subject matter experts. According to officials, in July 2019, while the eRulemaking PMO was housed at the Environmental Protection Agency (EPA), it launched a new Regulations.gov beta website to improve its software and functionality. Officials said this effort was intended to maintain the website's continuity, help it avoid obsolescence, improve its security, and provide capacity for improvements to user experience.<sup>13</sup>

The PMO is also working to upgrade FDMS. According to PMO officials, the system operates on outdated software and has limited capacity because it was not designed to meet the varied needs of the participating agencies. Officials told us a key priority of this effort is to ensure continuity of service by upgrading FDMS with new software.

In September 2019, the General Services Administration (GSA) took over as managing partner of the PMO from EPA. According to GSA and PMO officials, they plan to initiate a modernization assessment for Regulations.gov in fiscal year 2020 to explore new functionalities, services, and ways to better integrate and share regulatory information across multiple platforms. They said they are considering options to integrate the eRulemaking system (Regulations.gov and FDMS) with other regulatory systems, such as Reginfo.gov. In addition, officials said they plan to incorporate feedback from public users to further improve the platform's usability and enhance its data analytics capabilities.

According to officials, a high-level roadmap for modernization will not be available until the summer of calendar year 2020. Therefore it is too early to determine the outcomes of the modernization effort.

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<sup>12</sup>[GAO-19-483](#).

<sup>13</sup>According to officials, the current Regulations.gov site will be decommissioned and the new site will be in full use by September 2020.

6. What are the perspectives of selected user groups on the transparency and usability of FCC's Electronic Comment Filing System for public users during the public comment process?

The three Electronic Comment Filing System (ECFS) user groups that we spoke with told us that they generally find the platform easy to access and use for submitting comments on proposed rules. However, they said it can be difficult to navigate the platform because the search function is challenging to use and does not provide relevant or targeted results. While ECFS allows users to focus searches to particular categories of documents, officials from two of these user groups said that it is not always clear what some of these categories mean because they are not defined which can make it challenging to determine how best to search for materials.

According to agency officials, FCC is working to replace ECFS with a new system, beginning with a discovery phase which involves, among other things, identifying system requirements that will help FCC improve the security and functionality of the platform.

In February 2020, officials said they had developed system requirements and were obtaining leadership approval for them. After the discovery phase, FCC will move to an implementation phase, which will include awarding a contract for the project, developing and implementing the new system, and going live with the new system. Officials previously told us they expected the new system would be completed by April 2020; however, FCC pushed the deadline back and officials could not provide updated time frames for completion.

7. What are the perspectives of selected user groups on the transparency and usability of SEC's website for public users during the public comment process?

While the five SEC user groups we spoke with told us they could generally access the website and submit comments, they identified some challenges that impede usability. Four of the five user groups we spoke with said it can be difficult to find relevant rulemaking materials and to track them over the full life cycle of a given rule because rulemaking materials, comments, proposed rules, and final rules are not consistently linked to each other.

Moreover, officials from one user group said that it is not always clear when final rules are modified, and modified rules can be difficult to find. According to officials from this group, users can have difficulty understanding and complying with their regulatory obligations if they cannot be certain they have access to a complete rulemaking record, including any modifications to final rules.

In addition, four user groups told us that the website does not allow for advanced searching with multiple parameters, which also makes it difficult to find rulemaking materials. Officials from one of these groups said that, despite accessing SEC's rulemaking website every day, they are often unable to locate materials using SEC's search function, or it can take a long time to do so. They said they sometimes use Google instead, which generally yields better results.

SEC officials told us they developed the *Rulemaking Index* in 2015 to help users find relevant rulemaking materials and track them over the lifecycle of a rule. Officials said the *Rulemaking Index* allows users to view proposed rules, final rules, and other actions related to a particular rulemaking and sort them by various parameters.

We also reported in 2019 that, while SEC followed standardized posting processes associated with public comments submitted to its comment system, it had not clearly communicated these practices to the public. We recommended SEC develop a policy for posting duplicate comments and associated identity information and clearly communicate it to the public on the SEC website.<sup>14</sup> SEC has completed actions that are responsive to the recommendation.<sup>15</sup>

8. To what extent are the eRulemaking PMO, FCC, and SEC soliciting feedback and making changes to the platforms based on feedback they receive?

GSA and PMO officials said they are planning to engage more with public users and agencies that participate in Regulations.gov to improve usability. In January 2020, the PMO held a public meeting on the rise of mass and fake comments on federal rulemakings to obtain public users' input and sought public comment on the modernization of Regulations.gov via a notice in the *Federal Register* in late December of 2019. Officials also told us they had surveyed agencies that participate in Regulations.gov and are planning another public meeting on data analytics in May 2020. Officials said they plan to continue gathering feedback on Regulations.gov and FDMS from users to inform the modernization of the platform.

FCC officials said that as part of the ECFS replacement they solicited feedback from public users of the platform during a series of roundtable discussions. According to FCC officials, three

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<sup>14</sup>[GAO-19-483](#).

<sup>15</sup>In September 2019, SEC issued a memorandum that reflects SEC's internal policies for posting duplicate comments and associated identity information. SEC has also communicated these policies to public users on the SEC.gov website by adding a disclaimer on the main comment posting page that describes how the agency posts comments. These measures will help public users better determine whether and how they can use the data associated with public comments.

roundtable discussions were completed in November 2019. Officials said they incorporated user feedback from these sessions into the development of system requirements for the ECFS update. In addition, SEC officials told us the rulemaking website routinely surveys visitors about its usability, and surveyed users are asked to provide feedback on the site's organization, navigability, and completeness.

### **Agency Comments and Third Party Views**

We provided a draft of this correspondence to the Consumer Financial Protection Bureau, Departments of Health and Human Services, the Interior, and Labor; Environmental Protection Agency; Federal Communications Commission; General Services Administration; and Securities and Exchange Commission for comments. The Consumer Financial Protection Bureau, Departments of Health and Human Services, the Interior, and Labor; Environmental Protection Agency; Federal Communications Commission; and Securities and Exchange Commission agreed with the draft. The General Services Administration neither agreed nor disagreed. We also received technical comments from the Department of Labor, the Consumer Financial Protection Bureau, the Federal Communications Commission, and the General Services Administration which we review and addressed in this correspondence as appropriate.

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As arranged with your offices, unless you publicly announce the contents of this correspondence earlier, we plan no further distribution until 30 days from the correspondence date. At that time, we will send copies of this correspondence to the appropriate congressional committees; the Director of the Consumer Financial Protection Bureau; the Administrators of the Environmental Protection Agency and General Services Administration; the Chairmen of the Federal Communications Commission and Securities and Exchange Commission; and the Secretaries of Health and Human Services, Interior, and Labor, and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>. If you or your staffs have questions about this report, please contact Triana McNeil at (202) 512-6806 ([McNeilT@gao.gov](mailto:McNeilT@gao.gov)). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report.



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