

Why GAO Did This Study

Agencies publish thousands of rules each year, with significant benefits and costs. Before issuing a final rule, agencies are generally required to publish an NPRM in the *Federal Register*. Agencies must then respond to public comments when issuing final rules. Agencies may use exceptions in certain circumstances to forgo this NPRM process to expedite rulemaking. The Office of Management and Budget (OMB) has authority to provide guidance on regulatory issues. GAO was asked to provide information on the rulemaking process. This report addresses (1) how often agencies issued final rules without an NPRM; (2) which exceptions agencies used to do this; and (3) whether agencies took certain actions when issuing major rules without an NPRM, including voluntarily requesting and responding to public comments. GAO reviewed a generalizable random sample of 1,338 final rules published during calendar years 2003 through 2010. The sample contained rules by 52 agencies, including all cabinet departments issuing regulations. GAO completed more detailed analyses of 123 major rules without an NPRM, including every such rule published from 2007 through 2010, to obtain additional information to answer the objectives.

What GAO Recommends

GAO recommends that OMB issue guidance to encourage agencies to respond to comments on final major rules, for which the agency has discretion, that are issued without a prior NPRM. OMB disagreed that guidance would offer substantial benefits. GAO believes the recommendation remains valid, as further discussed in the report.

FEDERAL RULEMAKING

Agencies Could Take Additional Steps to Respond to Public Comments

What GAO Found

Agencies did not publish a notice of proposed rulemaking (NPRM), enabling the public to comment on a proposed rule, for about 35 percent of major rules and about 44 percent of nonmajor rules published during 2003 through 2010. A major rule has significant economic impact and may, for example, have an annual effect on the economy of \$100 million or more. Agencies published a total of 568 major rules from 2003 through 2010. Agencies also published about 30,000 nonmajor rules during this period, which have less economic significance and can involve routine administrative issues.

Agencies frequently cited the “good cause” exception and other statutory exceptions for publishing final rules without an NPRM. Agencies in GAO’s sample used the “good cause” exception for 77 percent of major rules and 61 percent of nonmajor rules published without an NPRM. Agencies may use the good cause exception when they find that notice and comment procedures are “impracticable, unnecessary, or contrary to the public interest.” In practice, agencies may find an NPRM “impracticable” when the rule must be issued by a statutory deadline, “unnecessary” when the rule pertains to technical corrections, and “contrary to the public interest” in an emergency situation. To a lesser extent, agencies also used other statutory exceptions to issue a rule without an NPRM. For example, in 84 of the 123 major rules that GAO analyzed, agencies described circumstances in which a statute: (1) either required or authorized them to issue the rule without an NPRM, (2) prescribed the content of the rule, or (3) set a deadline for a rule or program which the agency stated did not allow sufficient time to issue an NPRM.

GAO found that agencies, though not required, often requested comments on major final rules issued without an NPRM, but they did not always respond to the comments received. Agencies may solicit comments through the *Federal Register* when publishing a final rule without an NPRM, but the public does not have an opportunity to comment before the rule’s issuance, nor is the agency obligated to respond to comments it has received. For example, agencies requested comments on 77 of the 123 major rules issued without an NPRM in GAO’s sample. The agencies did not issue a follow-up rule or respond to comments on 26 of these 77 rules. This is a missed opportunity, because GAO found that when agencies did respond to public comments they often made changes to improve the rules. In addition, each of these 26 rules is economically significant and some of these rules have an impact of a billion dollars a year or more. These rules also cover important issues ranging from national health care policies to manufacturing incentive programs. For example, in one of the 26 rules, an agency defined a pre-existing condition to implement the Patient Protection and Affordable Care Act and sought public comment. The agency received 4,627 comments, but has not published a response to them. When agencies do not respond to comments requested, the public does not know whether the agency considered their comments, or if it intends to change the rule. As the courts have recognized, the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.