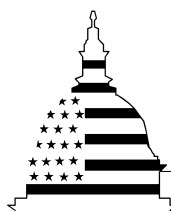


September 2003

RULEMAKING

OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews



G A O

Accountability * Integrity * Reliability



Highlights of [GAO-03-929](#), a report to congressional requesters

Why GAO Did This Study

Under Executive Order 12866, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) reviews hundreds of agency rules each year before they are published in the *Federal Register*. Those reviews can have a significant effect on a broad array of public policies. GAO was asked to (1) describe OIRA's review process and any changes in its policies or processes in recent years, (2) provide detailed information about rules submitted by nine health, safety, or environmental agencies that were returned, withdrawn, or changed at OIRA's suggestion, and (3) describe how OIRA decided that certain existing rules merited high priority review.

What GAO Recommends

GAO recommends that the OMB Director build on recent improvements that have been made in the transparency of the OIRA review process. In particular, GAO recommends that agencies be instructed to document substantive changes made at OIRA's suggestion to draft rules submitted for review whenever they occur, not just changes that OIRA recommended during formal reviews.

OMB said the factual foundations of our report were well grounded but disagreed with most of our recommendations, saying that the report had not demonstrated the need or desirability of changing the agency's existing level of transparency.

www.gao.gov/cgi-bin/getrpt?GAO-03-929.

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

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What GAO Found

The formal process by which OIRA reviews agencies' proposed and final rules is essentially unchanged since Executive Order 12866 was issued in 1993. However, there have been several changes in OIRA's policies in recent years, including increased use of public letters explaining why rules were returned to the agencies and prompting the development of new rules, increased emphasis on economic analysis, stricter adherence to the 90-day time limit for OIRA review, and improvements in the transparency of the OIRA review process (although some elements of that process are still unclear). Underlying many of these changes is a shift in how recent OIRA administrators view the office's role in the rulemaking process—from "counselor" to "gatekeeper." OIRA sometimes reviews drafts of rules before they are formally submitted, and OIRA has said it can have its greatest influence on agencies' rules during this informal review period. However, OIRA contends that agencies need only document the changes made to rules during what are sometimes very brief formal review periods.

Because about 400 rules were changed, returned, or withdrawn during the 1-year period that GAO examined, the review focused on 85 rules from the nine health, safety, or environmental agencies with five or more such rules. OIRA significantly affected 25 of those 85 rules. The Environmental Protection Agency's rules were most often significantly changed, and almost all of the returned rules were from the Department of Transportation. OIRA's suggestions appeared to have at least some effect on almost all of the 25 rules' potential costs and benefits or the agencies' estimates of those costs and benefits. Outside parties contacted OIRA before or during its formal review regarding 11 of the 25 rules that OIRA significantly affected. In 7 of these 11 cases, at least some of OIRA's recommendations were similar to those of the outside parties, but we could not determine whether those contacts influenced OIRA's actions. The agencies' docket files did not always provide clear and complete documentation of the changes made during OIRA's review or at OIRA's suggestion, as required by the executive order. However, some agencies clearly documented these changes, sometimes including changes suggested during OIRA's informal reviews.

OIRA did not publicly disclose how it determined that 23 of the 71 rules nominated by the public for change or elimination in 2001 merited high priority review. As explained to GAO, OIRA desk officers made the initial determinations regarding issues with which they were familiar, subject to the approval by OIRA management. The Mercatus Center at George Mason University made most of the nominations overall and in the high priority group. Regulatory agencies or OIRA have at least begun to address the issues raised in many of the 23 suggestions. OIRA's 2002 nomination and review process was different from the 2001 process in several respects (e.g., broader request for reforms, more responses from more commentators, prioritization of the suggestions being made by the agencies, and clearer discussion of process and criteria).

proposed rule was “stale” (ID 82). (The rule was later published as an “interim final” rule to permit additional public comment without having to restart the rulemaking at the proposed rule stage.) The remaining two rules—an FDA proposed rule concerning dietary ingredients and supplements and a NHTSA rule on light truck fuel economy standards—were withdrawn solely at the initiative of the agency or its executive department (IDs 83 and 85). All five of the withdrawn rules that we examined were subsequently resubmitted to OIRA by the agencies and were later characterized by the office as consistent with the executive order.

Rules from FAA and EPA’s Office of Air and Radiation and Office of Water Were More Often Significantly Affected by OIRA

As table 3 shows, when the results for all the changed, returned, or withdrawn rules are combined, it is clear that the rules submitted by FAA and EPA’s Office of Air and Radiation and Office of Water were most often significantly affected by OIRA’s review. During the period covered by our review, about 56 percent of the rules from these agencies (20 of 36) were significantly affected. In contrast, only about 10 percent of the rules from the remaining six agencies (5 of 49) were significantly affected by OIRA’s review.

Table 3: Rules from FAA and EPA’s Office of Air and Radiation and Office of Water Were Most Often Significantly Affected by OIRA Review

Agency	Rules submitted to OIRA for executive order review		
	Total	Number	Percent
APHIS	13	2	15
FDA	9	0	0
OSHA	5	0	0
DOT-FAA	12	6	50
DOT-FMCSA	6	0	0
DOT-NHTSA	7	2	29
EPA-Office of Air and Radiation	15	7	47
EPA-Office of Solid Waste and Emergency Response	9	1	11
EPA-Office of Water	9	7	78
Total	85	25	29

Source: GAO analysis.

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