



# Congressional Review Act: Rules Not Submitted to GAO and Congress

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## Summary

The Congressional Review Act (CRA; 5 U.S.C. §§801-808) was enacted to improve congressional authority over agency rulemaking, and requires federal agencies to submit all of their final rules to both houses of Congress and the Government Accountability Office (GAO) before they can take effect. GAO periodically compares the list of rules that are submitted to it with the rules that are published in the *Federal Register* to determine whether any covered rules have not been submitted.

Between 1999 and 2009, GAO sent the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget at least five letters listing more than 1,000 substantive final rules that GAO said it had not received. In each of those letters, GAO encouraged OIRA to use the information to ensure that the agencies complied with the CRA. The most recent of these letters was sent to OIRA in May 2009, and listed 101 substantive rules that were published during FY2008 that GAO said had not been submitted. The missing rules were issued by different agencies, including the Departments of Agriculture, Commerce, Transportation, and Homeland Security. The topics covered by these rules varied, and included chemical facility anti-terrorism standards, designation of critical habitats for endangered species, the administration of direct farm loan programs, oil and gas lease operations, and changes to workplace drug and alcohol programs. As of October 26, 2009, 99 of the 101 rules had still not been submitted to GAO and to both houses of Congress. OIRA sent an e-mail to federal agencies in November 2009 telling them to contact GAO regarding these missing rules. In the following week, several of the rules were submitted to GAO, and more than a dozen other rules were submitted in the following month. Also, CRS determined that 22 significant rules that were published in the *Federal Register* between October 2008 and July 2009 were not listed in GAO's database as of mid-November 2009.

H.R. 2247, which was passed by the House of Representatives on June 16, 2009, and is currently before the Senate Committee on Homeland Security, would amend the CRA and eliminate the requirement that federal agencies submit their rules to Congress before they can take effect. The rules would still have to be submitted to GAO, and GAO would be required to submit to each house of Congress a weekly report containing a list of the rules received.

Congress may conclude that enactment of this legislation will improve agencies' ability and willingness to submit their covered rules, or that this is an administrative issue that should be resolved between GAO, OIRA, and the rulemaking agencies. Alternatively, Congress could require OIRA or GAO to take additional actions to ensure compliance with the CRA's reporting requirements. Congress could also require GAO to provide a copy of its CRA compliance reports to Congress, publish the reports in the *Federal Register*, or both.

This report will be updated to reflect subsequent legislative or other developments.

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## Introduction

On November 20, 2007, the Department of Homeland Security (DHS) published a final rule entitled “Appendix to Chemical Facility Anti-Terrorism Standards.”<sup>1</sup> Publication of this rule marked a significant step in a multi-year policy process that began in the wake of the terrorist attacks of September 11, 2001.<sup>2</sup> Section 550 of the Department of Homeland Security Appropriations Act of 2007 (P.L. 109-295, October 4, 2006) required the Secretary of DHS to issue final regulations establishing “risk-based performance standards for security of chemical facilities” by April 2007. In December 2006, DHS issued an advance notice of proposed rulemaking, which sought comment on a range of issues.<sup>3</sup> On April 9, 2007, DHS issued an interim final rule that required covered chemical facilities to prepare “security vulnerability assessments” and “site security plans” that satisfy the new risk-based performance standards.<sup>4</sup> The interim final rule went into effect on June 8, 2007, except for an appendix containing a tentative list of “chemicals of interest” (COIs). DHS took comments from the public on the list, and published the November 2007 rule making the list final. The final rule also, among other things, (1) adjusted the “screening threshold quantities” (STQs) for certain COIs; (2) defined the specific security issue or issues implicated by each COI, (3) established different STQs for COIs based upon the security issue presented, and (4) added provisions that instructed facilities on how to calculate the quantities of COIs that they have in their possession. DHS said that the changes in the appendix “will assist the Department in more precisely identifying facilities that may be designated as high risk, while reducing the burden on facilities that possess chemicals in smaller amounts.”<sup>5</sup>

The rule was published with an effective date of November 20, 2007, and has been implemented since that date.<sup>6</sup> However, DHS did not comply with a statutory provision commonly known as the Congressional Review Act (CRA; 5 U.S.C. §§801-808), which requires each federal agency to send its covered final rules to the Comptroller General at the Government Accountability Office (GAO) and to both houses of Congress “[b]efore [such rules] can take effect.”<sup>7</sup> As of

<sup>1</sup> U.S. Department of Homeland Security, “Appendix to Chemical Facility Anti-Terrorism Standards,” 72 *Federal Register* 65396, November 20, 2007.

<sup>2</sup> For detailed information on this issue, see CRS Report R40695, *Chemical Facility Security: Reauthorization, Policy Issues, and Options for Congress*, by Dana A. Shea.

<sup>3</sup> U.S. Department of Homeland Security, “Chemical Facility Anti-Terrorism Standards,” 71 *Federal Register* 78276, December 28, 2006.

<sup>4</sup> U.S. Department of Homeland Security, “Chemical Facility Anti-Terrorism Standards,” 72 *Federal Register* 17688, April 9, 2007.

<sup>5</sup> U.S. Department of Homeland Security, “Appendix to Chemical Facility Anti-Terrorism Standards,” 72 *Federal Register* 65396, November 20, 2007, p. 65396.

<sup>6</sup> For example, in an October 1, 2009, statement for the record provided to the Subcommittee on Energy and Environment, House Committee on Energy and Commerce, Rand Beers, Under Secretary for the National Protection and Programs Directorate said (pp. 4-5) “In May, the Department issued approximately 140 final tiering determination letters to the highest risk (Tier 1) facilities, confirming their high-risk status and initiating their 120-day time frame for submitting [a Site Security Plan, SSP]. In June and July, we notified approximately 826 facilities of their status as final Tier 2 facilities and the associated due dates for their SSPs. Most recently, on August 31, 2009, we notified approximately 137 facilities of their status as either a final Tier 1, 2, or 3 facility and the associated due dates for their respective SSPs. Following preliminary authorization of the SSPs, the Department expects to begin performing inspections in the first quarter of FY 2010, starting with the Tier 1-designated facilities.” To view a copy of this testimony, see [http://energycommerce.house.gov/Press\\_111/20091001/beers\\_testimony.pdf](http://energycommerce.house.gov/Press_111/20091001/beers_testimony.pdf).

<sup>7</sup> 5 USC §801(a)(1)(A).

November 20, 2009—two years after the rule was published—neither GAO nor Congress had received the rule.

This report discusses the CRA requirement that federal agencies send their final rules to GAO and Congress before they can take effect, and notes that agencies have not done so more than 1,000 times in recent years. It also discusses the legislative history of the act regarding CRA rule submission, describes current legislation related to this issue, and presents other options that Congress could consider.

## Background

The CRA was included as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA; Title II of P.L. 104-121, 5 U.S.C. §601 note), which was signed into law on March 29, 1996. The act established expedited legislative procedures (primarily in the Senate) by which Congress may disapprove agencies' final rules by enacting a joint resolution of disapproval. The enactment of the CRA was an attempt to reestablish a measure of congressional authority over rulemaking. As Senator Don Nickles, one of the sponsors of the legislation, said shortly after the CRA was enacted,

As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments. In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.<sup>8</sup>

As the first step in the congressional disapproval process, the CRA generally requires federal agencies to submit their covered final rules to both houses of Congress and GAO before they can take effect. Specifically, the first sentence of the CRA (Section 801(a)(1)(A)) states that,

Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.<sup>9</sup>

The CRA delays the effective dates of “major rules” even further—until 60 days after the date that the rules are published in the *Federal Register* or submitted to Congress, whichever is later.<sup>10</sup> The CRA defines a “major rule” as

any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an

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<sup>8</sup> Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3686 (daily ed. April 18, 1996), at 142 *Cong. Rec.* S3683.

<sup>9</sup> 5 U.S.C. §801 (a)(1)(A).

<sup>10</sup> 5 U.S.C. §801(a)(3).

annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

The CRA also states that all non-major rules “shall take effect as otherwise provided by law after submission to Congress under paragraph (1).”<sup>11</sup> However, Section 808 states that,

Notwithstanding section 801—(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or (2) 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.

The “good cause” language in the second category of rules refers to an exception to the notice and comment rulemaking requirement in the Administrative Procedure Act (APA), which allows agencies to publish final rules without previously seeking comments from the public on an earlier proposed rule.<sup>12</sup> Interim final and direct final rules are considered particular applications of the APA’s good cause exception.<sup>13</sup>

The issue of whether a court may prevent an agency from enforcing a covered rule that was not reported to Congress has not been resolved conclusively.<sup>14</sup>

## **Covered Rules**

Section 804(3) of the CRA generally defines a covered “rule” by referring to the definition in Section 551 of the APA, which says that a rule is

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or

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<sup>11</sup> 5 U.S.C. §801(a)(4).

<sup>12</sup> See 5 U.S.C. §553(b)(3)(B). When agencies use the good cause exception, the act requires that they explicitly say so and provide a rationale for the exception’s use when the rule is published in the *Federal Register*. A federal agency’s invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review.

<sup>13</sup> Direct final rulemaking involves agency publication of a rule in the *Federal Register* with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (e.g., 30 days). However, if an adverse comment is filed, the direct final rule is withdrawn and the agency may publish the rule as a proposed rule under normal notice and comment procedures. In interim final rulemaking, an agency issues a final rule without a prior notice of proposed rulemaking that is generally effective immediately, but with a post-promulgation opportunity for the public to comment. If the public comments persuade the agency that changes are needed in the interim final rule, the agency may revise the rule by publishing a final rule reflecting those changes.

<sup>14</sup> For an analysis of the legal uncertainty adhering to an agency’s failure to report a covered rule to Congress, see CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by Morton Rosenberg, pp. 28-34.

prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.<sup>15</sup>

The CRA does, however, exclude certain types of rules from its coverage:

(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.<sup>16</sup>

These limits notwithstanding, the scope of the CRA is extremely broad, including rules that are exempt from notice-and-comment rulemaking procedures (e.g., interpretive rules, statements of policy, and rules that are considered “proprietary” or that fall under the “military” or “foreign affairs” exemptions in the APA).<sup>17</sup> As noted in an earlier CRS report,

The legislative history of the CRA emphasizes that by adoption of the Section 551(4) definition of rule, the review process would not be limited only to coverage of rules required to comply with the notice and comment provisions of the APA or any other statutorily required variations of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: “The committee’s intent in these subsections is ... to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties.”<sup>18</sup>

## **Legislative History of the Rule Submission Requirement**

The limited contemporaneous legislative history of the CRA suggests that the drafters of the legislation intended that virtually all covered final rules be submitted to Congress before they could take effect. A key sponsor of the legislation, Representative David McIntosh, explained during the floor debate on the bill that would become the CRA (H.R. 3136 in the 104<sup>th</sup> Congress) that “Under Section 8(a)(1)(A), covered rules may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress.”<sup>19</sup> The same day, Senator Don Nickles, another sponsor of the bill, said that “Upon issuing a final rule, a Federal agency must send to Congress and GAO a report containing a copy of the rule.”<sup>20</sup>

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<sup>15</sup> 5 U.S.C. §551(4).

<sup>16</sup> 5 U.S.C. §804 (3)(A-C).

<sup>17</sup> Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 4<sup>th</sup> ed., (Chicago, IL: 2006), p. 187.

<sup>18</sup> CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by Morton Rosenberg, p. 21, quoting the joint statement of House and Senate sponsors, 142 *Cong. Rec.* E571 at E579, and 142 *Cong. Rec.* S3683 at S3687.

<sup>19</sup> 142 *Cong. Rec.* H3005 (daily ed. March 28, 1996).

<sup>20</sup> 142 *Cong. Rec.* S3120 (daily ed. March 28, 1996).

## Post-Enactment Joint Statement

Shortly after the CRA was enacted, the principal Senate and House sponsors of the bill published a joint statement in the Congressional Record providing a detailed explanation of the CRA's provisions and its legislative history. Senator Nickles explained that, because the legislation did not go through the committee process, virtually "no other expression of its legislative history exists." He went on to say that "[t]his joint statement is intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms."<sup>21</sup> (The Justice Department has suggested that such post-enactment legislative history should not carry any weight.<sup>22</sup> Similarly, the Supreme Court has said that "less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment."<sup>23</sup> On the other hand, the Supreme Court has also described post-enactment statements by legislative sponsors as an "authoritative guide to the statute's construction."<sup>24</sup>)

With regard to the rule submission requirement in the CRA, the sponsors' joint statement said that "any covered rule not submitted to Congress and the Comptroller General will remain ineffective until it is submitted pursuant to subsection 801(a)(1)(A)."<sup>25</sup> The only exception to this requirement was in Section 808 of the act, which says that certain rules (i.e., rules related to hunting, fishing, and camping, and for which the agency invokes the "good cause" exception to notice and comment) can take effect when the promulgating agency determines. The joint statement said that even these rules must be submitted to GAO and Congress "as soon as practicable after promulgation," and the congressional review period would not begin until they are submitted.

Section 805 of the CRA states that "No determination, finding, action, or omission under this chapter shall be subject to judicial review." The joint statement said that this provision meant that "the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter." The joint statement went on to say that "The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3)."<sup>26</sup>

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<sup>21</sup> Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* E571, at E577 (daily ed. April 19, 1996); 142 *Cong. Rec.* S3683, at S3686 (daily ed. April 18, 1996), at 142 *Cong. Rec.* S3683.

<sup>22</sup> See letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at 10 n.14.

<sup>23</sup> *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102 (1980). In this case, the "subsequent legislative history" was a conference report for legislation that was being considered after the enactment of an earlier statute.

<sup>24</sup> See, for example, *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982) (citing a bill summary placed in the Congressional Record by the bill's sponsor after passage, and explanatory remarks made two years later by the same sponsor); *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190, 211 n. 23 (1983) (relying on a 1965 explanation by "an important figure in the drafting of the 1957 [Atomic Energy Act]"); and *Grove City College v. Bell*, 465 U.S. 555, 567 (1984) (remarks of sponsors deemed authoritative when they are consistent with the language of the legislation).

<sup>25</sup> Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3684 (daily ed. April 18, 1996).

<sup>26</sup> *Ibid.*, at S3686.



## OMB Guidance on the Rule Submission Requirements

In 1998, as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, Congress directed the Office of Management and Budget (OMB) to issue guidance on certain requirements in the CRA, including the requirements in Section 801(a)(1) regarding the submission of rules.<sup>27</sup> On January 12, 1999, the Director of OMB issued a memorandum to the heads of federal departments and agencies on “Submission of Rules under the Congressional Review Act” in which he noted that the CRA requires agencies to submit each new final rule to both houses of Congress and to GAO “before the rule can take effect.”<sup>28</sup> The memorandum also included a form that OMB and GAO developed to facilitate the submission of agency rules.

On March 30, 1999, the OMB Director issued another memorandum to the heads of federal departments and agencies on “Guidance for Implementing the Congressional Review Act.”<sup>29</sup> In that guidance, OMB said that “In order for a rule to take effect, you must submit a report to each House of Congress and GAO containing the following: a copy of the rule; a concise general statement related to the rule, including whether the rule is a ‘major rule;’ and the proposed effective date of the rule.” According to OMB, this guidance is still in effect.<sup>30</sup>

Also included in the March 1999 OMB guidance was a modified version of the rule submission form previously provided to the agencies.<sup>31</sup> Among other things, the current version of the form asks agencies to identify the priority level of each rule—i.e., whether it is (1) “economically significant,” “significant,” or “substantive”; or is (2) “routine and frequent” or “informational/administrative” in nature.<sup>32</sup> The form also asks agencies to identify whether or not each rule is a “major rule” as that term is defined in the CRA. When agencies submit rules to GAO, GAO enters them into a publicly available database that it maintains on its website.<sup>33</sup> As of September 30, 2009, GAO said it had received a total of 52,708 final rules since the CRA was enacted, of which 865 were considered “major” rules.<sup>34</sup>

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<sup>27</sup> P.L. 105-277, 112 Stat. 2681-495, October 21, 1998.

<sup>28</sup> OMB Memorandum M-99-07, January 12, 1999, available from the author.

<sup>29</sup> OMB Memorandum M-99-13, March 30, 1999, available from the author.

<sup>30</sup> E-mail from Steven D. Aitken, Deputy General Counsel, OMB, November 9, 2009, available from the author.

<sup>31</sup> The current GAO rule submission form is available at <http://www.gao.gov/decisions/majrule/fedrule2.pdf>.

<sup>32</sup> Executive Order 12866 defines a “significant” regulatory action as any such action “that is likely to result in a rule that may: 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; 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 this Executive order.” “Economically significant” rules meet the first of these four criteria. “Substantive” rules are defined in the Unified Agenda of Federal Regulatory and Deregulatory Actions as rules that are not “significant,” but also not routine and frequent or informational in nature.

<sup>33</sup> The GAO rules database can be accessed at <http://www.gao.gov/fedrules/>.

<sup>34</sup> E-mail from Sabrina Streagle, GAO Office of the General Counsel, October 6, 2009. GAO’s database indicates that GAO had received a total of 46,992 rules as of September 30, 2009, but GAO said that about 5,700 rules were received before the database was established.

## GAO Opinion on the CRA and the Effective Date of a Rule

GAO has said on numerous occasions that covered rules cannot take effect until the rules are submitted to it and to both houses of Congress, and GAO has provided Congress with at least nine legal opinions regarding whether certain agency actions constitute covered rules.<sup>35</sup> Although GAO has not provided Congress with a legal opinion regarding whether a particular missing non-major rule could take effect, the agency has provided at least one legal opinion regarding when a major rule can take effect. On January 18, 2002, the Centers for Medicare and Medicaid Services within the Department of Health and Human Services (HHS) published a final rule in the *Federal Register* entitled “Medicaid Program; Modification of the Medicaid Upper Payment Limit for Non-State Government-Owned or Operated Hospitals,” which was scheduled to take effect on March 19, 2002.<sup>36</sup> However, the House of Representatives did not receive the rule until February 14, 2002, and the Senate did not receive the rule until March 15, 2002. Because the rule was considered a major rule, the CRA says it could not take effect for 60 days from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later.<sup>37</sup> Therefore, by setting the effective date for March 19, 2002, the rule did not have the required 60-day delay in its effective date. In an April 5, 2002, letter to Senator Edward Kennedy, GAO said,

While section 801(a)(3)(A) uses the phrase “receipt of the rule by Congress” in beginning the computation of the 60-day delay provision, section 801(a)(1)(A) requires that “Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of Congress and the Comptroller General a report . . . .”

Section 801(a)(1)(A) makes clear that compliance with the requirements of the CRA necessitates submission of a rule to both Houses of Congress. Therefore, in this instance, the start of the 60-day delay period would have been March 15, 2002, the date of receipt by the Senate. Accordingly, we find that the Medicaid rule should not be effective under the provisions of the CRA until May 14, 2002.<sup>38</sup>

## Early GAO Reviews Determined That Some Covered Rules Were Not Being Submitted

Although it was not required to do so,<sup>39</sup> in 1997, GAO conducted a review to determine whether all of the rules that were published in the *Federal Register* from October 1, 1996, to July 31,

<sup>35</sup> For a synopsis of these cases, see CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by Morton Rosenberg, pp. 22-23.

<sup>36</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicaid Program; Modification of the Medicaid Upper Payment Limit for Non-State Government-Owned or Operated Hospitals,” 67 *Federal Register* 2602, January 18, 2002.

<sup>37</sup> 5 U.S.C. §801(a)(3)(A). On March 19, 2002, HHS published a notice in the *Federal Register* delaying the effective date of the Medicaid rule until April 15, 2002, in what GAO characterized as an attempt to comply with the CRA. See U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicaid Program; Modification of the Medicaid Upper Payment Limit for Non-State Government-Owned or Operated Hospitals: Delay of Effective Date,” 67 *Federal Register* 12479, March 19, 2002.

<sup>38</sup> This letter is available at <http://www.gao.gov/decisions/other/289880.htm>.

<sup>39</sup> GAO’s only responsibility in the CRA (other than to receive rules that agencies are required to submit to it) is to write a report on each “major” rule within 15 calendar days of the date that it is submitted. 5 U.S.C. §801(a)(2)(A).

1997, had been submitted to Congress and GAO.<sup>40</sup> GAO ultimately concluded that 279 covered rules published during this 10-month period had not been submitted, and in November 1997 provided a list of these rules to the Office of Information and Regulatory Affairs (OIRA) within OMB.<sup>41</sup> GAO said that OIRA distributed this list to the affected agencies and told them to contact GAO if they had any questions.

In February 1998, because many of the rules remained unfiled, GAO said that it followed up with each agency that still had missing rules. In March 1998 testimony before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform and Oversight, GAO said that 264 of the 279 rules had been submitted. GAO also said the following:

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.... 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.<sup>42</sup>

Some rulemaking agencies took what GAO characterized as “immediate and corrective action” in response to this review.<sup>43</sup> For example, on January 7, 1998, the Environmental Protection Agency (EPA) published nine final rules in the *Federal Register* changing the effective dates of rules that had not been submitted in accordance with the requirements in Section 801(a)(1)(A) of the CRA. In each of the rules, EPA noted that the CRA precludes a rule from taking effect until it is submitted to GAO and each house of Congress, and said that EPA had inadvertently failed to do so with regard to the subject rules. Although each of the rules had a designated effective date, EPA said “by operation of law, the rule did not take effect” on that date. After EPA discovered what it characterized as “its error,” the agency submitted the rules as required and amended the effective dates “consistent with the provisions of the CRA.”<sup>44</sup>

GAO conducted a second review of agencies’ compliance with the CRA in June 1998, and reported that 66 covered rules published during the five-month period from August 1, 1997, to December 31, 1997, had not been submitted.<sup>45</sup> GAO submitted the list of rules to OIRA, and

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<sup>40</sup> U.S. General Accounting Office, *Congressional Review Act: Implementation and Coordination*, GAO/T-OGC-98-38, March 10, 1998, pp. 2-3.

<sup>41</sup> GAO initially concluded that 498 rules had not been submitted, but later concluded that 182 were not covered rules (e.g., because they were rules of particular applicability or agency management) and that 37 rules had, in fact, been submitted. OIRA was created by the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), and currently is responsible for reviewing the substance of hundreds of regulations each year pursuant to Executive Order 12866. For more information, see CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Curtis W. Copeland.

<sup>42</sup> U.S. General Accounting Office, *Congressional Review Act: Implementation and Coordination*, GAO/T-OGC-98-38, March 10, 1998, p. 3.

<sup>43</sup> *Ibid.*

<sup>44</sup> See, for example, U.S. Environmental Protection Agency, “Technical Amendments to Benzidine-Based Chemical Substances; Significant New Uses of Certain Chemical Substances: Correction of Effective Date Under Congressional Review Act (CRA),” 63 *Federal Register* 673, January 7, 1998. Corrections of effective dates for eight other rules were on pages 682-691 of the same edition of the *Federal Register*.

<sup>45</sup> U.S. General Accounting Office, *Congressional Review Act: Update on Implementation and Coordination*, GAO/T-OGC-98-55, June 17, 1998, p. 3. GAO initially said that 115 rules had not been submitted, but later concluded that 25 were not covered rules and 24 had already been submitted.

OIRA reportedly agreed to follow up with the agencies—which caused GAO to note that OIRA appeared to have “become more involved” in the correction effort.

In December 1998, GAO published a notice in the *Federal Register* identifying “rules published by Federal agencies in the *Federal Register* that were not received by [GAO] prior to the announced effective dates.”<sup>46</sup> The notice included all final and interim final rules covered by the CRA that were issued between October 1, 1996, and December 31, 1997. GAO reported that more than 300 non-major rules published during this period were not submitted to GAO prior to their effective dates. The Departments of Agriculture and Transportation, and the Federal Emergency Management Agency, issued about 60% of the rules that had not been submitted.<sup>47</sup> By the date of GAO’s *Federal Register* notice (nearly one year after the end of the time period covered by the review), GAO said that it had received all of the rules.

## **GAO Has Repeatedly Notified OIRA That All Rules Were Not Being Submitted**

GAO has continued to compare its list of rules that agencies submit to the Comptroller General with the list of rules that are published in the *Federal Register* to determine whether any covered rules had not been submitted. However, GAO has not published a notice in the *Federal Register* delineating those missing rules since 1998.<sup>48</sup> Instead, GAO periodically sent letters to OIRA regarding the substantive rules that it had not received.<sup>49</sup> See the following examples:

- On September 21, 1999, GAO sent a letter to the Deputy Administrator of OIRA identifying 31 substantive regulations that were published in the *Federal Register* during calendar year 1998 that “have not been filed with us and, presumably, have also not been filed with the Congress.”<sup>50</sup>
- On July 3, 2003, GAO sent a similar letter to the Deputy Administrator of OIRA identifying 322 substantive regulations that were published during calendar years 2001 and 2002 but had not been filed with GAO.<sup>51</sup>
- On March 21, 2005, GAO sent another letter to the Deputy Administrator of OIRA identifying 460 substantive regulations that were published during calendar years 2003 and 2004 but were not filed with GAO.<sup>52</sup>

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<sup>46</sup> U.S. General Accounting Office, “Federal Agency Rules Filed Under Congressional Review Act Following General Accounting Office Review of Unfiled Rules,” 63 *Federal Register* 71672, December 29, 1998. Until 2004, GAO was the General Accounting Office.

<sup>47</sup> The Department of Agriculture rules were primarily issued by the Federal Crop Insurance Corporation. The Department of Transportation rules were primarily issued by the Federal Aviation Administration. The Federal Emergency Management Agency’s rules primarily involved flood elevation determinations.

<sup>48</sup> GAO said that continuing to publish the notices in the *Federal Register* was “not cost effective.” E-mail from Shirley Jones, Assistant General Counsel, Government Accountability Office, November 13, 2009, available from the author.

<sup>49</sup> GAO said that the lists of rules that it provided to OIRA were “substantive” in that they did not include items such as technical amendments to regulations that are printed in the *Federal Register*.

<sup>50</sup> Letter from Kathleen E. Wannisky, Associate General Counsel for Operations, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, September 21, 1999, available from the author.

<sup>51</sup> Letter from Kathleen E. Wannisky, Managing Associate General Counsel, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, July 3, 2003, available from the author.

- On May 27, 2008, GAO sent another letter to the Administrator of OIRA identifying 116 substantive regulations that were published during fiscal year (FY) 2007 but “have not been submitted to us as required by Section 801(a)(1)(A).”<sup>53</sup>

In each of these letters, GAO noted the rule submission requirement in Section 801(a)(1)(A) of the CRA, and said “We trust that your office will use this information to ensure that executive agencies fully comply with [CRA] requirements by filing regulations with both the Congress and GAO.”<sup>54</sup> GAO officials said that OIRA did not respond to GAO with regard to any of these letters, and GAO and OIRA officials said they were not aware of any effort by OIRA to contact federal agencies regarding the missing rules during the time periods covered by these letters.<sup>55</sup>

## GAO’s May 2009 Letter to OIRA

In the most recent letter on this issue, GAO notified the Acting Administrator of OIRA on May 26, 2009, that “a number of regulations have not been submitted to us as required by section 801(a)(1)(A) [of the CRA].”<sup>56</sup> Enclosed with the letter was a list of 101 substantive rules that were published in the *Federal Register* during FY2008 (i.e., October 1, 2007, through September 30, 2008) and that had not been submitted to GAO. Copies of that letter and the enclosed list of rules are provided as **Figure A-1** and **Figure A-2** in an **Appendix** at the end of this report. Taken together, the five GAO-OIRA letters covered seven one-year periods between 1998 and 2008, and listed 1,030 substantive rules that were published in the *Federal Register* were not submitted to GAO – an average of nearly 150 rules per year.

GAO said it did not send copies of any of these letters to congressional committees responsible for oversight of the CRA, the administrative offices within each house of Congress that typically receives rules from the agencies (i.e., the House Parliamentarian and the Secretary of the Senate), or anyone else in Congress.<sup>57</sup> GAO officials noted that it was not statutorily required to notify Congress about this issue, but said GAO did mention that it had identified missing rules as part of congressional testimony regarding the CRA in recent years.<sup>58</sup>

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<sup>52</sup> Letter from Kathleen E. Wannisky, Managing Associate General Counsel, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, March 21, 2005, available from the author.

<sup>53</sup> Letter from Robert J. Cramer, Associate General Counsel, GAO, to Susan E. Dudley, Administrator, OIRA, May 27, 2008, available from the author.

<sup>54</sup> GAO said that it sent other letters and lists of rules to OIRA for other years between 1998 and 2008, but could not provide copies of those documents to CRS. GAO provided a copy of an April 10, 2001, letter to OIRA, but a referenced list of unfiled substantive rules (covering the period from January 1, 2000, through December 31, 2000) was not included.

<sup>55</sup> Telephone conversations with GAO and OIRA officials, November 2009. One former OIRA official said he had a vague recollection of contacting federal agencies and telling them to submit missing rules, but he could not provide any details. Telephone conversation with Donald Arbuckle, November 9, 2009.

<sup>56</sup> Letter from Robert J. Cramer, Managing Associate General Counsel, GAO, to Kevin F. Neyland, Acting Administrator, OIRA, May 26, 2009, available from the author.

<sup>57</sup> E-mail from Shirley Jones, Assistant General Counsel, Government Accountability Office, November 13, 2009, available from the author.

<sup>58</sup> For example, GAO noted that in a November 2007 statement for the record, GAO’s former General Counsel said that “GAO has conducted yearly reviews to determine whether all final rules covered by CRA and published in the Federal Register were filed with GAO. We submit to OIRA each year a computer listing of rules we found published in the (continued...)”

## Agencies and Issues

As indicated in **Table 1** below, the missing rules from FY2008 were issued by many different federal departments and agencies. However, the Departments of Agriculture, Commerce, Defense, Homeland Security, and Transportation, as well as the General Services Administration, each had more than five missing rules.

**Table 1. Number of Substantive Final Rules Not Received by GAO, FY2008**

Department/Agency	Number of Rules Not Received
Department of Agriculture (USDA)	20
Department of Commerce (DOC)	8
Department of Defense (DOD)	7
Department of Health and Human Services (HHS)	3
Department of Homeland Security (DHS)	7
Department of Housing and Urban Development (HUD)	1
Department of the Interior (DOI)	3
Department of State (DOS)	4
Department of Transportation (DOT)	12
Department of the Treasury	5
Department of Veterans Affairs (DVA)	1
Executive Office of the President (EOP)	2
General Services Administration (GSA)	9
Peace Corps	2
Pension Benefit Guarantee Corporation	2
Small Business Administration	3
Other agencies (one rule each)	12
<b>Total</b>	<b>101</b>

**Source:** Letter from GAO to OIRA, May 24, 2009 (see Figures A-1 and A-2 in the Appendix to this report).

The subjects covered by the 101 missing rules from FY2008 were also varied. In addition to the previously mentioned November 2007 DHS rule on chemical facility security, the missing rules included the following:

- An October 2007 rule that was issued by the Food and Nutrition Service within USDA on “Procurement Requirements for the National School Lunch, School

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Federal Register the previous year that have not been filed with our Office.” U.S. Government Accountability Office, *Congressional Review Act*, GAO-08-268T, November 6, 2007, p. 3. See also U.S. Government Accountability Office, *Federal Rulemaking: Perspectives on 10 Years of Congressional Review Act Implementation*, GAO-06-601T, March 30, 2006, p. 4, in which GAO said that “roughly 200 nonmajor rules per year [are] not filed with our office.”

Breakfast and Special Milk Programs.”<sup>59</sup> According to the rule summary, it makes “changes in a school food authority’s responsibilities for proper procurement procedures and contracts, limits a school food authority’s use of nonprofit school food service account funds to costs resulting from proper procurements and contracts, and clarifies a State agency’s responsibility to review and approve school food authority procurement procedures and contracts.”<sup>60</sup>

- An October 2007 rule that was issued by the Fish and Wildlife Service within DOI on “Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Guaj[oacute]n (*Eleutherodactylus cooki*).”<sup>61</sup> According to the rule summary, it designates critical habitat for the guajon (a rock frog endemic to Puerto Rico) under the Endangered Species Act of 1973, as amended.
- A November 2007 rule that was issued by the Farm Service Agency (FSA) within USDA on “Regulatory Streamlining of the Farm Service Agency’s Direct Farm Loan Programs.”<sup>62</sup> According to the rule summary, it “simplifies and clarifies FSA’s direct loan regulations; implements the recommendations of the USDA Civil Rights Action Team; meets the objectives of the Paperwork Reduction Act of 1995; and separates FSA’s direct Farm Loan Programs regulations from the Rural Development mission area’s loan program regulations.”<sup>63</sup>
- A December 2007 rule that was issued by the Equal Employment Opportunity Commission (EEOC) on “Age Discrimination in Employment Act: Retiree Health Benefits.”<sup>64</sup> According to the rule summary, it allows employers to “create, adopt, and maintain a wide range of retiree health plan designs, such as Medicare bridge plans and Medicare wrap-around plans, without violating the Age Discrimination in Employment Act of 1967 (ADEA). To address concerns that the ADEA may be construed to create an incentive for employers to eliminate or reduce retiree health benefits, EEOC is creating a narrow exemption from the prohibitions of the ADEA for the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program.”<sup>65</sup>
- A December 2007 rule that was issued by the Office of Thrift Supervision (OTS) within the Department of the Treasury on “Permissible Activities of Savings and Loan Holding Companies.”<sup>66</sup> One of the stated purposes of the rule is to “expand

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<sup>59</sup> U.S. Department of Agriculture, Food and Nutrition Service, “Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs,” *72 Federal Register* 61479, October 31, 2007.

<sup>60</sup> *Ibid.*, p. 61479.

<sup>61</sup> U.S. Department of the Interior, Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Guaj[oacute]n (*Eleutherodactylus cooki*),” *72 Federal Register* 60068, October 23, 2007.

<sup>62</sup> U.S. Department of Agriculture, Farm Service Agency, “Regulatory Streamlining of the Farm Service Agency’s Direct Farm Loan Programs,” *72 Federal Register* 63242, November 8, 2007.

<sup>63</sup> *Ibid.*, p. 63242.

<sup>64</sup> U.S. Equal Employment Opportunity Commission, “Age Discrimination in Employment Act: Retiree Health Benefits,” *72 Federal Register* 72938, December 26, 2007.

<sup>65</sup> *Ibid.*, p. 72938.

<sup>66</sup> U.S. Department of the Treasury, Office of Thrift Supervision, “Permissible Activities of Savings and Loan Holding Companies,” *72 Federal Register* 72235, December 20, 2007.

the permissible activities of savings and loan holding companies (SLHCs) to the full extent permitted under the Home Owners' Loan Act (HOLA)." The rule also amended the agency's existing requirements "to conform the regulation to the statute that it is intended to implement, and to set forth standards that OTS will use to evaluate applications submitted pursuant to the statutory application requirement."<sup>67</sup>

- A February 2008 rule that was issued by the National Oceanic and Atmospheric Administration (NOAA) within DOC on "Endangered and Threatened Species: Final Threatened Listing Determination, Final Protective Regulations, and Final Designation of Critical Habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon."<sup>68</sup> According to the rule summary, it was a "final determination to list the Oregon Coast coho salmon (*Oncorhynchus kisutch*) evolutionarily significant unit (ESU) as a threatened species under the Endangered Species Act (ESA)." The agency said it was "also issuing final protective regulations and a final critical habitat designation for the Oregon Coast coho ESU."<sup>69</sup>
- A February 2008 rule that was issued by the Bureau of Land Management (BLM) within DOI on "Oil and Gas Leasing: National Petroleum Reserve – Alaska" (NPR-A).<sup>70</sup> According to the summary, the rule "amends the administrative procedures for the efficient transfer, consolidation, segregation, suspension, and unitization of Federal leases in the NPR-A. The rule also changes the way the BLM processes lease renewals, lease extensions, lease expirations, lease agreements, exploration incentives, lease consolidations, and termination of administration for conveyed lands in the NPR-A. Finally, the rule makes the NPR-A regulation on additional bonding consistent with the regulations that apply outside of the NPR-A."<sup>71</sup>
- An April 2008 rule issued by NOAA's National Marine Fisheries Service on "Endangered and Threatened Species: Designation of Critical Habitat for North Pacific Right Whale."<sup>72</sup> According to the rule summary, the "North Pacific right whale was recently listed as a separate, endangered species, and because this was a newly listed entity, we were required to designate critical habitat for it."<sup>73</sup>
- A June 2008 rule that was issued by the Office of the Secretary within DHS on "Procedures for Transportation Workplace Drug and Alcohol Testing

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<sup>67</sup> Ibid, p. 72235.

<sup>68</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, "Endangered and Threatened Species: Final Threatened Listing Determination, Final Protective Regulations, and Final Designation of Critical Habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon," 73 *Federal Register* 7816, February 11, 2008.

<sup>69</sup> Ibid, p. 7816.

<sup>70</sup> U.S. Department of the Interior, Bureau of Land Management, "Oil and Gas Leasing: National Petroleum Reserve – Alaska," 73 *Federal Register* 6430, February 4, 2008.

<sup>71</sup> Ibid., p. 6430.

<sup>72</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, "Endangered and Threatened Species; Designation of Critical Habitat for North Pacific Right Whale," 73 *Federal Register* 19000, April 8, 2008.

<sup>73</sup> Ibid., p. 19000.



Programs.”<sup>74</sup> According to the summary, the rule amends certain provisions of its drug and alcohol testing procedures to “change instructions to collectors, laboratories, medical review officers, and employers regarding adulterated, substituted, diluted, and invalid urine specimen results. These changes are intended to create consistency with specimen validity requirements established by the U.S. Department of Health and Human Services and to clarify and integrate some measures taken in two of our own Interim Final Rules. This Final Rule makes specimen validity testing mandatory within the regulated transportation industries.”<sup>75</sup>

- A July 2008 rule that was issued by the Transportation Security Administration within DHS on “False Statements Regarding Security Background Checks.”<sup>76</sup> According to the rule summary, it codifies statutory provisions that “prohibit public transportation agencies, railroad carriers, and their respective contractors and subcontractors from knowingly misrepresenting Federal guidance or regulations concerning security background checks for certain individuals.”<sup>77</sup>
- September 2008 rule issued by the National Highway Traffic Safety Administration (NHTSA) within DOT on “Nonconforming Vehicles Decided to be Eligible for Importation.”<sup>78</sup> According to the rule summary, it “revises the list of vehicles not originally manufactured to conform to the Federal motor vehicle safety standards (FMVSS) that NHTSA has decided to be eligible for importation.”<sup>79</sup>

### **Submission of Missing Rules After GAO’s May 2009 Letter**

CRS examined the GAO rules database on October 26, 2009, which indicated that GAO received 5 of the 101 missing rules after the date of the May 26, 2009, letter to OIRA:

- A May 2008 DHS rule establishing a security zone around any vessel being escorted by one or more Coast Guard, State, or local law enforcement assets within the Captain of the Port Zone Jacksonville, Florida, which GAO received on June 5, 2009.<sup>80</sup>
- A June 2008 DOT rule clarifying the qualifications of individuals who certify by signature the extended operations (ETOPS) pre-departure service check for ETOPS flights operated by air carriers and in commuter and on-demand passenger carrying operations, which GAO received on June 5, 2009.<sup>81</sup>

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<sup>74</sup> U.S. Department of Homeland Security, Office of the Secretary, “Procedures for Transportation Workplace Drug and Alcohol Testing Programs,” *73 Federal Register* 35961, June 25, 2008.

<sup>75</sup> *Ibid.*, p. 35961.

<sup>76</sup> U.S. Department of Homeland Security, Directorate of Border and Transportation Security, Transportation Security Administration, “False Statements Regarding Security Background Checks,” *73 Federal Register* 44665, July 31, 2008.

<sup>77</sup> *Ibid.*, p. 44665.

<sup>78</sup> U.S. Department of Transportation, National Highway Traffic Safety Administration, “List of Nonconforming Vehicles Decided to be Eligible for Importation,” *73 Federal Register* 56741, September 30, 2008.

<sup>79</sup> *Ibid.*, p. 56741.

<sup>80</sup> U.S. Department of Homeland Security, United States Coast Guard, “Security Zone; Escorted Vessels in Captain of the Port Zone Jacksonville, FL,” *73 Federal Register* 28707, May 19, 2008.

<sup>81</sup> U.S. Department of Transportation, Federal Aviation Administration, “Extended operations (ETOPS) of Multi- (continued...) ”

- A July 2008 Federal Trade Commission rule describing biodiesel and biomass-based diesel automotive fuel labeling requirements, which GAO received on October 4, 2009.<sup>82</sup>
- An August 2008 DOT rule amending certain rating definitions and type certification standards for rotorcraft turbine engines, which GAO received on June 5, 2009.<sup>83</sup>
- A September 2008 rule issued by the Department of the Treasury on “Risk Based Capital Guidelines,” which GAO received on July 5, 2009.

The other 96 rules that were published during FY2008 that GAO said that it had not received were still not listed in the GAO database as of October 26, 2009.

### **Congress Did Not Receive Most of the FY2008 Missing Rules**

CRS also examined the House and Senate executive communication databases on October 26, 2009, which indicated that 80 of the 101 rules that GAO identified in its May 2009 letter to OIRA had not been received by the House of Representatives, and 81 had not been received by the Senate.<sup>84</sup> Even though 20 of the 101 rules on GAO’s list of missing rules had been submitted to Congress, the CRA says they cannot take effect until they are submitted to GAO as well.

Of the five rules that were submitted to GAO after the May 2009 letter to OIRA, three of the rules had not been submitted to either House of Congress as of October 26, 2009.<sup>85</sup> Therefore, 99 of the 101 rules that were identified in GAO’s May 2009 letter to OIRA had not been submitted in all three locations (i.e., both houses of Congress and GAO).

### **OIRA’s Actions in November 2009 and Agencies’ Response**

On October 20, 2009, CRS provided the Deputy Administrator of OIRA with a copy of GAO’s May 2009 letter and enclosure listing the 101 missing rules, and asked whether OIRA had taken any action in response to that letter. OIRA officials initially told CRS that it had no record of having received the May 2009 letter from GAO.<sup>86</sup> Subsequently, however, on November 12,

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engine Airplanes,” 73 *Federal Register* 33879, June 16, 2008.

<sup>82</sup> Federal Trade Commission, “Automotive Fuel Ratings, Certification and Posting; Final Rule,” 73 *Federal Register* 40154, July 11, 2008.

<sup>83</sup> U.S. Department of Transportation, Federal Aviation Administration, “Airworthiness Standards: Rotorcraft Turbine Engines One-Engine-Inoperative (OEI) Ratings, Type Certification Standards,” 73 *Federal Register* 48119, August 18, 2008.

<sup>84</sup> The House executive communications database is available at <http://www.congress.gov/execomh>, and the Senate executive communications database is available at <http://www.congress.gov/execcoms>.

<sup>85</sup> The two rules that were submitted to the House and the Senate were (1) the May 2008 DHS rule establishing a security zone around any vessel being escorted by one or more Coast Guard, State, or local law enforcement assets within the Captain of the Port Zone Jacksonville, Florida (received by the House of Representatives on May 29, 2008, and by the Senate on February 9, 2009); and (2) the September 2008 rule issued by the Department of the Treasury on “Risk Based Capital Guidelines” (received in the House of Representatives on June 26, 2009, and in the Senate on April 16, 2009).

<sup>86</sup> Telephone conversation with OIRA and OMB officials, November 6, 2009. However, GAO officials subsequently told CRS that GAO had evidence that OIRA had received the list of missing rules by at least June 2009.

2009, the Deputy Administrator of OIRA sent an e-mail to federal agencies saying that it “had come to my attention that your agency may not have submitted final rules to Congress and to [GAO] as required by the Congressional Review Act.” He urged the agencies to “contact the GAO to determine which rules they have not yet received from your agency.” (The Deputy Administrator did not, however, provide the agencies with a list of the missing rules, either overall or for their agency.) He also noted in the e-mail that “agencies must submit all final rules to Congress before they can take effect,” and provided the agencies with a copy of OMB’s 1999 guidance on the CRA.

The following week, representatives from GAO’s Office of the General Counsel told CRS that federal agencies had begun submitting some of the missing rules listed in the May 2009 letter.<sup>87</sup> As of November 20, 2009, GAO said it had been contacted by eight agencies regarding possible missing rules (including one agency with no rules on the May 2009 list), and that three agencies had recently submitted six of the missing rules—three from the Small Business Administration, and one rule each from the Nuclear Regulatory Commission, the Securities and Exchange Commission, and DVA.<sup>88</sup>

On December 21, 2009, CRS searched GAO’s database and determined that 18 of the missing rules listed in the May 2009 letter had been received at GAO between November 23, 2009, and December 17, 2009. Of these rules, five were submitted by DOT, and three each were submitted by HHS and the Small Business Administration.

## **FY2009 Significant Rules Not Received by GAO**

GAO said that it did not plan to send a letter to OIRA regarding missing rules that were published during FY2009 until at least the end of calendar year 2009.<sup>89</sup> To determine whether relatively important rules that were published during FY2009 were being submitted to GAO as required in the CRA, CRS used a publicly available database (at <http://www.reginfo.gov>) to identify “significant”<sup>90</sup> final rules (1) that were submitted to OIRA for review by cabinet departments or EPA, (2) on which OIRA completed its review between October 1, 2008, and June 30, 2009,<sup>91</sup> and (3) that were published in the *Federal Register* shortly after the completion of OIRA’s review.

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<sup>87</sup> GAO said it was not aware that OIRA had previously urged agencies to contact GAO regarding their missing rules. Telephone conversation with Shirley Jones, Assistant General Counsel, Government Accountability Office, November 18, 2009.

<sup>88</sup> The SEC and DVA had copies of the coversheets that were submitted with the report, bearing a date stamp indicating they had been previously submitted. Therefore, the database was corrected to reflect the earlier date.

<sup>89</sup> To ensure that OIRA received this letter, GAO officials said they would send it by certified mail and would also send an electronic version to OIRA.

<sup>90</sup> Executive Order 12866 defines a “significant” regulatory action as one that is expected to “(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 this Executive order.” Only about 15% of all final rules that are submitted to GAO are considered “significant” rules.

<sup>91</sup> The June 30, 2009, cutoff date was used to allow sufficient time after publication in the *Federal Register* for the rules to have arrived at GAO.

As indicated in **Table 2** below, of 181 significant rules that met those criteria, 22 of the rules (12.2 %) had not been submitted to GAO as of November 17, 2009. Some of the rules had been published in the *Federal Register* more than a year earlier, and all had been published at least four months earlier.

**Table 2. Significant Final Rules Reviewed by OIRA from October 2008 Through June 2009 and Not Received at GAO**

Department/Agency	Number of Significant Final Rules	Number of Rules Not Received by GAO
Department of Agriculture (USDA)	24	12
Department of Commerce (DOC)	17	0
Department of Defense (DOD)	5	0
Department of Education (DOEd)	5	0
Department of Energy (DOE)	4	0
Department of Health and Human Services (HHS)	27	3
Department of Homeland Security (DHS)	11	2
Department of Housing and Urban Development (HUD)	3	0
Department of the Interior (DOI)	12	2
Department of Justice (DOJ)	12	1
Department of Labor (DOL)	14	0
Department of State (DOS)	0	0
Department of Transportation (DOT)	17	1
Department of the Treasury	5	0
Department of Veterans Affairs (DVA)	8	0
Environmental Protection Agency	17	1
<b>Total</b>	<b>181</b>	<b>22</b>

**Source:** CRS analysis of published rules with completed OIRA reviews between October 1, 2008, and June 30, 2009 (see <http://www.reginfo.gov/public/do/eoHistoricReport>), and GAO's CRA database (see <http://www.gao.gov/fedrules/>).

USDA had the most missing significant rules during this period, but there were differences in the rates of submission between agencies and offices within USDA. For example, five of the seven rules issued by USDA's Commodity Credit Corporation (CCC) had not been submitted to GAO,<sup>92</sup> and four of the six rules issued by the department's Natural Resources Conservation Service

<sup>92</sup> Some of these rules were issued pursuant to the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill, P.L. 110-234). Section 1601(c)(3) of the legislation required the Secretary of Agriculture to "use the authority provided under section 808" of the CRA, which says that "Notwithstanding section 801, (1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or (2) 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." USDA invoked the good cause exception to notice and comment in at least two of these rules.

(NRCS) had not been submitted. On the other hand, all four of the rules issued by USDA's Food and Nutrition Service had been submitted to GAO.

The subjects covered by these missing rules also varied, and included the following:

- A December 2008 USDA/CCC rule on "Farm Program Payment Limitation and Payment Eligibility for 2009 and Subsequent Crop, Program, or Fiscal Years," which made "changes in payment eligibility, payment attribution, maximum income limits, and maximum dollar benefit amounts for participants in CCC-funded programs" as required by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill).<sup>93</sup>
- An October 2008 USDA/Forest Service rule on "Roadless Area Conservation," which "designates 250 Idaho Roadless Areas (IRAs) and establishes five management themes that provide prohibitions with exceptions or conditioned permissions governing road construction, timber cutting, and discretionary mineral development."<sup>94</sup>
- A January 2009 USDA/NRCS rule on the "Environmental Quality Incentives Program" that "incorporate programmatic changes as authorized by amendments in the Food, Conservation, and Energy Act of 2008."<sup>95</sup> USDA said this was a "major" rule that was expected to have more than a \$100 million annual impact on the economy.
- A November 2008 HHS rule on "Patient Safety and Quality Improvement," which "establishes a framework by which hospitals, doctors, and other health care providers may voluntarily report information to Patient Safety Organizations (PSOs), on a privileged and confidential basis, for the aggregation and analysis of patient safety events. The final rule outlines the requirements that entities must meet to become PSOs and the processes by which the Secretary will review and accept certifications and list PSOs. It also describes the privilege and confidentiality protections for the information that is assembled and developed by providers and PSOs, the exceptions to these privilege and confidentiality protections, and the procedures for the imposition of civil money penalties for the knowing or reckless impermissible disclosure of patient safety work product."<sup>96</sup> The rule reportedly implemented certain aspects of the Patient Safety and Quality Improvement Act of 2005 (P.L. 109-41).

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<sup>93</sup> U.S. Department of Agriculture, Commodity Credit Corporation, "Farm Program Payment Limitation and Payment Eligibility for 2009 and Subsequent Crop, Program, or Fiscal Years," *73 Federal Register* 79267, December 29, 2008.

<sup>94</sup> U.S. Department of Agriculture, Forest Service, "Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho," *73 Federal Register* 61455, October 16, 2008.

<sup>95</sup> U.S. Department of Agriculture, Natural Resources Conservation Service and Commodity Credit Corporation, "Environmental Quality Incentives Program," *74 Federal Register* 2293, January 15, 2009. USDA said that "Section 2904(c) of the Food, Conservation, and Energy Act of 2008 requires that the Secretary use the authority in section 808(2) of title 5, United States Code, which allows an agency to forego [the CRA's] usual 60-day Congressional Review delay of the effective date of a major regulation if the agency finds that there is a good cause to do so. NRCS hereby determines that it has good cause to do so in order to meet the Congressional intent to have the conservation programs, authorized or amended by Title II, in effect as soon as possible."

<sup>96</sup> U.S. Department of Health and Human Services, Agency for Healthcare Research and Quality, "Patient Safety and Quality Improvement," *73 Federal Register* 70731, November 21, 2008.

- A November 2008 HHS rule that made “technical changes to the existing methodology and process used to compute and issue each State’s preliminary and final allotments available to pay the Medicare Part B premiums for qualifying individuals.”<sup>97</sup> The department said the rule would “conform the existing regulations to reflect continued funding of this program.”
- An October 2008 DHS rule on “Safe Harbor Procedures for Employers Who Receive a No-Match Letter,” which reaffirmed regulations providing a “safe harbor” from liability for employers that follow certain procedures after receiving a notice that casts doubt on the employment eligibility of their employees.<sup>98</sup>
- An October 2008 DOI rule on “Implementation of the National Environmental Policy Act (NEPA) of 1969,” which codified the department’s procedures for implementing NEPA.<sup>99</sup>
- A December 2008 DOJ rule on “Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct,” which amended the “record-keeping, labeling, and inspection requirements to account for changes in the underlying statute made by Congress in enacting the Adam Walsh Child Protection and Safety Act of 2006.”<sup>100</sup>
- A December 2008 DOT rule on “New Entrant Safety Assurance Process,” which (among other things) “identifies 16 regulations that are essential elements of basic safety management controls necessary to operate in interstate commerce and makes a carrier’s failure to comply with any one of the 16 regulations an automatic failure of the safety audit.”<sup>101</sup> DOT said that the rule was “major” under the CRA because it would have at least a \$100 million impact on the economy.
- An April 2009 EPA rule on “Endocrine Disruptor Screening Program,” which described “the specific details of the policies and procedures that EPA generally intends to adopt for initial screening under the EDSP, including the statutory requirements associated with and format of the test orders, as well as EPA’s procedures for fair and equitable sharing of test costs and handling confidential data.”<sup>102</sup>

In one case, a rule that had been developed and published by more than one agency was submitted to GAO by one agency, but not the others. On October 20, 2008, DOL, HHS, and the

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<sup>97</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicaid Program; State Allotments for Payment of Medicare Part B Premiums for Qualifying Individuals: Federal Fiscal Year 2008 and Federal Fiscal Year 2009,” *73 Federal Register* 70886, November 24, 2008.

<sup>98</sup> U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, “Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis,” *73 Federal Register* 63843, October 28, 2008.

<sup>99</sup> U.S. Department of the Interior, Office of the Secretary, “Implementation of the National Environmental Policy Act (NEPA) of 1969,” *73 Federal Register* 61291, October 15, 2008.

<sup>100</sup> U.S. Department of Justice, “Revised Regulations for Records Relating to Visual Depictions of Sexually Explicit Conduct,” *73 Federal Register* 77431, December 18, 2008.

<sup>101</sup> U.S. Department of Transportation, Federal Motor Carrier Safety Administration, “New Entrant Safety Assurance Process,” *73 Federal Register* 76471, December 16, 2008.

<sup>102</sup> U.S. Environmental Protection Agency, “Endocrine Disruptor Screening Program; Policies and Procedures for Initial Screening,” *74 Federal Register* 17559, April 15, 2009.

Department of the Treasury jointly issued a rule that established requirements “for group health plans and health insurance issuers concerning hospital lengths of stay for mothers and newborns following childbirth, pursuant to the Newborns’ and Mothers’ Health Protection Act of 1996 and the Taxpayer Relief Act of 1997.”<sup>103</sup> The Department of the Treasury submitted the rule to GAO, but the DOL and HHS did not.

## **Related Legislation in the 111<sup>th</sup> Congress**

On June 16, 2009, the House of Representatives passed H.R. 2247, the “Congressional Review Act Improvement Act,” which would amend the CRA and eliminate the requirement that federal agencies submit their covered rules and related reports to both Houses of Congress before such rules can take effect. On June 17, 2009, the bill was referred to the Senate Committee on Homeland Security and Governmental Affairs. If H.R. 2247 is enacted, covered rules and reports would still have to be submitted to GAO, and GAO would be required to submit to each House a weekly report containing a list of the rules received, including a notation identifying each major rule. The Speaker of the House of Representatives would be required to publish the GAO report in the *Congressional Record*. The House of Representatives passed identical legislation during the 110<sup>th</sup> Congress (H.R. 5593), but the Senate did not act on the bill before the end of the 110<sup>th</sup> Congress.

According to the report on H.R. 2247 by the House Committee on the Judiciary, the bill “would reduce reporting requirements for agencies that submit information to the legislative branch under the Congressional Review Act (CRA).”<sup>104</sup> Currently, agencies “must often resort to hand-delivering the required materials by courier to the House and Senate, in order to comply with the CRA and the standards regarding communications transmitted to Congress. Materials are frequently returned to the promulgating agency for failure to comply with the CRA or these other congressional requirements, delaying implementation of the rule.”<sup>105</sup>

It is possible that elimination of the requirement that agencies submit their rules and related reports to the House and the Senate could increase the ability and willingness of agencies to submit their rules to GAO, either electronically or otherwise.<sup>106</sup> However, the data from FY2008 indicated that fewer rules were submitted to GAO than to either the House or the Senate.

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<sup>103</sup> U.S. Department of the Treasury, Internal Revenue Service, U.S. Department of Labor, Employee Benefits Security Administration, and U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Final Rules for Group Health Plans and Health Insurance Issuers Under the Newborns’ and Mothers’ Health Protection Act,” 73 *Federal Register* 62410, October 20, 2008.

<sup>104</sup> U.S. Congress, House Committee on the Judiciary, *Congressional Review Act Improvement Act*, report to accompany H.R. 2247, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 111-150 (Washington: GPO, 2009), p. 5.

<sup>105</sup> *Ibid.*, p. 3.

<sup>106</sup> GAO has said that has been able to receive CRA-covered rules and reports electronically since 1999, but that most agencies do not do so because they must submit paper copies to the House and the Senate. See U.S. Government Accountability Office, *Congressional Review Act*, GAO-08-268, November 6, 2007, p. 3. Also, in its May 27, 2008, letter to the Administrator of OIRA, GAO noted that Congress was considering amendments to the CRA that would eliminate the requirement that agencies submit rules to the Senate and the House of Representatives (H.R. 5593, 110<sup>th</sup> Congress), and said if the bill was enacted into law, “we would welcome the opportunity to work with your office and federal agencies to implement the law and make greater use of electronic submission of rules to our Office.” Letter from Robert J. Cramer, Associate General Counsel, GAO, to Susan E. Dudley, Administrator, OIRA, May 27, 2008, available from the author.

Therefore, enactment of H.R. 2247 could have little effect on agencies' compliance with the CRA's reporting requirements.

## Analysis

Agency regulations generally start with an act of Congress, and are the means by which statutes are implemented and specific requirements are established. Therefore, Congress has a vested interest in overseeing the regulations that agencies issue pursuant to those statutes. Because congressional authority over agency rulemaking was believed to have waned in recent decades (while presidential authority over rulemaking had increased), the CRA was enacted in an attempt to reclaim a measure of congressional control.<sup>107</sup> Although Congress can learn about the issuance of agency rules in many ways, the requirement in Section 801(a)(1)(A) of the CRA that agencies submit all of their final rules to GAO and Congress before they can take effect helps to ensure that Congress will have an opportunity to review, and possibly disapprove of, agency rules.

Notwithstanding this requirement, GAO said that it (and presumably Congress) did not receive more than 1,000 final rules during 7 of the past 10 years. More recently, CRS discovered that GAO did not receive 21 significant rules that were issued during FY2009. It is possible that some of these rules were submitted by the rulemaking agencies, and are missing because of a problem on the receiving end at GAO or Congress. However, because about two-thirds of the rules were not received by GAO or either house of Congress, it seems more likely that the agencies did not submit them as required by the CRA.

The CRA says that a Member of Congress can introduce a joint resolution of disapproval regarding a rule “beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress.”<sup>108</sup> Therefore, by not submitting these rules to Congress, the rulemaking agencies have arguably prevented Congress from using the expedited disapproval authority that it granted itself with the enactment of the CRA. The fact that Congress has used the CRA to disapprove only one rule since the legislation was enacted<sup>109</sup> does not lessen agencies' responsibilities to submit their rules in accordance with the act's requirements.

Despite the reporting requirements contained in the CRA, it appears that agencies have implemented some, if not all, of these rules. Some of the rules have not been submitted for years. For example, of the 31 missing rules that GAO identified in its 1999 letter to OIRA, 24 were not listed in the GAO database in November 2009—more than 10 years after they were published and scheduled to go into effect. Of the seven rules that were later submitted, some were not received at GAO until years after they were published and scheduled to go into effect.<sup>110</sup>

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<sup>107</sup> Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3686 (daily ed. April 18, 1996), at 142 *Cong. Rec.* S3683.

<sup>108</sup> 5 U.S.C. §802(a).

<sup>109</sup> In 2001, Congress disapproved a rule on ergonomics in the workplace. See U.S. Department of Labor, Occupational Safety and Health Administration, “Ergonomics Program,” 65 *Federal Register* 68261, November 14, 2000. Although the CRA has been used to disapprove only one rule, it may have other, less direct or discernable effects (e.g., keeping Congress informed about agency rulemaking and preventing the publication of rules that may be disapproved).

<sup>110</sup> See, for example, U.S. Department of Health and Human Services, Food and Drug Administration, “Amendment to Examination and Investigation Sample Requirements,” 63 *Federal Register* 51297, September 25, 1998, which was not submitted to GAO until October 22, 2002.



Some of the missing rules were interim final or direct final rules, or were final rules in which the agencies specifically invoked the “good cause” exception to the notice and comment requirements in the APA. Section 808 of the CRA states that agencies can make their rules effective “at such time as the Federal agency promulgating the rule determines” when the agency invokes the good cause exception. Therefore, in these cases, the agencies would appear to be able to put the rules into effect even though they had not been submitted to GAO and Congress. However, as noted earlier in this report, the post-enactment legislative history of the CRA states that even these rules must be submitted to GAO and Congress “as soon as practicable after promulgation” to permit the congressional review period to begin.

The CRA currently gives both GAO and OIRA limited roles in the rule submission process. OIRA is required to determine which rules are “major,”<sup>111</sup> and GAO is to write a report on each major rule within 15 calendar days.<sup>112</sup> GAO has voluntarily taken on the task of determining which *Federal Register* rules it has not received, and has periodically notified OIRA of these missing rules. However, OIRA has not responded directly to GAO regarding most of these letters. Also, GAO has not sent Congress copies of its letters to OIRA, or otherwise informed Congress about the scope of this issue, and has not published a notice in the *Federal Register* regarding this issue since 1998.

## Congressional Options

Congress may conclude that agencies’ failure to submit all of their covered rules to GAO and Congress is an administrative issue that should be resolved by GAO and OIRA, or by GAO and the individual rulemaking agencies. Congress may also conclude that enactment of H.R. 2247 (allowing agencies to submit their rules only to GAO, perhaps electronically) will improve agencies’ willingness or ability to submit all of their covered rules, and that no other action is needed.

Should Congress want to take other actions to improve reporting of covered rules, it could (among other things) (1) require GAO to continue to compare the rules it receives with the rules that are published in the *Federal Register*, (2) require GAO to continue to report any missing rules to OIRA, and (3) require OIRA or GAO to take other action to encourage agencies to comply with the CRA’s reporting requirements. For example, GAO has said in the past that it follows up with the agencies regarding any major rules that are missing.<sup>113</sup> Congress could require GAO to contact the agencies for the missing non-major rules as well, or could require OIRA to contact the agencies. GAO and OIRA have each taken action in the past to contact individual agencies, and could be required to do so again.<sup>114</sup> Both GAO and OIRA have, however, indicated to CRS that they currently have limited resources to take on additional responsibilities for CRA compliance enforcement.

OIRA played a somewhat similar role in improving agencies’ compliance with the Paperwork Reduction Act (PRA), which specifically requires OIRA to provide direction and oversee

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<sup>111</sup> 5 U.S.C. §804 (2).

<sup>112</sup> 5 U.S.C. §801(a)(2)(A).

<sup>113</sup> See U.S. Government Accountability Office, *Congressional Review Act*, GAO-08-268, November 6, 2007, p. 3.

<sup>114</sup> As noted earlier in this report, GAO said that it and OIRA contacted individual agencies regarding missing rules in 1998.

agencies' information collection requests.<sup>115</sup> In its annual reports to Congress on the implementation of the PRA in the late 1990's and early 2000's, OIRA reported that there were hundreds of violations of the act each year (i.e., agencies collecting information without OIRA approval, or collecting information after such approvals had expired). For example, OIRA reported that there were 872 violations of the PRA in FY1998, and 710 in FY1999. GAO included information on these violations in its annual testimonies on the implementation of the PRA.<sup>116</sup> In 2001, OIRA began a concerted effort to drive down the number of violations, requiring agencies to establish procedures to ensure that information was not collected without OIRA authorization.<sup>117</sup> By 2003, OIRA reported that there were only 18 PRA violations government-wide.<sup>118</sup>

OIRA is described in Executive Order 12866 as "the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory priorities."<sup>119</sup> The executive order also says that the administrator of OIRA "shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law..."<sup>120</sup> OIRA is also uniquely positioned both within OMB (with its budgetary influence) and within the federal rulemaking process (reviewing and commenting on rules just before they are published in the *Federal Register*) to enable it to exert maximum influence on federal agencies. In 1998, Congress directed OIRA to issue guidance on the implementation of the CRA, and that guidance is still in effect. Therefore, OIRA could play an integral role in ensuring compliance with the CRA and implementation of the President's and Congress' regulatory priorities.

Also, GAO could be required to provide a copy of its CRA compliance reports to Congress, publish the reports in the *Federal Register*, or both. Providing the reports of missing rules to Congress would give Congress a clearer sense of how the CRA is being implemented, and could permit Congress to conduct oversight of agencies compliance with the act. Publishing the lists of missing rules in the *Federal Register* could provide an incentive to the agencies to comply with the CRA.

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<sup>115</sup> 44 U.S.C. §3504(a)(1)(B).

<sup>116</sup> See, for example, U.S. General Accounting Office, *Paperwork Reduction Act: Burden Increases at IRS and Other Agencies*, GAO/T-GGD-00-114, April 12, 2000.

<sup>117</sup> See [http://www.whitehouse.gov/omb/assets/omb/inforeg/pra\\_memo111401.pdf](http://www.whitehouse.gov/omb/assets/omb/inforeg/pra_memo111401.pdf).

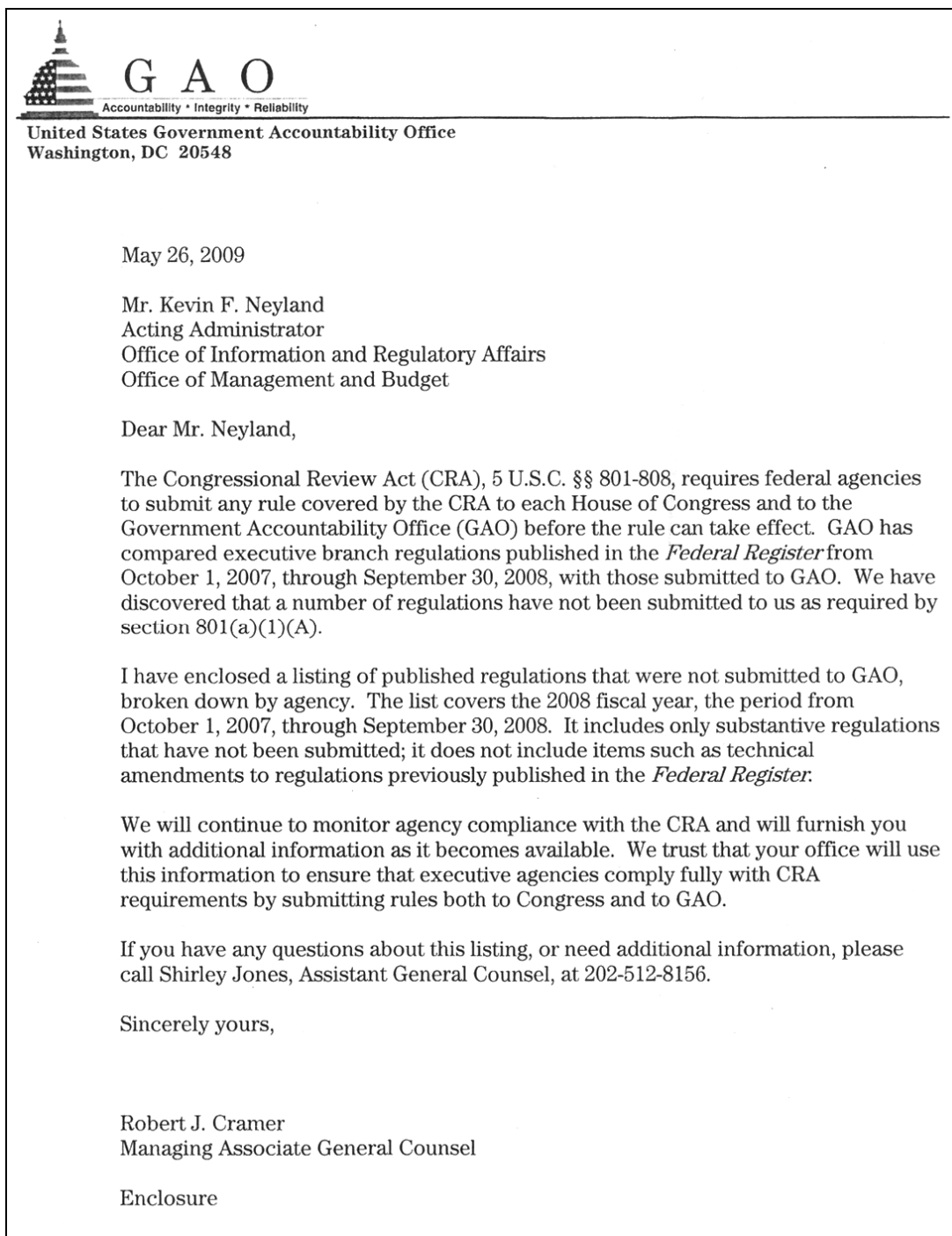
<sup>118</sup> See [http://www.whitehouse.gov/omb/assets/omb/inforeg/compliance\\_pra092704.pdf](http://www.whitehouse.gov/omb/assets/omb/inforeg/compliance_pra092704.pdf).

<sup>119</sup> The President, Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, Section 2(b).

<sup>120</sup> *Ibid.*, Section 6(b).

## Appendix. GAO Documents

Figure A-1. GAO's May 2009 Letter to OIRA



Source: GAO.

**Figure A-2. Enclosure to GAO's May 2009 Letter to OIRA Listing 101 Missing Rules During FY2008**

<b>Active RnR 10/01/07_12/31/07</b>				
<b>Agency</b>	<b>fulldate</b>	<b>Fed Reg Cit</b>	<b>Title and Action</b>	<b>count</b>
<b>DHS</b>			1	
	11/20/2007	72 FR 65396	APPENDIX TO CHEMICAL FACILITY ANTI-TERRORISM STANDARDS	6521
<b>DOC/NOAA</b>			1	
	10/05/2007	72 FR 56929	ATLANTIC HIGHLY MIGRATORY SPECIES; ATLANTIC SWORDFISH QUOTAS	6486
<b>DOC/OS</b>			1	
	10/09/2007	72 FR 57198	COMMERCE DEBT COLLECTION	6488
<b>DOD/NAVY</b>			1	
	10/03/2007	72 FR 56267	ADMIRALTY CLAIMS	6484
<b>DOD/OS</b>			3	
	11/16/2007	72 FR 65436	TRICARE; EXPANSION OF GEOGRAPHIC SCOPE OF THE TRICARE RETIREE DENTAL PROGRAM	6520
	12/19/2007	72 FR 71792	PROVISION OF EARLY INTERVENTION AND SPECIAL EDUCATION SERVICES TO ELIGIBLE DOD DEPENDENTS	6540
	12/19/2007	72 FR 71793	DOD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM	6541

Agency	fulldate	Fed Reg Cit	Title and Action	count
<b>DOI-FWS</b>			1	
	10/23/2007	72 FR 60068	ENDANGERED AND THREATENED WILDLIFE AND PLANTS; DESIGNATION OF CRITICAL HABITAT FOR THE GUAJON (ELEU THERODACTYLUS COOKI)	6499
<b>DOT/FRA</b>			1	
	12/28/2007	72 FR 73659	ADJUSTMENT OF MONETARY THRESHOLD FOR REPORTING RAIL EQUIPMENT ACCIDENTS; INCIDENTS FOR CALENDAR YEAR 2008	6547
<b>EEOC</b>			1	
	12/26/2007	72 FR 72938	AGE DISCRIMINATION IN EMPLOYMENT ACT; RETIREE HEALTH BENEFITS	6544
<b>FMS&amp;HRC</b>			1	
	12/19/2007	72 FR 71788	FREEDOM OF INFORMATION ACT PROCEDURAL RULES	6539
<b>NARA</b>			1	
	11/15/2007	72 FR 64153	FEDERAL RECORDS MANAGEMENT; MEDIA NEUTRAL SCHEDULES	6519
<b>NRC</b>			1	
	10/19/2007	72 FR 59162	NATIONAL SOURCE TRACKING OF SEALED SOURCES; REVISED COMPLIANCE DATES	6497
<b>OMB</b>			1	
	11/13/2007	72 FR 63783	TRAFFICKING IN PERSONS; GRANTS AND COOPERATIVE AGREEMENTS	6516
				2

Agency	fulldate	Fed Reg Cit	Title and Action	count
<b>PBGC</b>			2	
	11/30/2007	72 FR 61644	BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS	6529
	11/30/2007	72 FR 61645	ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS; VALUATION OF BENEFITS AND ASSETS; EXPECTED RETIREMENT AGE	6530
<b>STATE</b>			3	
	10/11/2007	72 FR 57857	SEARCH FEES IN FREEDOM OF INFORMATION ACT CASES	6491
	11/02/2007	72 FR 62112	EXCHANGE VISITOR PROGRAM--SANCTIONS AND TERMINATIONS	6511
	12/20/2007	72 FR 72245	RULE TITLE: EXCHANGE VISITOR PROGRAM--SANCTIONS AND TERMINATIONS	6543
<b>TREAS/MO</b>			2	
	10/26/2007	72 FR 60772	ASSESSMENT OF CIVIL PENALTIES FOR MISUSE OF WORDS, LETTERS, SYMBOLS, AND EMBLEMS OF THE UNITED STATES MINT	6503
	10/29/2007	72 FR 61055	PROHIBITION ON THE EXPORTATION, MALTING, OR TREATMENT OF 5-CENT AND ONE-CENT COINS; CORRECTION	6504
<b>TREAS/OTS</b>			2	
	11/07/2007	72 FR 62768	PERSONAL TRANSACTIONS IN SECURITIES	6513
	12/20/2007	72 FR 72235	PERMISSIBLE ACTIVITIES OF SAVINGS AND LOAN HOLDING COMPANIES	6542
				3

Agency	fulldate	Fed Reg Cit	Title and Action	count
<b>USDA/APHIS</b>			2	
	11/28/2007	72 FR 67227	IMPORTATION OF LIVE SWINE, SWINE SEMEN, PORK, AND PORK PRODUCTS FROM THE CZECH REPUBLIC, LATVIA, LITHUANIA, AND POLAND	6523
	11/30/2007	72 FR 67635	BRUCELLOSIS IN CATTLE; STATE AND AREA CLASSIFICATIONS; IDAHO	6528
<b>USDA/FNS</b>			1	
	10/31/2007	72 FR 61479	PROCUREMENT REQUIREMENTS FOR THE NATIONAL SCHOOL LUNCH, SCHOOL BREAKFAST AND SPECIAL MILK PROGRAMS	6507
<b>USDA/FSA</b>			1	
	11/08/2007	72 FR 63242	REGULATORY STREAMLINING OF THE FARM SERVICE AGENCY'S DIRECT FARM LOAN PROGRAMS	6515
<b>USDA/FSA/RB-CS/RHS/RUS/FSA</b>			1	
	11/15/2007	72 FR 64119	REGULATORY STREAMLINING OF THE FARM SERVICE AGENCY'S DIRECT FARM LOAN PROGRAMS: CONFORMING CHANGES	6517
<b>USDA/RHS</b>			1	
	12/27/2007	72 FR 73252	SINGLE FAMILY HOUSING LOANS, PAYMENT ASSISTANCE	6545
			29	

Source: GAO.

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