

# **Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress**

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## Abstract

The Congressional Review Act (CRA; 5 U.S.C. §§801-808) was enacted in March 1996 as a way to reestablish a measure of congressional control over agency rulemaking. The CRA generally requires federal agencies to send almost all of their final rules to both houses of Congress and the Government Accountability Office (GAO) before they can take effect. After Congress receives a covered rule, any Member of Congress may introduce a CRA resolution of disapproval that, if signed into law, prevents the rule from taking effect (or continuing in effect).

Shortly after the CRA was enacted, GAO voluntarily developed a database of submitted rules, began checking the *Federal Register* to ensure that all covered rules were being submitted, and periodically notified the Office of Management and Budget (OMB) about missing rules. From 1997 through 2011, federal agencies submitted an average of about 3,600 rules to GAO each year, which was about 88% of the final rules that were published in the *Federal Register* in those years.

However, in November 2011, GAO decided to reduce its checks of the *Federal Register*, and to stop notifying OMB about missing rules. Shortly thereafter, the number of rules in the GAO database fell sharply. Federal agencies submitted 2,660 final rules that were published in the *Federal Register* during 2012, and submitted 2,586 rules that were published in 2013 – only about 71% of the rules that were published during those two years, and 1,242 fewer rules that would have been submitted to GAO at the 88% historical rate of submission. During the first half of 2014, federal agencies submitted 835 final rules to GAO – less than half of those published during this period, and 647 fewer rules than would have been submitted at the 88% rate of submission. Although most of the missing rules from 2012 through the first half of 2014 appear to be routine or informational in nature, they also included at least six rules that were considered “major” under the CRA (e.g., rules with a \$100 million annual effect on the economy) and at least 37 other rules that were considered “significant” under Executive Order 12866.

It is not clear why some of the missing rules were not in the GAO database. Most of the 43 missing major and significant rules also did not appear to have been received by both houses of Congress – thereby preventing a Member of Congress from introducing a resolution of disapproval under the CRA. Even if a covered rule is submitted to both houses of Congress, the CRA generally indicates it cannot take effect until it is also submitted to GAO. However, because the CRA prohibits judicial review of any “action” or “omission,” it is unclear whether a court may prevent an agency from enforcing a covered rule that was not reported to GAO and Congress. To address this issue, Congress could (1) require that GAO reinstitute its checks of the *Federal Register* and notifications to OMB, (2) reduce the number of rules required to be submitted to GAO and Congress, (3) change the rule submission process, and/or (4) permit some form of judicial review of the CRA rule submission requirement.

## Introduction

The regulations that federal agencies issue are often the means by which legislation is implemented and specific requirements are established. Many final rules are about relatively minor, technical issues, but some of the rules involve important public policies. Agency rules can also involve considerable costs, provide substantial benefits, reduce federal expenditures, and/or permit the transfer of large amounts of federal funds. For example:

- In January 2012 and April 2013, the Department of Defense (DOD) published three rules implementing the department's sexual assault prevention and response program.<sup>1</sup> Just one of the three rules was estimated to cost the department nearly \$15 billion to implement (with additional costs to each individual military service).
- In February 2012, the Department of Commerce (DOC) published a rule that completely revised regulations concerning the authorization and regulation of foreign-trade zones and zone activity in the United States.<sup>2</sup>
- In March 2013, the Department of Education published a rule making changes to the "Investing in Innovation Fund" that were expected to involve annual transfers of more than \$140 million from the federal government to local education agencies and nonprofit organizations.<sup>3</sup>
- In August 2013, DOD published a rule involving the TRICARE health program that implemented a reimbursement methodology similar to the Medicare

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<sup>1</sup> U.S. Department of Defense, "Sexual Assault Prevention and Response (SAPR) Program," *77 Federal Register* 4239, January 27, 2012; "Sexual Assault Prevention and Response (SAPR) Program," *78 Federal Register* 20443, April 5, 2013; and "Sexual Assault Prevention and Response (SAPR) Program Procedures," *78 Federal Register* 21715, April 11, 2013. DOD estimated the department's costs associated with the April 5, 2013, rule at \$14,819 million (*78 Federal Register* 20444).

<sup>2</sup> U.S. Department of Commerce, "Foreign-Trade Zones in the United States," *77 Federal Register* 12111, February 28, 2012. A foreign-trade zone is a designated location in the United States where companies can use special procedures that help encourage U.S. activity and value added - in competition with foreign alternatives - by allowing delayed or reduced duty payments on foreign merchandise, as well as other savings. The zones help create and maintain employment by encouraging operations in the United States that might otherwise have been carried out abroad.

<sup>3</sup> U.S. Department of Education, "Final Priorities, Requirements, Definitions, and Selection Criteria-Investing in Innovation Fund," *78 Federal Register* 18682, March 27, 2013.

program for inpatient services provided by sole community hospitals.<sup>4</sup> In December 2013, DOD published another TRICARE rule establishing a pilot program for refills of maintenance medicines.<sup>5</sup> DOD estimated that each of these rules would produce annual budgetary savings of more than \$100 million.

- In November 2013, the Department of Transportation (DOT) published a rule regarding the stowage of wheelchairs on aircraft, and another rule on the accessibility to the disabled of air carrier web sites and automated kiosks at airports.<sup>6</sup> DOT estimated that the first rule would produce 20-year net quantified benefits of more than \$200 million, and estimated the 10-year monetized costs and benefits of the second rule would each exceed \$100 million.

Although all of these final rules were to have taken effect by March 2014, the Congressional Review Act (CRA; 5 U.S.C. §§801-808) states that final rules generally cannot take effect until they are submitted to both houses of Congress and the Government Accountability Office (GAO).<sup>7</sup> As of July 15, 2014, none of the above rules appear to have been submitted to GAO, so technically none of them could take effect (even though the agencies issuing the rules are likely treating them as if they were already in effect).<sup>8</sup> In addition, the CRA states that Members of Congress cannot introduce a CRA resolution of disapproval regarding any rule until it is “received” by Congress.<sup>9</sup> Because none of the above rules appear to have been

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<sup>4</sup> U.S. Department of Defense, “TRICARE; Reimbursement of Sole Community Hospitals and Adjustment to Reimbursement of Critical Access Hospitals,” 78 *Federal Register* 48303, August 8, 2013.

<sup>5</sup> U.S. Department of Defense, “Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)/TRICARE: Pilot Program for Refills of Maintenance Medications for TRICARE for Life Beneficiaries Through the TRICARE Mail Order Program,” 78 *Federal Register* 75245, December 11, 2013.

<sup>6</sup> U.S. Department of Transportation, “Nondiscrimination on the Basis of Disability in Air Travel; Accessibility of Aircraft and Stowage of Wheelchairs,” 78 *Federal Register* 67918, November 12, 2013; and “Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports,” 78 *Federal Register* 67882, November 12, 2013.

<sup>7</sup> 5 U.S.C. §801(a)(1)(A). GAO was the General Accounting Office until 2004. The head of GAO is the Comptroller General of the United States.

<sup>8</sup> For example, DOD published a technical correction to its August 2013 rule on sole community hospitals shortly after the rule was published. See 78 *Federal Register* 51061, August 20, 2013. In April 2014, the Department of Education announced the start of the 2014 grant competition for the Investing in Innovation program’s scale-up and validation categories. See <http://www.ed.gov/news/press-releases/2014-investing-innovation-competition-continues-invitation-scale-and-validation->

<sup>9</sup> 5 U.S.C. §802(a).

submitted to both houses of Congress, no Member of Congress can use the expedited disapproval process established by the CRA for these rules.

The missing rules mentioned above are not isolated cases. Historical rates of submission indicate that more than 1,200 covered final rules that were published in 2012 and 2013 may not have been submitted to GAO, and therefore technically could not take effect. Several hundred other final rules published during the first half of 2014 also appear to have not been submitted to GAO. These missing rules include at least six “major” rules (e.g., rules expected to have at least a \$100 million annual effect on the economy), and at least 37 other rules that were considered “significant” under Executive Order 12866,<sup>10</sup> and/or were reviewed by the Office of Management and Budget (OMB) pursuant to the executive order. This report examines this issue, attempts to identify why certain rules were not in the GAO database, and discusses some options for Congress to consider if it decides that it wants to address this issue.

## Background

The CRA was included as part of the Small Business Regulatory Enforcement Fairness Act (Title II of P.L. 104-121, 5 U.S.C. §601 note), which was signed into law on March 29, 1996. The CRA established expedited legislative procedures (primarily in the Senate) by which Congress may disapprove agencies’ final rules by enacting a joint resolution of disapproval.<sup>11</sup> 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

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<sup>10</sup> Executive Order 12866, “Regulatory Planning and Review,” 58 *Federal Register* 51735, October 4, 1993. Section 3(f) of the executive order defines a “significant” regulatory action as one likely 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.”

<sup>11</sup> For a detailed description of the CRA disapproval process, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth, available at [http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0E%2C\\*P%5C\\_%3D%22P%20%20%0A](http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0E%2C*P%5C_%3D%22P%20%20%0A).

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>12</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>13</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>14</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 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.<sup>15</sup>

However, Section 808 of the CRA states that certain types of rules “shall take effect at such time as the Federal Agency promulgating the rule determines.” Those rules are “(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)

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<sup>12</sup> Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3686 (daily ed. April 18, 1996), at 142 *Cong. Rec.* S3683. As noted later in this report, there was very little legislative history prior to the enactment of the CRA, so these post-enactment statements by the CRA’s sponsors represent the best evidence of the intent of the statute.

<sup>13</sup> 5 U.S.C. §801 (a)(1)(A). On the same day, agencies are to provide a copy of the cost-benefit analysis of the rule (if any) as well as actions relevant to certain provisions in the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and “any other relevant information or requirements under any other Act and any relevant Executive orders.” 5 U.S.C. §801(a)(1)(B).

<sup>14</sup> 5 U.S.C. §801(a)(3).

<sup>15</sup> 5 U.S.C. §804(2).

that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>16</sup>

The CRA states 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>17</sup> The period for introducing a CRA joint resolution ends 60 days after Congress receives the rule, not including days when either house of Congress is adjourned for more than three days during a session. If the joint resolution is ultimately enacted, the rule may not take effect (or continue in effect), and may not be later reissued in substantially the same form.<sup>18</sup>

### What Rules Does the CRA Cover?

The CRA generally defines the word “rule” as having the same meaning as in Section 551 of the Administrative Procedure Act (APA, 5 U.S.C. §551 *et seq*), 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 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>19</sup>

However, the CRA specifically excludes from 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

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<sup>16</sup> 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, which allows agencies to publish final rules without previously seeking comments from the public on an earlier proposed rule. See 5 U.S.C. §553(b)(3)(B). Interim final and direct final rules are considered particular applications of the APA’s good cause exception

<sup>17</sup> 5 U.S.C. §802(a). Generally, therefore, a Member cannot introduce a resolution of disapproval until the rule is submitted. However, the Senate Parliamentarian has ruled that if GAO determines that an agency action is a covered rule that should have been submitted, a Member can introduce a resolution of disapproval starting on the date of GAO’s determination. See, for example, <http://www.finance.senate.gov/newsroom/chairman/release/?id=363028c1-c4fe-4ca9-b180-746e3e9daf82>.

<sup>18</sup> 5 U.S.C. §801(b)(2).

<sup>19</sup> 5 U.S.C. §551(4).

(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.<sup>20</sup>

These limits notwithstanding, the scope of the CRA is extremely broad, including rules that are exempt from APA 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>21</sup> As noted in a report by the Congressional Research Service (CRS):

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>22</sup>

Members of Congress have occasionally asked GAO for its opinion regarding whether particular agency actions or documents (e.g., letters, records of decision, booklets, guidance, and memoranda) were “rules” for purposes of the CRA. In its written responses to those requests, GAO has frequently noted that the definition of a rule in the CRA is very broad, and has stated that the CRA’s legislative history “confirms that it is intended to include within its purview almost all rules that an agency issues and not only those rules that must be promulgated according to the notice and comment requirements in section 553 of the APA.”<sup>23</sup>

### Most Rules Involve Routine and/or Technical Issues

As discussed in greater detail later in this report, during the past 15 years, federal agencies have typically published between 3,500 and 4,500 final rules in the *Federal Register* each year, and may publish thousands of other documents each year that could be considered “rules” as defined by the CRA. Just focusing on the final rules

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<sup>20</sup> 5 USC §804(3).

<sup>21</sup> Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 4<sup>th</sup> ed., (Chicago, IL: 2006), p. 187.

<sup>22</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>23</sup> See, for example, Letter from Lynn H. Gibson, GAO General Counsel, to the Honorable Orrin Hatch and the Honorable Dave Camp regarding whether an information memorandum issued by the Department of Health and Human Services constituted a rule under the CRA, B-323772, September 4, 2012, available at <http://gao.gov/assets/650/647778.pdf>.



that are published in the *Federal Register* reveals that while some of the rules are substantive in nature, most of them involve relatively routine and/or technical matters. For example, during the first week of May 2014, the Department of Homeland Security (DHS) published nine final rules in the *Federal Register*. Of these:

- Two rules were temporary deviations from existing drawbridge operations, one for five days to facilitate replacement of safety barrier gates at a bridge at Jersey City, New Jersey, and the other for two and one-half months to allow the owner to repair the damaged deck system of a bridge near Rio Vista, California. A third rule removed the existing drawbridge operation regulation for a bridge at Elizabeth, New Jersey, because the drawbridge was converted to a fixed bridge.
- One rule established a temporary safety zone in a particular part of San Francisco Bay in support of the town of Tiburon's 50<sup>th</sup> anniversary fireworks celebration from 11:00 a.m. until 9:45 p.m. on May 30, 2014. Another rule announced that the Coast Guard would enforce a previously established safety zone in a particular part of Mission Bay at Sea World in San Diego on 80 particular days between May 24 and September 6, 2014, because of recurring fireworks displays. A third rule established a special local regulation for the Indian River near Stuart, Florida, to accommodate the Stuart Sailfish Regatta from May 16 through May 18, 2014.
- Two rules finalized base flood elevations for certain communities in Kentucky, North Carolina, and Louisiana as part of the National Flood Insurance Program (NFIP). A third rule identified communities where the sale of flood insurance had been authorized under the NFIP.

During the same week, the Federal Aviation Administration (FAA) within the Department of Transportation (DOT) published seven final rules. Of those, six were new or amended airworthiness directives requiring particular types of maintenance and inspection procedures for Boeing Model 767 and 777F airplanes, Agusta helicopters, SOCATA Model TBM 700 airplanes, and certain models of M7 Aerospace aircraft. The seventh rule established "special conditions" for one particular model of acrobatic airplane, and applied to only one company.<sup>24</sup>

### **ABA Sections Recommend Limiting the Rules Submitted**

During the first 11 months of the CRA's implementation (late March 1996 through February 1997), GAO said that federal agencies submitted more than 3,600 final

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<sup>24</sup> For more information on the types of rules that agencies issue, see CRS Report R43056, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register*, by Maeve P. Carey, available at <https://www.fas.org/sgp/crs/misc/R43056.pdf>.

rules to GAO (about 15 rules per working day, on average).<sup>25</sup> Although 58 of the rules submitted were considered “major” rules, most were routine or informational in nature (e.g., FAA airworthiness directives).

In August 1997, the American Bar Association’s (ABA) Section of Administrative Law and Regulatory Practice and Section of Business Law adopted a series of recommendations to “provide a more practical process for Congressional review of agency regulations.”<sup>26</sup> Among other things, the ABA sections recommended that Congress amend the CRA to

limit automatic application of the resolution of disapproval process to major rules and such other defined classes of rules as are likely to have important impacts, while establishing an alternative process by which the action of any congressional committee or subcommittee may bring any other pending rulemaking within the process. At a minimum, routine and frequent rules should be excluded from the automatic application of the Act.<sup>27</sup>

The report accompanying this recommendation noted that a “rule” as defined in the CRA includes more than just the 3,000 or so final rules that are published annually in the *Federal Register*, and includes “tens of thousands” of such items as interpretive rules, general statements of policy, guidance to field offices, suggested enforcement strategies, and other actions affecting a member of the public and relied upon by the agency.

Were agencies to comply fully with the [CRA’s] requirement that *all* these matters be filed with congress as a condition of their effectiveness (as it appears, thus far, they are not), Congress and the GAO would be swamped with filings. Burying Congress in paper might even seem a useful means of diverting attention from larger, controversial matters; haystacks can be useful for concealing needles. However, no one believes many, if any, of these rules will be the subject of a resolution of disapproval. Yet requiring their submission could impose significant aggregate costs, both in encouraging agencies to cease providing such information and in dollars, well beyond their possible benefit.<sup>28</sup>

The ABA report also indicated that requiring agencies to submit all covered actions to Congress and GAO could have unintended consequences (e.g., cause agencies to avoid rulemaking, and use individualized letters that would not be made generally available and would not involve public participation). Therefore, the report suggested that the

automatic application of the statute should be limited to those actions that are likely to have important impacts. Congress should moderate its claim to participation in

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<sup>25</sup> U.S. General Accounting Office, *Congressional Review Act*, GAO/T-OGC-97-29, March 6, 1997.

<sup>26</sup> Report No. 2 of the Section of Administrative Law and Regulatory Practice, Presented Jointly with the Section of Business Law, 1997, 122-2 ABA Ann. Rep. 465 (August 1997) (hereafter, “ABA report”). To view a copy of these recommendations, see [http://www.americanbar.org/groups/leadership/recommend\\_107a.html](http://www.americanbar.org/groups/leadership/recommend_107a.html), or [http://www.americanbar.org/content/dam/aba/directories/policy/1997\\_am\\_107a\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/1997_am_107a_authcheckdam.pdf).

<sup>27</sup> *Ibid.*, p. 465.

<sup>28</sup> *Ibid.*, p. 470.

rulemaking oversight with an appreciation how, at the level of routine, frequent, and relatively unimportant actions, this mechanism could easily disserve the ends of responsive and responsible government.<sup>29</sup>

The report noted that under Executive Order 12291 (issued in 1981),<sup>30</sup> covered agencies were required to submit all of their proposed and final rules to the Office of Information and Regulatory Affairs (OIRA) within OMB (between 2,000 and 3,000 rules per year). However, in 1993, Executive Order 12866 revoked Executive Order 12291 and limited OIRA review to “significant” regulatory actions (usually between 500 and 700 per year). The ABA report said that in the wake of that change, congressional review of non-significant rules “cannot be as easily defended as a political check on the Presidency.”<sup>31</sup>

### OMB Guidance on Rule Submission Requirements

In 1998, as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, Congress directed OMB to issue guidance on certain requirements in the CRA, including the requirements in Section 801(a)(1)(A) regarding the submission of rules.<sup>32</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>33</sup>

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>34</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.” This CRA guidance is still on the OMB website.<sup>35</sup>

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<sup>29</sup> Ibid., p. 473.

<sup>30</sup> Executive Order 12291, “Federal Regulation,” 46 *Federal Register* 13193, February 19, 1981.

<sup>31</sup> Ibid., p. 474.

<sup>32</sup> P.L. 105-277, 112 Stat. 2681-495, October 21, 1998.

<sup>33</sup> OMB Memorandum M-99-07, January 12, 1999, available from the author.

<sup>34</sup> OMB Memorandum M-99-13, March 30, 1999, available from the author.

<sup>35</sup> See

[http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m99-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m99-13.pdf).

## Has the CRA Worked?

Although the CRA was enacted to provide more congressional authority over rulemaking, some consider the act a failure.<sup>36</sup> Of the more than 60,000 final rules that have been submitted to Congress since the legislation was enacted in March 1996 (including more than 1,200 major rules), and despite the introduction of nearly 100 CRA resolutions of disapproval, the CRA has been used to disapprove only one rule—the Occupational Safety and Health Administration’s November 2000 final rule on ergonomics, which was disapproved in March 2001.<sup>37</sup> The primary reason why the CRA has not been used more often is fairly straightforward. After enactment, a CRA joint resolution of disapproval must be presented to the President for signature or veto. Under most circumstances, it is likely that the President would veto the resolution to protect rules developed under his own administration, and it may also be difficult for Congress to muster the two-thirds vote in both houses needed to overturn the veto.

The rejection of the ergonomics rule was the result of a specific set of circumstances created by a transition in party control of the presidency. The majority party in both houses of Congress was the same as the party of the incoming President (George W. Bush). When the new Congress convened in 2001 and adopted a resolution disapproving the rule published under the outgoing President (William J. Clinton), the incoming President did not veto the resolution. Congress may be most able to use the CRA to disapprove rules in similar, transition-related circumstances.<sup>38</sup>

Although only one CRA resolution of disapproval has been signed into law during the past 18 years, the CRA has arguably had other, less discernable effects. As Morton Rosenberg pointed out in his report on the CRA for the Administrative Conference of the United States (ACUS), the introduction of a disapproval resolution

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<sup>36</sup> See, for example, Cindy Skrzycki, “Reform’s Knockout Act, Kept Out of the Ring,” *Washington Post*, April 18, 2006, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/04/17/AR2006041701561.html?nav=rss\\_opinion/columns](http://www.washingtonpost.com/wp-dyn/content/article/2006/04/17/AR2006041701561.html?nav=rss_opinion/columns).

<sup>37</sup> U.S. Department of Labor, Occupational Safety and Health Administration, “Ergonomics Program,” 65 *Federal Register* 68261, November 14, 2000.

<sup>38</sup> See, for example, Susan E. Dudley, “Reversing Midnight Regulations,” *Regulation*, vol. 24 (Spring 2001), p. 9, who noted that the “veto threat is diminished [after a transition], since the president whose administration issued the regulations is no longer in office.” See also testimony of Curtis W. Copeland, in U.S. Congress, House Committee on Government Reform, Subcommittee on Regulatory Affairs, *The Effectiveness of Federal Regulatory Reform Initiatives*, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., July 27, 2005, p. 13. See CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade*, by Morton Rosenberg, for a description of this and several other possible factors affecting the law’s use.

has been used to gather support for other legislation, to force agencies to withdraw or suspend the implementation of certain rules, to delay rules until further information is obtained, and to even speed up the implementation of rules.<sup>39</sup> The CRA has also helped keep Congress informed of agency rulemaking actions, and may have prevented some rules from being developed. Members of Congress continue to use the CRA in an effort to stop regulations they consider ill advised, even when they know that the legislation is unlikely to be signed into law.<sup>40</sup> During the 112<sup>th</sup> Congress (2011-2012), a total of 26 resolutions of disapproval were introduced in the House and the Senate – twice as many as in any Congress since the CRA was enacted.<sup>41</sup>

## GAO Database and Federal Register Reviews

GAO's only delineated 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 or published in the *Federal Register*, whichever is later.<sup>42</sup> However, shortly after the CRA was enacted, GAO voluntarily developed a database showing the covered final rules that had been submitted by department and agency.<sup>43</sup> GAO's general counsel testified in 1998 that the agency did so because "we believe that basic information about the rules should be collected in a manner that can be of use to Congress and the public."<sup>44</sup> The database

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<sup>39</sup> Morton Rosenberg, *The Critical Need for Effective Congressional Review of Agency Rules: Background and Considerations for Incremental Reform* (hereafter, "Rosenberg report"), July 18, 2012, pp 14-17, available at [http://www.acus.gov/sites/default/files/documents/CRA%20\\_%20Final%20Report.pdf](http://www.acus.gov/sites/default/files/documents/CRA%20_%20Final%20Report.pdf). This report was based on a report Rosenberg prepared while at the Congressional Research Service. 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.

<sup>40</sup> See, for example, Laura Barron-Lopez, "McConnell to force vote on EPA carbon regs," *The Hill*, January 16, 2014; and Amy Harder, "How Mitch McConnell Can Force a Vote, One Way or Another, on EPA Rules," *National Journal*, February 3, 2014, which indicated that Senator McConnell could "could use the results to put pressure on moderate Democrats up for reelection."

<sup>41</sup> Katie Weatherford, "Attempts to Use Congressional Review Act for Proposed Rules Threatens Public Safeguards," Center for Effective Government, March 11, 2014, available at <http://www.foreffectivegov.org/attempts-use-congressional-review-act-proposed-rules-threaten-all-public-safeguards>.

<sup>42</sup> 5 U.S.C §801(a)(2)(A). See <http://gao.gov/legal/congressact/majrule.html> to view these reports.

<sup>43</sup> To view this database, see <http://gao.gov/legal/congressact/congress.html>.

<sup>44</sup> U.S. General Accounting Office, *Congressional Review Act: Implementation and Coordination*, GAO/T-OGC-98-38, March 10, 1998, p. 2. See also U.S. General

includes most of the final rules that are published in the *Federal Register*, but does not include those actions that fall within the exceptions listed in the CRA (i.e., rules of particular applicability, rules relating to agency management or personnel, and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties). GAO also does not include in its database technical amendments or corrections to previously published regulations.<sup>45</sup> As discussed in greater detail later in this report, between 1997 and 2011, the GAO database has included about 88% of the final rules that were published in the *Federal Register*.

## GAO Reviews of the Federal Register

In 1997, GAO voluntarily conducted a review to determine whether all of the covered final rules that had been published in the *Federal Register* from October 1996 through July 1997 had been submitted to Congress and GAO.<sup>46</sup> The agency said it performed the review

both verify the accuracy of our database and to ascertain the degree of agency compliance with CRA. We were concerned that regulated entities may have been led to believe that rules published in the *Federal Register* were effective when, in fact, they were not unless filed in accordance with CRA.<sup>47</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. GAO later followed up with agencies that still had missing rules, and subsequently testified that 264 of the 279 rules were ultimately submitted.<sup>48</sup> In December 1998, GAO published a notice in the *Federal Register*, identifying more than 300 covered rules that had been published in the *Federal Register* between October 1996 and December 1997 but that GAO had not received prior to the announced effective dates of the rules.<sup>49</sup>

From 1998 until 2011, GAO continued to compare its list of rules that agencies submitted with the list of rules that were published in the *Federal Register* to

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Accounting Office, *Congressional Review Act: Update on Implementation and Coordination*, GAO/T-OGC-98-55, June 17, 1998, p. 2.

<sup>45</sup> Many of these kinds of provisions correct typographical errors or mistaken addresses, or make other types of non-substantive changes to recently published rules.

<sup>46</sup> U.S. General Accounting Office, *Congressional Review Act: Implementation and Coordination*, GAO/T-OGC-98-38, March 10, 1998, pp. 2-3.

<sup>47</sup> *Ibid.*, p. 2.

<sup>48</sup> *Ibid.*

<sup>49</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.

determine whether any covered rules had not been submitted. Between 1999 and 2009, GAO sent OIRA at least five letters listing more than 1,000 substantive final rules that GAO said it had not received during previous time periods (usually one or two-year periods ending three to nine months before the letter was sent).<sup>50</sup> For example:

- On July 3, 2003, GAO sent a 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 a 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>
- On May 27, 2008, GAO sent a 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>
- On May 26, 2009, GAO sent a letter to the acting administrator of OIRA listing 101 substantive rules that were published during FY 2008 that had not been submitted. Subsequently, OIRA sent an e-mail to federal agencies telling them that unsubmitted rules could not go into effect, and provided them with OMB’s 1999 guidance on the CRA. Many of these missing rules were ultimately submitted to GAO.<sup>54</sup>

In January 2010, GAO sent a letter to OIRA identifying 31 substantive rules that had been published during FY2009 that had not been submitted to GAO.<sup>55</sup> In the letter, GAO said “we appreciate recent efforts made by your office to encourage executive agencies to comply with the requirements of 5 U.S.C. § 801(a)(1)(A), and would be pleased to discuss ways in which we can work together to ensure that agencies

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<sup>50</sup> For a more complete discussion of this effort, see CRS Report R40997, *Congressional Review Act: Rules Not Submitted to GAO and Congress*, by Curtis W. Copeland, available at [http://assets.opencrs.com/rpts/R40997\\_20091229.pdf](http://assets.opencrs.com/rpts/R40997_20091229.pdf). The lists of rules that GAO provided to OIRA were limited to “substantive” rules in that they did not include items such as technical amendments to regulations that are printed in the *Federal Register*.

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

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

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

<sup>54</sup> See CRS Report R40997, Appendix 1, for a copy of this 2009 letter.

<sup>55</sup> Letter from Robert J. Cramer, Managing Associate General Counsel, GAO, to Cass R. Sunstein, Administrator, OIRA, January 19, 2010.



comply fully with CRA requirements by submitting rules both to Congress and to GAO.” GAO also said that it sent separate letters to each of the agencies that had missing rules, along with a listing of the rules that had not been received from each agency.

OIRA officials said that after receiving GAO’s January 2010 letter, the deputy administrator of OIRA sent another e-mail to federal agencies that reminded them of their obligation to submit their rules to GAO and Congress, and provided another copy of OMB’s 1999 guidance on the CRA. They also said that OIRA planned to send similar e-mails twice each year to agency regulatory officials, and planned to give GAO a list of those agency officials so that GAO could resolve any concerns about unsubmitted rules more quickly. Finally, OIRA officials said that they planned to raise the issue of compliance with the CRA at meetings of the Regulatory Working Group.<sup>56</sup> By July 2010, all but three of the 31 missing rules from FY 2009 had been submitted to GAO.

In March 2012, GAO sent a letter to the OIRA Administrator identifying 21 substantive rules that were published during FY2011 that had not been submitted to GAO.<sup>57</sup> In the letter, GAO said it was “pleased to note that the number of regulations not submitted to GAO has continued to be low,” and said it appreciated “recent efforts made by your office to encourage agencies to comply” with the CRA’s submission requirements.” GAO also said it “would be pleased to discuss ways in which we can work together to ensure that agencies comply fully with CRA requirements by submitting rules both to Congress and to GAO.”<sup>58</sup>

### **GAO Reduces Its *Federal Register* Reviews**

However, by November 2011, five months before its March 2012 letter to OIRA, GAO had already decided to change its voluntary CRA procedures. Instead of periodically reviewing the *Federal Register* to ensure that it had received *all* of the covered rules that been published, GAO began limiting those reviews to just the *major* rules (e.g., searching the *Federal Register* to see if the issuing agency characterized certain missing rules as “major” or “economically significant”). Also, GAO stopped preparing for OIRA an end-of-year list of the rules that it had not received. GAO said that if it discovers that certain major rules have not been received, it follows up with the issuing agencies. GAO officials said that because of reductions in GAO’s

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<sup>56</sup> The Regulatory Working Group was established by Section 4(d) of Executive Order 12866, and is composed in part of representatives from each agency that the OIRA administrator determines to have “significant regulatory responsibility.”

<sup>57</sup> Letter from Robert J. Cramer, Managing Associate General Counsel, GAO, to Cass R. Sunstein, Administrator, OIRA, March 20, 2012.

<sup>58</sup> DOD issued 11 of the 21 rules on the list. Several of the rules were considered “significant” rules under Executive Order 12866 and/or were reviewed by OIRA under the executive order.



appropriations in recent years, the agency decided to reduce its CRA-related work that is not required by the Act.<sup>59</sup>

In its March 2012 letter to the OIRA Administrator, GAO told OIRA that it “will not be preparing a list of rules not received for the 2012 fiscal year due to constraints on GAO’s resources.” However, GAO officials said that GAO did not tell anyone in Congress about these changes in its procedures, and did not tell the rulemaking agencies or the public about the changes.<sup>60</sup>

## Comparison of GAO and *Federal Register* Databases

As **Table 1** below shows, during the 15-year period from 1997 (the first full year that the CRA was in effect) through 2011, federal agencies submitted to GAO an average of about 3,600 final rules per year, or about 88% of the final rules that were published in the *Federal Register* during those years.<sup>61</sup> The percentage of *Federal Register* final rules that were submitted to GAO varied somewhat from year to year, but never fell below 82% in any year.

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<sup>59</sup> Interview with Robert Cramer and Shirley Jones, GAO Office of the General Counsel, April 9, 2014.

<sup>60</sup> Ibid.

<sup>61</sup> Some of the difference between the GAO and *Federal Register* numbers can be attributed to (1) exemptions in the CRA (e.g., for rules of “particular applicability” and rules related to agency management or personnel), and (2) GAO’s decision not to include in its database technical corrections to previously published final rules.

**Table 1: Comparison of Number of Final Rules Published in the Federal Register with Number of Final Rules Submitted to GAO: 1997 through 2013**

Year	Number of Final Rules Published in the Federal Register	Number of Final Rules Submitted to GAO
1997	4,642	3,930
1998	4,919	4,388
1999	4,672	4,336
2000	4,490	4,079
2001	4,136	3,423
2002	4,171	3,559
2003	4,283	3,774
2004	4,174	3,661
2005	3,978	3,301
2006	3,730	3,065
2007	3,594	2,947
2008	3,820	3,085
2009	3,456	3,472
2010	3,563	3,261
2011	3,781	3,868
<b>2012</b>	<b>3,714</b>	<b>2,660</b>
<b>2013</b>	<b>3,659</b>	<b>2,586</b>

Note: GAO data are for rules published in the *Federal Register* during the above years and in the GAO database as of July 15, 2014. It is unclear why the GAO database reflects more rules than were published in 2009 and 2011.

Source: GAO database, available at <http://gao.gov/legal/congressact/fedrule.html>.

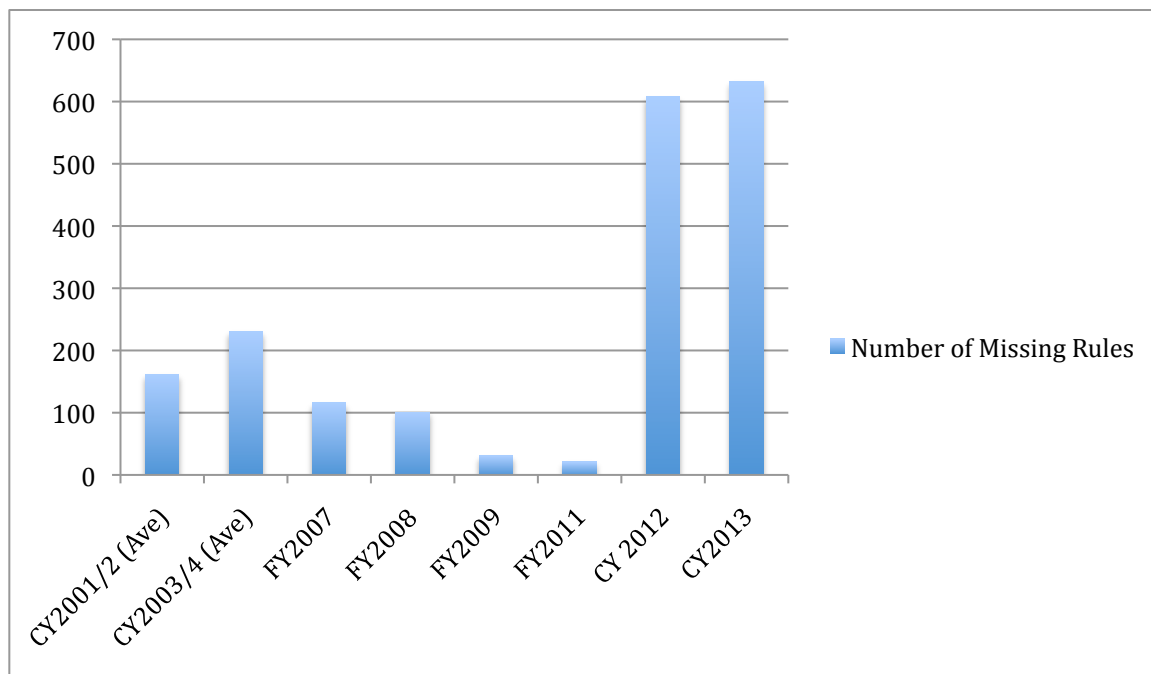
However, as **Table 1** also shows, after GAO reduced its checks of the *Federal Register* in November 2011 and stopped notifying OIRA about missing rules, the number and percentage of final rules in the GAO database dropped to unprecedented levels.

- During calendar year 2012, federal agencies published a total of 3,714 final rules in the *Federal Register*, but the GAO database indicates that only 2,660 of those rules were submitted (71.6%). Had GAO received 88% of the final rules that were published during 2012, the database would have included 3,268 rules – 608 more than appear to have been submitted.
- During calendar year 2013, federal agencies published a total of 3,659 final rules in the *Federal Register*, but (as of July 15, 2014) the GAO database included only 2,586 of those rules (70.7%). Had GAO received 88% of the

final rules that were published during 2013, the database would have included 3,220 rules – 634 more than appear to have been submitted.

Taken together, the GAO database appears to include 1,242 fewer rules for 2012 and 2013 than the historical rate of submission would suggest should have been submitted to GAO.<sup>62</sup> If this is correct, the number of missing rules in each of those years would far exceed the number that GAO reported to be missing in any previous one-year period. (See **Figure 1** below.)

**Figure 1: Number of Apparently Missing Rules in 2012 and 2013 Far Exceed the Number Missing in Previous Years**



Note: GAO reported 322 missing rules during calendar years (CY) 2001 and 2002, for an average in those years of 161 missing rules per year. GAO reported 460 missing rules during CY2003 and CY2004 (average of 230 per year); 116 missing rules during FY2007, 101 missing rules during FY2008, 31 missing rules during FY2009, and 21 missing rules during FY2011. Data for 2012 and 2013 are for rules published in the *Federal Register* during those years, and are estimates based on historical rates of submission.

Source: GAO and author analysis of Federal Register and GAO data.

When broken down by cabinet department and the Environmental Protection Agency (EPA) (**Table 2** below), the biggest differences between the *Federal Register* and GAO database for 2012 and 2013 occurred in three Cabinet departments – DOD, DHS, and DOT.

<sup>62</sup> Even if GAO had received only 82% of the final rules published in the *Federal Register* during 2012 and 2013 (the lowest percentage of any year since the CRA was enacted), GAO would have received 6,045 rules – 798 more than GAO actually received for those years.

**Table 2: Comparison of Final Rules Published in *Federal Register* with Rules Submitted to GAO by Department/Agency: 2012 and 2013**

Department/ Agency	2012		2013	
	<i>Federal Register</i>	GAO	<i>Federal Register</i>	GAO
USDA	128	106	164	132
DOC	350	316	327	301
<b>DOD</b>	<b>164</b>	<b>68</b>	<b>143</b>	<b>43</b>
DOEd	18	14	42	28
DOE	52	19	54	18
HHS	141	84	145	94
<b>DHS</b>	<b>649</b>	<b>379</b>	<b>591</b>	<b>282</b>
HUD	18	13	23	15
DOI	95	67	115	96
DOJ	20	14	26	16
DOL	38	17	39	19
DOS	17	4	15	8
<b>DOT</b>	<b>777</b>	<b>556</b>	<b>855</b>	<b>666</b>
VA	37	33	33	28
TREAS	121	74	106	64
EPA	635	585	514	463
All Other Agencies	454	311	467	313
Total	3,714	2,660	3,659	2,586

Note: GAO data are for rules published in the *Federal Register* during the above years and in the GAO database as of July 15, 2014. Acronyms not previously introduced include USDA (U.S. Department of Agriculture), DOEd (Department of Education), DOE (Department of Energy), HUD (Department of Housing and Urban Development), DOI (Department of the Interior), DOJ (Department of Justice), DOL (Department of Labor), DOS (Department of State), VA (Department of Veterans Affairs), and TREAS (Department of the Treasury). The DOD totals include rules issued by the Corps of Engineers that were listed separately from DOD in the GAO database under “Department of the Army” (six in 2012 and four in 2013).

Source: Federal Register database, available at <https://www.federalregister.gov/articles/search#advanced>, and GAO database, available at <http://gao.gov/legal/congressact/fedrulerule.html>.

During 2012 and 2013, DOD published a total of 307 final rules, but the GAO database contained only 111 (36%) of those rules – 196 fewer rules, and 159 fewer than would have been submitted at the 88% rate. Within DHS and DOT, one agency within each department accounted for most of the rules that were published, as well as most of the differences from the *Federal Register* totals.

- DHS published 1,240 final rules in 2012 and 2013, but the GAO database contained only 661 of those rules – 579 fewer rules, and 430 fewer than

would have been submitted at the 88% historical rate. Within DHS, the U.S. Coast Guard published 1,047 final rules during 2012 and 2013, but only 503 (48%) of those rules appeared in the GAO database – 544 fewer rules, and 418 fewer than would have been submitted at the 88% historical rate.

- DOT published 1,632 final rules in the *Federal Register* during 2012 and 2013, but as of July 15, 2014, the GAO database contained only 1,222 of those rules – 410 fewer rules, and 214 fewer than would have been submitted at the 88% historical rate. Within DOT, the FAA published 1,441 final rules during 2012 and 2013, but only 1,140 (79%) of those rules appeared in the GAO database – 301 fewer rules, and 128 fewer than would have been submitted at the 88% historical rate.

As **Table 3** below shows, based on the historical rate of rule submission, DOD, Coast Guard, and FAA accounted for more than one-half of the final rules that were published during 2012 and 2013 but that appeared to be missing from the GAO database as of July 15, 2014. Coast Guard alone accounted for about one-third of the missing rules.

**Table 3: DOD, Coast Guard, and FAA Accounted for Most of the Missing Rules Published in 2012 and 2013**

Coverage	Final Rules Published in <i>Federal Register</i> During 2012 and 2013	Final Rules Expected in GAO Database at 88% Historical Rate	Final Rules in the GAO Database (as of 7/15/14)	Expected Final Rules Not in the GAO Database
DOD	307	270	111	159
Coast Guard	1,047	921	503	418
FAA	1,441	1,268	1,140	128
DOD, Coast Guard, and FAA Combined	2,795	2,459	1,754	705
All Agencies	7,373	6,488	5,246	1,242

Note: GAO data are for rules published in the *Federal Register* during the above years and in the GAO database as of July 15, 2014.

Source: Federal Register database, available at <https://www.federalregister.gov/articles/search#advanced>, and GAO database, available at <http://gao.gov/legal/congressact/fedrule.html>.

## Major and Significant Rules Missing from GAO Database

Most of the final rules that were published in the *Federal Register* during 2012 and 2013 but were not in the GAO database as of July 2014 appear to be “routine” or “informational” in nature.<sup>63</sup> However, at least five of these missing rules were identified by the issuing agencies as “major” rules under the Congressional Review Act (e.g., expected to have at least a \$100 million annual impact on the economy), and another 31 of the missing rules were considered “significant” under Executive Order 12866<sup>64</sup> and/or were reviewed by OIRA under the executive order.<sup>65</sup>

### Missing Major Rules

In 2006, GAO testified that its checks of the *Federal Register* during the first 10 years of the CRA’s implementation indicated that although about 200 non-major rules were not submitted each year, all of the major rules were submitted “in a timely fashion.”<sup>66</sup> However, it appears that at least five major rules that were

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<sup>63</sup> In the Unified Agenda of Regulatory and Deregulatory Actions, rules are categorized into one of five levels of priority: (1) Economically Significant (which is essentially the same as “major”), (2) Other Significant, (3) Substantive, Nonsignificant, (4) Routine and Frequent, and (5) Informational and Other. See “Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions,” the current edition available at [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201310/Preamble\\_8888.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201310/Preamble_8888.html).

<sup>64</sup> Executive Order 12866, “Regulatory Planning and Review,” 58 *Federal Register* 51735, October 4, 1993. As noted previously, Section 3(f) of the executive order defines a “significant” regulatory action as one likely 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.”

<sup>65</sup> Several of the rules were reviewed by OIRA, even though the issuing agencies indicated that the rules were not “significant” under the executive order. Because OIRA only reviews “significant” rules, and the OIRA database indicates these rules were “significant,” this report considers these rules to be “significant” rules.

<sup>66</sup> U.S. Government Accountability Office, *Federal Rulemaking: Perspectives on 10 Years of Congressional Review Act Implementation*, GAO-06-601T, March 30, 2006, p. 4.

published during 2012 and 2013 were missing from the GAO database as of July 2014:

- A DOD rule on “Voluntary Education Programs,” published on December 7, 2012 (77 FR 72941, RIN 0790-AI50). The rule was intended to implement policy, assign responsibilities, and prescribe procedures for the operation of voluntary education programs within DOD. Voluntary education programs include tuition assistance, which is administered uniformly across the services. Subject to appropriations, each service pays no more than \$250 per semester-unit for tuition and fees combined. Each Service member participating in off-duty, voluntary education is eligible for up to \$4,500 in aggregate, for each fiscal year. DOD certified that the rule was “economically significant” because it was expected to have more than a \$100 million annual effect on the economy. OIRA’s database indicated that it was a “major rule.”
- A Department of Education rule on "Final Priorities, Requirements, Definitions, and Selection Criteria-Investing in Innovation Fund," published on March 27, 2013, (78 FR 18682, RIN 1855-AA09). The rule clarified and redesigned key aspects of the program, making changes that were expected to result in accelerating the identification of promising solutions to pressing challenges in K-12 public education. The department estimated that the rule would involve annualized transfers from the federal government to local education agencies and nonprofit organizations of more than \$140 million.
- A DOD rule on "TRICARE; Reimbursement of Sole Community Hospitals and Adjustment to Reimbursement of Critical Access Hospitals," published on August 8, 2013 (78 FR 48303, RIN 0720-AB41). The rule implemented a reimbursement methodology similar to that applicable to Medicare beneficiaries for inpatient services provided by sole community hospitals. The rule also provided for special reimbursement for labor/delivery and nursery services in such hospitals and creates a possible General Temporary Military Contingency Payment Adjustment for inpatient services. DOD estimated that the rule would reduce its payments to such hospitals, producing budgetary savings of about \$676 million for the FY2013-2017 period.
- A DOD rule on “Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)/TRICARE: Pilot Program for Refills of Maintenance Medications for TRICARE for Life Beneficiaries Through the TRICARE Mail Order Program,” published on December 11, 2013 (78 FR 75245, RIN 0720-AB60). Under the pilot program, beneficiaries would be required to obtain all refill prescriptions for covered maintenance medications from the TRICARE mail order program or military treatment facility pharmacies. DOD estimated the program would produce savings to the department of about \$120 million during the first year, and savings to beneficiaries of about \$28 million in reduced copayments. Savings to both the department and

beneficiaries were expected to increase about 4% per year during the remaining four years of the demonstration.

- A Consumer Financial Protection Bureau rule on “Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z),” published on December 31, 2013 (78 FR 79730, RIN 3170-AA19). As required by Sections 1098 and 1100A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010, hereafter, the “Dodd-Frank Act”), the rule established new disclosure requirements and forms in Regulation Z for most closed-end consumer credit transactions secured by real property, combines existing requirements, and provides extensive guidance regarding compliance with those requirements. The agency estimated that annual costs to creditors and settlement agents during the first five years would be about \$275 million, with annual benefits to consumers even greater.

### Significant Rules Not in the GAO Database

Thirty-one other final rules that were published in 2012 and 2013 but not in the GAO database in July 2014 were considered “significant” under Executive Order 12866<sup>67</sup> and/or were reviewed by OIRA before they were published in the *Federal*

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<sup>67</sup> Section 3(f) of Executive Order 12866 defines a “significant” regulatory action as one likely 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.”



*Register*.<sup>68</sup> Twenty-one of those rules were published in 2012, and 10 were published in 2013.<sup>69</sup>

### Missing Significant Rules from 2012

- A rule by the U.S. Agency for Information and Development (AID) on “Procurement of Commodities and Services Financed by USAID Federal Program Funds,” published on January 10, 2012 (77 FR 1396, RIN 0412-AA70), which simplified implementation of the statutory requirement that Federal assistance, or program, funds made available by the United States Congress to USAID under the authority of the Foreign Assistance Act of 1961, as amended, be used for procurement in the United States, the recipient country, or developing countries.
- A DOC rule on “Foreign-Trade Zones in the United States,” published on February 28, 2012 (77 FR 12111, RIN 0625-AA81), which revised regulations issued by the Foreign-Trade Zones Board pursuant to the Foreign-Trade Zones Act of 1934, as amended, concerning the authorization and regulation of foreign-trade zones and zone activity in the United States.
- A DOD rule on “Federal Voting Assistance Program,” published on September 18, 2012 (77 FR 57486, RIN 0790-AI27). The rule provided direction and guidance to DOD and other federal departments and agencies in establishing voting assistance programs for citizens covered by the Uniformed and Overseas Citizens Absentee Voting Act as modified by the Military and Overseas Voter Empowerment Act.
- A DOD rule on the “DOD Information Assurance Scholarship Program (IASP),” published March 14, 2012 (77 FR 14955, RIN 0790-AI28). The rule implemented policy, responsibilities and procedures for executing an

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<sup>68</sup> At least two other significant rules were not in the database at the start of this study, but were submitted after both GAO and the issuing agency were notified that the rules were missing: (1) a Coast Guard rule on “Implementation of the Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, and Changes to National Endorsements,” published on December 24, 2013 (78 FR 77795, RIN 1625-AA16), received by GAO on March 4, 2014; and (2) a Coast Guard rule on “Nontank Vessel Response Plans and Other Response Plan Requirements,” published on September 30, 2013 (78 FR 60099, RIN 1625-AB27), received by GAO on April 28, 2014.

<sup>69</sup> One other significant rule was not in the database at the start of this review, even though it had been submitted to GAO in November 2013. (GAO did not enter the rule into the database until May 2014). See FAA rule on “Qualification, Service, and Use of Crewmembers and Aircraft Dispatchers,” published on November 12, 2013 (78 FR 67799, RIN 2120-AJ00). The FAA estimated base costs of this rule from 2019 to 2028 of about \$313 million, with benefits even higher.

information assurance scholarship and grant program, used to recruit and retain the nation's top information assurance and information technology talent, which is critical as DOD progresses into the cybersecurity arena.

- A DOD rule on the “Sexual Assault Prevention and Response (SAPR) Program,” published on January 27, 2012 (77 FR 4239, RIN 0790-AI37). The rule implemented DOD policy and assigned responsibilities for the SAPR Program on prevention, response, and oversight to sexual assault.
- A DOD rule on “Defense Support to Special Events,” published on April 17, 2012 (77 FR 22671, RIN 0790-AI55), which established procedures and assigned responsibilities for Special Events, set forth procedural guidance for the execution of Special Events support when requested by civil authorities or qualifying entities and approved by the appropriate DOD authority, or as directed by the President.
- A DOD rule on “Department of Defense-Defense Industrial Base Voluntary Cyber Security and Information Assurance Activities,” published on May 11, 2012 (77 FR 27615), which established a voluntary cyber security information sharing program between DOD and eligible DIB companies, enhancing and supplementing DIB participants' capabilities to safeguard DOD information that resides on, or transits, DIB unclassified information systems.
- A DOD rule on “DOD Unclassified Controlled Nuclear Information (UCNI),” published on July 25, 2012 (77 FR 43506, RIN 0790-AI64), which updated policies and responsibilities for controlling DOD UCNI in accordance with the provisions of current law.
- A DOD rule on “Pilot Program for the Temporary Exchange of Information Technology Personnel,” published on June 20, 2012 (77 FR 36916, RIN 0790-AI66), which assigned responsibilities and provides procedures for implementing a Pilot Program for the Temporary Exchange of Information Technology Personnel to enhance skills and competencies.
- A DOL/Employment and Training Administration rule on the “YouthBuild Program,” published on February 15, 2012 (77 FR 9111, RIN 1205-AB49), which implemented the YouthBuild Transfer Act of 2006. The goals of the Transfer Act for YouthBuild program are to assist at-risk youth in obtaining a high school or General Educational Development (GED) diploma and acquiring occupational skills training that leads to employment through the construction/rehabilitation of housing for low-income or homeless individuals and families in the community.
- A rule by the State Department on “Amendment to the International Traffic in Arms Regulations: Exemption for Temporary Export of Chemical Agent

Protective Gear,” published on May 2, 2012 (77 FR 25865, RIN 1400-AC71), which added an exemption for the temporary export of chemical agent protective gear for personal use. The exemption for body armor was amended to also cover helmets when they are included with the body armor.

- A State Department rule on “Exchange Visitor Program-Summer Work Travel,” published on May 11, 2012 (77 FR 27593, RIN 1400-AD14), which expanded upon and provided guidance on additional regulatory changes and bolsters portions of the regulations to protect the health, safety, and welfare of Summer Work Travel Program participants and to reinforce the cultural exchange aspects of the Program to promote mutual understanding in accordance with the Mutual Educational and Cultural Exchange Act of 1961.
- A State Department rule on “Amendment to the International Traffic in Arms Regulations: Afghanistan and Change to Policy on Prohibited Exports,” published on December 31, 2012 (77 FR 76864, RIN 1400-AD26), which amended the International Traffic in Arms Regulations to list Afghanistan as a major non-NATO ally, and to make available the use of two additional defense export license exemptions for proscribed destinations.
- A rule by the Department of Education on “Final Revisions to Certain Data Collection and Reporting Requirements, Final Priority; State Fiscal Stabilization Fund Program and Discretionary and Other Formula Grant Programs,” published January 31, 2012 (77 FR 4663, RIN 1894-AA02), which revised certain data collection and reporting requirements, and a final priority, under the State Fiscal Stabilization Fund program (which provides states with billions in formula grants to help minimize and avoid reductions in education and other essential services).
- A Department of Education rule on the “State Fiscal Stabilization Fund Program,” published on January 31, 2012 (77 FR 4674, RIN 1894-AA03), which finalized a previously issued interim final rule that extended to January 31, 2012, the deadline by which States must collect and publicly report data and other information on various program indicators and descriptors.<sup>70</sup>
- A DOT rule on “Prioritization and Allocation Authority Exercised by the Secretary of Transportation Under the Defense Production Act,” published on October 1, 2012 (77 FR 59793, RIN 2105-AD83), which clarified the priorities and allocation authorities exercised by the Secretary of

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<sup>70</sup> Interim final rulemaking is a particular application of the “good cause” exception in the Administrative Procedure Act in which an agency issues a final rule without a notice of proposed rulemaking that is generally effective immediately, but with a post-promulgation opportunity for the public to comment. The agency may later issue a final rule revising or confirming the interim final rule.

Transportation under title I of the Defense Production Act of 1950, and established the administrative procedures by which the Secretary will exercise this authority.

- A DOT/FAA rule on “The New York North Shore Helicopter Route,” published on July 9, 2012 (77 FR 39911, RIN 2120-AJ75), which required helicopter pilots to use the New York North Shore Helicopter Route when operating along the north shore of Long Island, New York.
- A NASA rule on “Inventions and Contributions,” published on May 10, 2012 (77 FR 27365, RIN 2700-AD51), which amended the agency’s regulations to clarify and update the procedures for board recommended awards, and the procedures and requirements for recommended special initial awards, including patent application awards, software release awards, and Tech Brief awards, and to update citations and the information on the systems used for reporting inventions and issuing award payments.
- A rule by the Equal Employment Opportunity Commission on “Federal Sector Equal Employment Opportunity,” published on July 25, 2012 (77 FR 43498, RIN 3046-AA73), which revised the agency’s regulations for processing equal employment opportunity complaints by federal sector employees and job applicants.
- A rule by the Small Business Administration (SBA) on the “Small Business Technology Transfer Program Policy Directive,” published on August 6, 2012 (77 FR 46855, RIN 3245-AF45), which amended the agency’s Small Business Technology Transfer Policy Directive to implement those provisions of the National Defense Authorization Act for Fiscal Year 2012 affecting the program.
- An SBA rule on the “Small Business Innovation Research Program Policy Directive,” published on August 6, 2012 (77 FR 46805, RIN 3245-AF84), which amended the Small Business Innovation Research Policy Directive to implement those provisions of the National Defense Authorization Act for Fiscal Year 2012 affecting the program.

### Missing Significant Rules from 2013

- A DOD rule on the “Sexual Assault Prevention and Response (SAPR) Program,” published on April 5, 2013 (78 FR 20443, RIN 0790-AI37). The rule implemented DOD policy and assigned responsibilities for the SAPR Program on prevention, response, and oversight to sexual assault.
- A DOD rule on “Defense Support of Civilian Law Enforcement Agencies,” published on April 12, 2013 (78 FR 21826, RIN 0790-AI54). The rule provided specific policy direction and assigns responsibilities with respect to

DOD support provided to federal, state, and local civilian law enforcement agencies, including responses to civil disturbances.

- A DOD rule on “Defense Industrial Base (DIB) Voluntary Cyber Security and Information Assurance (CS/IA) Activities,” published on October 22, 2013 (78 FR 62430, RIN 0790-AI60). DIB CS/IA is a voluntary cyber security information-sharing program between DOD and eligible DIB companies. The program enhances and supplements DIB participants' capabilities to safeguard DOD information that resides on, or transits, DIB unclassified information systems.
- A DOD rule on “Mission Compatibility Evaluation Process,” published on December 5, 2013 (78 FR 73085, RIN 0790-AI69). The rule implemented provisions in Section 358 of the Ike Skelton National Defense Authorization Act for FY2011, which required DOD to designate a senior official and a lead organization to serve as a clearinghouse for the coordination of DOD review of applications filed with the Secretary of Transportation. Applications referred to DOD involve proposals for the construction of structures that may affect navigable air space. Section 358 requires DOD to issue procedures for addressing the impacts of those structures on military operations and determining if they pose an unacceptable risk to the national security of the United States.
- A Department of State rule on “International Traffic in Arms Regulations: Canadian Firearms Components Exemption,” published on July 8, 2013 (78 FR 40630, RIN 1400-AD07). The rule amended the International Traffic in Arms Regulations to implement a statutory provision regarding the exemption from licensing for export to Canada of firearms components not exceeding \$500 in value.
- A Department of State rule on “Amendment to the International Traffic in Arms Regulations: Continued Implementation of Export Control Reform,” published on July 8, 2013 (78 FR 40922, RIN 1400-AD40). The rule, part of the President's Export Control Reform effort, amended the International Traffic in Arms Regulations to revise four more U.S Munitions List categories and provide new definitions and other changes.
- A Department of Education rule on “Direct Grant Programs and Definitions That Apply to Department Regulations,” published on August 13, 2013 (78 FR 49337, RIN 1890-AA14). The rule provided a series of amendments to the department's general administrative regulations to allow it to be more effective and efficient when selecting grantees in discretionary grant competitions, provide higher-quality data to the Congress and the public, and better focus applicants on the goals and objectives of the programs to which they apply for grants.

- A DOT rule on “Nondiscrimination on the Basis of Disability in Air Travel; Accessibility of Aircraft and Stowage of Wheelchairs,” published on November 12, 2013 (78 FR 67918, RIN 2105-AD87). The rule allowed (but not require) airlines to use the seat-strapping method (placing a wheelchair across a row of seats using a strap kit that complies with applicable FAA or foreign government regulations on the stowage of cargo in the cabin compartment) to transport a passenger’s manual folding wheelchair in the cabin of aircraft.
- A DOT rule on “Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports,” published on November 12, 2013 (78 FR 67882, RIN 2105-AD96). The rule required air carriers to make their websites accessible to individuals with disabilities, and required ticket agents that are not small businesses to disclose and offer web-based fares to passengers who indicate that they are unable to use the agents’ web sites due to a disability.
- A Small Business Administration rule on “Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation,” published on October 2, 2013 (78 FR 61113, RIN 3245-AG20). Among other things, the rule established policies and procedures for setting aside, partially setting aside and reserving Multiple Award Contracts for small business concerns.

### Other Rules

In addition to the above “significant” rules, several other rules that were published in 2012 or 2013 but not in the GAO database appeared to be substantive in nature but (because they were issued by independent regulatory agencies) are not covered by Executive Order 12866, and therefore were not reviewed by OIRA. For example, a Commodity Futures Trading Commission (CFTC) rule entitled “Final Exemptive Order Regarding Compliance With Certain Swap Regulations,” published on January 7, 2013 (78 FR 858, RIN 3038-AD85) permitted certain individuals to delay compliance with certain requirements of the Commodity Exchange Act, as amended by the Dodd-Frank Act. The rule (25 pages in the *Federal Register*) was highly controversial, and was criticized by some as delaying compliance by certain foreign entities, and prolonging exposure of U.S. taxpayers to unnecessary systemic risks. CFTC said it recognized those risks, but said the rule would allow those entities time to transition to the new regulatory regime in a more orderly manner.<sup>71</sup>

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<sup>71</sup> CFTC also published a related document, “Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations,” on July 26, 2013 (78 FR 45291, RIN 3038-AD85, 84 pages in the *Federal Register*) that was also not in the GAO database. Although described as “guidance” and a “policy statement,” it was published in the “Rules and Regulations” section of the *Federal Register*.

Also, there were several regulatory actions reviewed by OIRA under Executive Order 12866 that were described as “notices” that could arguably meet the definition of a “rule” under the CRA. For example, a “notice of final determination” by the Department of Energy on “Updating State Residential Building Energy Efficiency Codes,” published on May 17, 2012 (77 FR 29322, RIN 1904-AC59) reflected a determination that the 2012 edition of the International Code Council (ICC) International Energy Conservation Code (IECC) (2012 IECC or 2012 edition) would achieve greater energy efficiency in low-rise residential buildings than the 2009 IECC. Upon publication of this affirmative final determination, States were required to file certification statements to DOE that they have reviewed the provisions of their residential building code regarding energy efficiency and made a determination as to whether to update their code to meet or exceed the 2012 IECC. Additionally, this Notice provided guidance to States on how the codes have changed from previous versions, and the certification process.

Most of the missing “major” and “significant” rules listed above were scheduled to take effect in 2012, 2013, or early 2014.<sup>72</sup> However, if they were not submitted to GAO (even if they were submitted to Congress), the CRA generally indicates those rules could not take effect.<sup>73</sup>

## Submission of Rules to Congress

Most of the “major” and “significant” rules that were published in 2012 and 2013 but that were not in the GAO database also do not appear to have been submitted to both houses of Congress as required by the Congressional Review Act. Of the five “major” rules that were published in 2012 or 2013 but were not in the GAO database, none appear to have been submitted to Congress.

Of the 31 “significant” but non-major rules that were published in 2012 or 2013 but were not in the GAO database, 25 of the rules do not appear to have been submitted to either house of Congress:

- The AID rule on “Procurement of Commodities and Services Financed by USAID Federal Program Funds,” published on January 10, 2012 (77 FR 1396, RIN 0412-AA70);

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<sup>72</sup> A few of the rules had longer effective dates. For example, the CFPB major rule on “Integrated Mortgage Disclosures” is not scheduled to take effect until October 1, 2015.

<sup>73</sup> Some of the missing rules were issued without a prior notice of proposed rulemaking pursuant to the “good cause” exception in the APA. As noted previously, Section 808 of the CRA indicates that those rules “shall take effect at such time as the Federal Agency promulgating the rule determines.”

- The DOC rule on “Foreign-Trade Zones in the United States,” published on February 28, 2012 (77 FR 12111, RIN 0625-AA81);
- The DOD rules on (1) “Sexual Assault Prevention and Response (SAPR) Program,” published on January 27, 2012 (77 FR 4239, RIN 0790-AI37); (2) “DOD Information Assurance Scholarship Program (IASP),” published March 14, 2012 (77 FR 14955, RIN 0790-AI28); (3) “Defense Support to Special Events,” published on April 17, 2012 (77 FR 22671, RIN 0790-AI55); (4) “Department of Defense-Defense Industrial Base Voluntary Cyber Security and Information Assurance Activities,” published on May 11, 2012 (77 FR 27615); (5) “Pilot Program for the Temporary Exchange of Information Technology Personnel,” published on June 20, 2012 (77 FR 36916, RIN 0790-AI66); (6) “DOD Unclassified Controlled Nuclear Information (UCNI),” published on July 25, 2012 (77 FR 43506, RIN 0790-AI64); (7) “Sexual Assault Prevention and Response (SAPR) Program,” published on April 5, 2013 (78 FR 20443, RIN 0790-AI37); (8) “Defense Support of Civilian Law Enforcement Agencies,” published on April 12, 2013 (78 FR 21826, RIN 0790-AI54); (9) “Federal Voting Assistance Program,” published on September 18, 2012 (77 FR 57486, RIN 0790-AI27); (10) “Defense Industrial Base (DIB) Voluntary Cyber Security and Information Assurance (CS/IA) Activities,” published on October 22, 2013 (78 FR 62430, RIN 0790-AI60); and (11) “Mission Compatibility Evaluation Process,” published on December 15, 2013 (78 FR 73085, RIN 0790-AI69);
- The Department of Education rules on (1) “Final Revisions to Certain Data Collection and Reporting Requirements, Final Priority; State Fiscal Stabilization Fund Program and Discretionary and Other Formula Grant Programs,” published January 31, 2012 (77 FR 4663, RIN 1894-AA02); and (2) “State Fiscal Stabilization Fund Program,” published on January 31, 2012 (77 FR 4674, RIN 1894-AA03);
- The DOT rules on (1) “The New York North Shore Helicopter Route,” published on July 6, 2012 (77 FR 39911, RIN 2120-AJ75); (2) “Prioritization and Allocation Authority Exercised by the Secretary of Transportation Under the Defense Production Act,” published on October 1, 2012 (77 FR 59793, RIN 2105-AD83); (3) “Nondiscrimination on the Basis of Disability in Air Travel; Accessibility of Aircraft and Stowage of Wheelchairs,” published on November 12, 2013 (78 FR 67918, RIN 2105-AD87); and (4) “Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports,” published on November 12, 2013 (78 FR 67882, RIN 2105-AD96);
- The State Department rule on “Exchange Visitor Program-Summer Work Travel,” published on May 11, 2012 (77 FR 27593, RIN 1400-AD14);



- A NASA rule on “Inventions and Contributions,” published on May 10, 2012 (77 FR 27365, RIN 2700-AD51);
- A rule by the Equal Employment Opportunity Commission on “Federal Sector Equal Employment Opportunity,” published on July 25, 2012 (77 FR 43498, RIN 3046-AA73);
- The SBA rules on (1) “Small Business Technology Transfer Program Policy Directive,” published on August 6, 2012 (77 FR 46855, RIN 3245-AF45); (2) “Small Business Innovation Research Program Policy Directive,” published on August 6, 2012 (77 FR 46805, RIN 3245-AF84); and (3) “Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation,” published on October 2, 2013 (78 FR 61113, RIN 3245-AG20).

Also, three rules appear to have been sent to the House of Representatives but not the Senate:

- State Department rules on (1) “Amendment to the International Traffic in Arms Regulations: Exemption for Temporary Export of Chemical Agent Protective Gear,” published on May 2, 2012 (77 FR 25865, RIN 1400-AC71); and (2) “Amendment to the International Traffic in Arms Regulations: Afghanistan and Change to Policy on Prohibited Exports,” published on December 31, 2012 (77 FR 76864, RIN 1400-AD26); and
- The Department of Education rule on “Direct Grant Programs and Definitions That Apply to Department Regulations,” published on August 13, 2013 (78 FR 49337, RIN 1890-AA14).

In addition, it appears that the CFTC rule entitled “Final Exemptive Order Regarding Compliance With Certain Swap Regulations,” published on January 7, 2013 (78 FR 858, RIN 3038-AD85) was not submitted to either house of Congress.

The CRA states that 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>74</sup> Arguably, a rule that is submitted to only the House of Representatives or the Senate (but not both) has not been “received by Congress.” Even for rules that were submitted to both houses of Congress, the CRA says they cannot take effect until they are submitted to GAO as well.

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<sup>74</sup> 5 U.S.C. §802(a).

## Understanding Why Rules Are Not in GAO's Database

As noted earlier in this report, the FAA, the Coast Guard, and DOD accounted for nearly two-thirds of the 2012 and 2013 final rules that appeared to be missing from the GAO database as of July 2014. To better understand why so many of these agencies' rules were not in the database, a subset of each agency's final rules published during 2013 was examined, and the rules that were and were not in the GAO database were identified. With regard to the FAA, however, a first step was to determine whether the missing rules had in fact been submitted to GAO.

### FAA Rules

GAO officials interviewed for this report on April 9, 2014, said they did not know why the number of rules in the GAO database had declined in 2012 and 2013. They said that GAO's usual practice is to include in the database all rules that the agencies send shortly after they are received. After being provided information about the large number of rules published in 2013 in the *Federal Register* that were not in the database,<sup>75</sup> GAO officials investigated and found that a large number of FAA rules from 2013 had not been entered.

Shortly thereafter, the number of FAA rules published during 2013 that were in the GAO database rose quickly. On April 11, 2014, the database contained only 282 of the 768 final rules that the FAA published in the *Federal Register* during 2013. By May 8, 2014, the GAO database contained 574 FAA rules that had been published during 2013 – almost 300 more rules than had been in the database four weeks earlier.

On May 8, 2014, GAO officials told the author of this report that all FAA rules from 2013 had been entered into the database, that no other agencies had rules from 2013 that needed to be entered, and that all rules from 2012 had been entered. However, a check of the GAO database several weeks later revealed that 47 more FAA rules published during 2013 had been entered into the database since May 8, bringing the total to 621 rules.

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<sup>75</sup> DOT officials provided the author with a list of 664 FAA rules that had been submitted to GAO in 2013, and indicated they had receipts indicating that GAO had, in fact, received these rules. The DOT officials also said that a GAO paralegal told them via e-mail on April 22, 2014, that GAO had a backlog of FAA rules that it was still entering, including rules that had been published as early as February 2013 – 14 months earlier.

## January – February 2013 Rules

To determine whether the rules that were and were not in the GAO database were qualitatively different, the author reviewed all 107 final rules that FAA published in the *Federal Register* during January and February 2013. As of April 11, 2014, only 8 of the 107 rules were in the GAO database. However, by the end of May 2014, 38 more FAA rules from this period had been added to the GAO database, bringing the total to 46 rules (43% of the rules that were published during this period).

Of the 61 FAA rules from this period that were still not in the GAO database, 11 were “special condition” rules that only applied to the company named in the rule as applying for a certificate regarding a particular model of airplane or device.<sup>76</sup> Therefore, they appear to be classic “rules of particular applicability” that are not covered by the CRA. Five other rules were technical corrections or clarifications to previously published rules; GAO has never included such rules in its database.

Of the 45 remaining rules, there did not appear to be a major difference in the nature of the rules that were and were not in the GAO database. For example:

- Most of the rules that were in the GAO database were establishing or amending airworthiness directives;<sup>77</sup> most of the rules not in the GAO database were also about airworthiness directives.
- Several other rules in the GAO database established or amended airspace classifications;<sup>78</sup> several of the rules not in the GAO database were also about airspace classifications.

The impact of the rules on regulated parties did not appear to be a factor in determining whether these rules were or were not in the GAO database. In fact, some of the rules that *were not* in the database appeared to be more costly than

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<sup>76</sup> According to the FAA, a special condition rule is “is specific to an aircraft make and often concerns the use of new technology that the Code of Federal Regulations do not yet address. Special Conditions are an integral part of the Certification Basis and give the manufacturer permission to build the aircraft, engine or propeller with additional capabilities not referred to in the regulations.” See [http://rgl.faa.gov/Regulatory\\_and\\_Guidance\\_Library/rgSC.nsf/MainFrame?OpenFrameSet](http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgSC.nsf/MainFrame?OpenFrameSet).

<sup>77</sup> An airworthiness directive is a formal notification to owners and operators of certified aircraft that a known safety deficiency with a particular model of aircraft, engine, avionics or other system exists and must be corrected.

<sup>78</sup> The U.S. airspace classification scheme provides maximum pilot flexibility with acceptable levels of risk appropriate to the type of operation and traffic density within that class of airspace - in particular to provide separation and active control in areas of dense or high-speed flight operations. Class E airspace is any airspace up to 18,000 feet that is not classified as Class B, C, or D airspace.

several rules that *were* in the database. For example, rules *not* in the GAO database included:

- Two FAA airworthiness directives published on January 2, 2013, (one on Rolls-Royce turbofan engines and the other affecting Boeing Company airplanes) that together were estimated to cost regulated parties as much as \$5 million.<sup>79</sup>
- Another airworthiness directive published on January 11, 2013, that affected more than 500 Pratt & Whitney turboprop engines, and was expected to cost more than \$1 million to implement.<sup>80</sup>
- Another airworthiness directive that was published January 18, 2013, that affected more than 300 Boeing Company airplanes and was estimated to cost operators more than \$2 million.<sup>81</sup>

On the other hand, several of the airworthiness directives that *were* in the GAO database were described as “noncontroversial,” a “routine matter,” or having no costs to U.S. operators.<sup>82</sup>

In summary, it appears that GAO had simply not entered many of the FAA rules that were initially missing from the GAO database. The absence of some of the remaining rules can be explained (e.g., as “special condition” rules, or as technical corrections to previously published rules), but other missing rules appeared similar in many respects to rules that were in the database.

### Coast Guard Rules: January – March 2013

The Coast Guard published 96 final rules in the *Federal Register* between January and March 2013. Of these rules, 43 (about 45%) were in the GAO database as of May 2014 and 53 were not.

There seemed to be a noticeable difference in the types and subject matter of the rules in these two groups. (See **Table 4** below.) Of the 43 final rules that *were* in the GAO database, 31 were “Temporary Final Rules” concerning safety or security zones or other topics. The other 12 rules in the GAO database were final rules

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<sup>79</sup> 78 *Federal Register* 5 and 78 *Federal Register* 9, January 2, 2013.

<sup>80</sup> 78 *Federal Register* 2331, January 11, 2013.

<sup>81</sup> 78 *Federal Register* 4042, January 18, 2013.

<sup>82</sup> For example, in a January 28, 2013, rule on “Engine Alliance Turbofan Engines” (78 *Federal Register* 5710) that was in the GAO database, the FAA stated “we estimate the cost of this proposed AD to U.S. operators to be \$0.”

concerning safety zones, drawbridge operations, or other topics.<sup>83</sup> Of the 53 final rules published during this period that *were not* in the GAO database, 31 rules were “Notices of Deviation” concerning drawbridge operations, and another eight rules not in the GAO database were “Notices of Enforcement” concerning safety or security zones or other topics. The GAO database contained no rules characterized as “Notices of Deviation” or “Notices of Enforcement.”

**Table 4: Nature and Subjects of Coast Guard Rules Published January Through March 2013**

Subject of Rule	Final Rules	Temporary Final Rules	Notices of Deviation	Notices of Enforcement	Other	Total
<b>Rules In GAO Database</b>						
Safety/ Security Zones	4	25	0	0	0	29
Drawbridge Operations	4	0	0	0	0	4
Other	4	6	0	0	0	10
<i>Subtotal</i>	<i>12</i>	<i>31</i>	<i>0</i>	<i>0</i>	<i>0</i>	<i>43</i>
<b>Rules Not In GAO Database</b>						
Safety/ Security Zones	1	5	0	5	0	11
Drawbridge Operations	1	0	31	0	0	32
Other	2	2	0	3	3	10
<i>Subtotal</i>	<i>4</i>	<i>7</i>	<i>31</i>	<i>8</i>	<i>3</i>	<i>53</i>
<b>Total</b>	<b>16</b>	<b>38</b>	<b>31</b>	<b>8</b>	<b>3</b>	<b>96</b>

Note: GAO data are for rules published during 2013 and received in GAO as of April 11, 2014.

On the other hand, seven of the rules that *were not* in the GAO database were “Temporary Final Rules” concerning safety zones or regulated navigation areas,<sup>84</sup> and four others were final rules concerning a variety of topics. These 11 rules appeared to be similar to some of the substantive rules that *were* included in the GAO database.

<sup>83</sup> Drawbridge operation regulations authorize changes to drawbridge schedules to accommodate bridge repairs, seasonal vessel traffic, and local public events.

<sup>84</sup> Regulated Navigation Areas are water areas within a defined boundary for vessels navigating within an area established by the regional Coast Guard District Commander.

In fact, some of the rules that *were not* in the GAO database appeared to be more substantive than some rules that *were* in the database. For example, rules not in the GAO database included:

- A February 28, 2013, interim final rule on “Implementation of MARPOL Annex V Amendments” (conforming regulations to an international agreement prohibiting the discharge of garbage from vessels) was described as affecting more than 12 million commercial and recreational vehicles at an annualized cost of more than \$400,000 per year.<sup>85</sup>
- A final rule published the same day on “Great Lakes Pilotage Rates – Annual Review and Adjustment” was estimated to result in an overall rate increase of \$148,000, but with differential effects by district and area.<sup>86</sup>

However, a February 27, 2013, rule that *was* in the GAO database was described as a “technical amendment” to previous regulations, and updated references to consensus standards developed by another body that were reapproved without change. The Coast Guard said the rule “will not have any substantive impact on the regulated public.”<sup>87</sup>

The length of time that the safety and security zone rules were in effect did not seem to be a factor in determining whether they were or were not in the GAO database. For example:

- Three of the four final rules that *were not* in the GAO database were of unlimited duration, and the fourth established a safety zone for four weeks. On the other hand, four of the final rules establishing safety zones that *were* in the GAO database were only in effect for one day.
- Four of the seven temporary final rules *not* in the GAO database were in effect for months (e.g., a February 15 rule establishing a four-month safety zone near Salem, New Jersey). In contrast, some of the temporary final rules that *were* in the GAO database were in effect for less than two hours (e.g., a February 13 rule establishing a 90-minute safety zone near a fireworks display at Sea World in San Diego).

In summary, it appears that the rules that were and were not in the GAO database were different in some respects, but similar in others. In some cases, the standards

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<sup>85</sup> 78 *Federal Register* 13481.

<sup>86</sup> 78 *Federal Register* 13521.

<sup>87</sup> “Updates to Standards Incorporated by Reference; Reapproved ASTM Standards; Technical Amendment,” 78 *Federal Register* 13243. Other technical amendments to previously published rules were not in the GAO database.

regarding whether certain types of rules should be in the GAO database or not seem to have been inconsistently applied.<sup>88</sup>

### Notices of Deviation and Enforcement

Also, some rules were not submitted to GAO because Coast Guard officials said that the agency does not consider notices of deviation and notices of enforcement to be “rules” as defined by the CRA. According to the *Federal Register*, the Coast Guard published a total of 100 “notices of deviation,” and 84 “notices of enforcement” during 2013. If none of these 184 documents were submitted to GAO, they would represent more than 60% of the 300 final rules published in the *Federal Register* that were not in the GAO database.

Although these Coast Guard publications were characterized as “notices” on the action line of the *Federal Register* documents, they were published in the “Rules and Regulations” section of the *Federal Register*. An official in the Office of the Federal Register pointed out that under 1 CFR 5.9 (“Categories of Documents”), “documents that affect other documents previously published in the rules and regulations section” are considered “rules and regulations,” not “notices.” Also, Section 551 of the APA (which is referenced in the CRA’s definition of a “rule”) defines “rule making” as the “agency process for formulating, amending, or repealing a rule.”<sup>89</sup> Therefore, to the extent that “notices of deviation” or “notices of enforcement” amend existing rules, those “notices” are arguably “rules” as defined by the CRA.

### DOD Rules: January – June 2013

DOD published 76 final rules in the *Federal Register* during the first six months of 2013. Of these, 18 rules were listed in the GAO database under “DOD” and 58 rules were not.<sup>90</sup> However, 22 of these 58 rules were Federal Acquisition Regulations that were jointly issued by DOD, the General Services Administration (GSA) and the

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<sup>88</sup> Some Coast Guard rules may not have been in the GAO database because staff in GAO’s Office of the General Counsel telephoned officials in the U.S. Coast Guard in November 2011 and notified them that they considered certain types of rules (e.g., those establishing temporary safety or security zones) to be rules of “particular applicability” because they were of limited duration and covered a specific and limited geographic area. Because the CRA explicitly exempts rules of particular applicability from coverage, GAO staff told the Coast Guard officials that they did not believe the rules needed to be submitted to GAO. GAO management emphasized that the staff’s conversations with Coast Guard about what constituted a “rule of particular applicability” was not an official policy statement by GAO, and noted that the Coast Guard continued to submit many safety and security zone rules to GAO.

<sup>89</sup> 5 U.S.C. 551(5).

<sup>90</sup> This total includes two rules issued by the Corps of Engineers that were listed separately from DOD under “Department of the Army.”

National Aeronautics and Space Administration (NASA), and were filed in the GAO system as GSA rules, not as DOD (or NASA) rules.<sup>91</sup> Therefore, as of April 2014, 36 of the 76 rules (47%) published during the first six months of 2013 were not in the GAO database at all. Of these 36 rules, 14 were characterized as editorial or technical corrections to previously published rules, two were small entity compliance guides, and three were summaries of previously issued groups of rules – publications that either are arguably not “rules” as defined by the CRA, or rules that GAO traditionally has not entered into its database.

However, a number of the remaining 17 DOD rules that *were not* in the GAO database appeared to be substantive final rules. For example:

- A February 26 final rule provided the Director of the TRICARE program with the authority to sanction third-party billing agents, and was issued in response to a recommendation from the DOD Office of the Inspector General.<sup>92</sup>
- A February 27 final rule implemented the provisions of the Duncan Hunter National Defense Authorization Act for FY 2009 (P. L. 110– 417) that established a smoking cessation program under the TRICARE program. DOD estimated that the rule would cost \$24 million to implement.<sup>93</sup>
- An April 5 final rule implemented DOD policy and assigned responsibilities for the Sexual Assault Prevention and Response (SAPR) program. Estimated costs associated with the rule just for DOD were nearly \$15 billion.<sup>94</sup>
- A separate April 11 interim final rule on the SAPR “Program Procedures” took more than 30 pages in the *Federal Register*. DOD estimated the cost of this rule at approximately \$15 million.<sup>95</sup>
- An April 12 final rule on “Defense Support of Civilian Law Enforcement Agencies” that took 13 pages in the *Federal Register*.<sup>96</sup>
- A May 29 final rule established the “TRICARE Young Adult” program, implementing Section 702 of the Ike Skelton National Defense Authorization

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<sup>91</sup> One Federal Acquisition Regulation rule was, in fact, listed as a DOD rule in the GAO database.

<sup>92</sup> 78 *Federal Register* 12953.

<sup>93</sup> 78 *Federal Register* 13236.

<sup>94</sup> 78 *Federal Register* 20443. DOD said this figure only refers to the program budget allocated to the department, and noted that each individual service has its own SAPR funding. Nevertheless, DOD indicated that this rule was not a significant rule as defined by Executive Order 12866.

<sup>95</sup> 78 *Federal Register* 21715.

<sup>96</sup> 78 *Federal Register* 21826.



Act for FY 2011, and extending program coverage opportunity to most unmarried children under the age of 26 of uniformed services sponsors.<sup>97</sup>

- A June 7 final rule established policies and procedures for the “Post 9/11 GI Bill,” and (among other things) described the use of supplemental educational assistance for certain service members.<sup>98</sup>

On the other hand, some of the DOD rules that *were* in the GAO database did not appear to be as substantive as some of the above rules that *were not*. For example, a May 16 DOD final rule in the GAO database simply reflected the joining together of three contractor data systems into one data system.<sup>99</sup> Another rule in the GAO database that was published on May 22 updated instructions for assigning basic and supplementary procurement instrument identification numbers.<sup>100</sup> Five of the final rules in the GAO database simply adopted as final five previously issued interim final rules.

According to GAO officials, in November 2013, GAO notified DOD and other agencies that send hard copies of rules that they were either sending the rules to an incorrect address or were not including complete addresses on their rule packages, resulting in several days’ delays in GAO’s receipt of the rules.<sup>101</sup> However, this addressing issue does not explain why so many rules published during 2013 would remain missing from the GAO database.

In summary, it appears that while some of the final rules that DOD published (or jointly published) during the first half of 2013 were not in the GAO database for understandable reasons (e.g., rules credited to another agency, technical corrections, guides, or summaries), it is not clear why other rules from this period were not in the database. At a minimum, it seems that any standards for inclusion in or exclusion from the GAO database were inconsistently applied.

## Submission of Rules Published During the First Half of 2014

Federal agencies typically submit their rules to GAO within a few days of their publication in the *Federal Register*, although some rules are not submitted or logged into the GAO database until somewhat later. Therefore, an accurate count of the number of rules ultimately submitted to GAO may not be available until weeks or even months after the end of a reporting period.

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<sup>97</sup> 78 *Federal Register* 32116.

<sup>98</sup> 78 *Federal Register* 34250.

<sup>99</sup> 78 *Federal Register* 28756.

<sup>100</sup> 78 *Federal Register* 30231.

<sup>101</sup> E-mail from Robert J. Cramer, Managing Associate General Counsel, GAO, to the author, April 17, 2014.

These caveats notwithstanding, preliminary indications suggest that the rate of rule submission to GAO could be at an all-time low in the first half of 2014. From January 1, 2014, through June 30, 2014, federal agencies published a total of 1,684 final rules in the *Federal Register*. If 88% of those rules had been submitted to GAO (the historical rate of submission during the first 15 years of the CRA's implementation), the GAO database would contain 1,482 rules that were published during the first half of 2014. However, as of July 15, 2014, the GAO database contained only 835 (49.6%) of those rules – 647 fewer than the historical rate of submission would suggest.

As **Table 5** below indicates, DOD, DHS, and DOT again appeared to represent the largest number and/or percentage of missing rules, but other agencies (e.g., the Department of Education and HHS) also appear to have submitted to GAO less than half of the rules that they published.

**Table 5: Comparison of Final Rules Published in *Federal Register* with Rules Submitted to GAO by Department/Agency: First Half of 2014**

Department/ Agency	1/1/2014 – 6/30/2014	
	<i>Federal Register</i>	GAO
USDA	88	52
DOC	155	95
<b>DOD</b>	<b>61</b>	<b>20</b>
DOEd	13	1
DOE	29	10
HHS	89	40
<b>DHS</b>	<b>286</b>	<b>81</b>
HUD	8	5
DOI	41	24
DOJ	9	5
DOL	11	7
DOS	13	5
<b>DOT</b>	<b>339</b>	<b>176</b>
VA	12	9
TREAS	61	33
EPA	264	184
All Other Agencies	205	90
Total	1,684	835

Note: GAO data are for rules published in the *Federal Register* from January 1, 2014, through June 30, 2014, and in the GAO database as of July 15, 2014.

Source: Federal Register database, available at <https://www.federalregister.gov/articles/search#advanced>, and GAO database, available at <http://gao.gov/legal/congressact/fedrule.html>.

### Missing Major and Significant Rules from 2014

As was the case in 2012 and 2013, most of the missing rules for the first half of 2014 appeared to be relatively minor in nature (e.g., Coast Guard safety zone rules). However, seven of the missing rules were “significant” rules and/or were reviewed by OIRA prior to publication. Of these, one was a “major” rule:

- A DOD rule on “Voluntary Education Programs,” published on May 15, 2014 (79 FR 27732, RIN 0790-AJ06) that implemented new policy, responsibilities, and procedures for the operation of voluntary education programs within the department. The new policies discussed in the rule included a

requirement that all educational institutions providing education programs through the DOD Tuition Assistance Program provide meaningful information to students about the financial cost and attendance at an institution so military students can make informed decisions on where to attend school. The institutions also must not use unfair, deceptive, and abusive recruiting practices; and must provide academic and student support services to Service members and their families. The rule was scheduled to go into effect on July 14, 2014.

Six rules of the missing rules from the first half of 2014 were not “major,” but were considered “significant” regulatory actions and/or were reviewed by OIRA:

- A DOC rule on “Implementation of the Understandings Reached at the June 2013 Australia Group (AG) Plenary Meeting and the December 2012 AG Intersessional Decisions,” published on March 26, 2014 (79 FR 16664, RIN 0694-AG04), that amended the Export Administration Regulations to (among other things) (1) amend the Commerce Control List (CCL) entry in the Export Administration Regulations that controls equipment capable of handling biological materials to reflect the 2013 AG Plenary understanding that clarifies controls on fermenters, and certain components thereof, in the AG “Control List of Dual-Use Biological Equipment and Related Technology and Software;” and (2) amend the CCL entry that controls certain animal pathogens to reflect a recommendation made at the 2013 AG Plenary meeting, which was later adopted pursuant to the AG silent approval procedure, to revise the AG “List of Animal Pathogens for Export Control” to clarify the controls on the Lyssavirus genus. The rule was to have gone into effect on March 26, 2014 (the date of publication).
- A DOD rule on “Department of Defense Personnel Security Program (PSP),” published on April 1, 2014 (79 FR 18161, RIN 0790-AI42) that updated policies and responsibilities for the DOD Personnel Security Program (PSP) in accordance with the provisions of current U.S. Code, public laws, and executive orders. The rule established policy and assigned responsibilities related to the operation of the DOD PSP, including investigative and adjudicative policy for determining eligibility to hold a national security position. This rule also established investigative and adjudicative policy for the Department's personal identity verification credential. The rule was scheduled to go into effect on May 1, 2014.
- A DVA rule on “Burial Benefits,” published on June 6, 2014 (79 FR 32653, RIN 2900-A082) that amended DVA regulations governing entitlement to monetary burial benefits, which include burial allowances for service-connected and non-service-connected deaths, a plot or interment allowance, and reimbursement of transportation expenses. As amended, the regulations established rules to support VA's automated payment of burial allowances to surviving spouses, conversion to flat-rate burial and plot or interment

allowances that are equal to the maximum benefit authorized by law, and priority of payment to non-spouse survivors. The purpose of these regulations was to streamline the program and make it easier for veterans and their families to receive the right benefits and meet their expectations for quality, timeliness, and responsiveness. The rule was to have taken effect on July 7, 2014.

- An SBA rule on the “Small Business Technology Transfer Program Policy Directive,” issued on January 8, 2014 (79 FR 1309, RIN 3245-AF45) amended the SBA Small Business Technology Transfer (STTR) Program Policy Directive in response to public comments SBA received on the final STTR and Small Business Innovation Research (SBIR) Policy Directives, published on August 6, 2012. SBA also made several minor clarifying changes to ensure that the STTR participants clearly understand certain program requirements. Additionally, the changes to the STTR Policy Directive were made to maintain concordance with the SBIR program. The amendments were to have taken effect on January 8, 2014.
- An SBA rule on the “Small Business Innovation Research Program Policy Directive,” published on January 8, 2014 (79 FR 1303, RIN 3245-AF84), in which the agency amended its Small Business Innovation Research (SBIR) Program Policy Directive in response to public comments SBA received on the final SBIR Policy Directive, published on August 6, 2012. SBA also made several minor clarifying changes to ensure that the SBIR participants clearly understand certain program requirements. The amendments were to have taken effect on January 8, 2014.
- An SBA rule on “504 and 7(a) Loan Programs Updates,” published on March 21, 2014 (79 FR 15641, RIN 3245-AG04) that finalized the proposed rule that SBA issued to improve access to its two flagship business lending programs: the 504 Loan Program and the 7(a) Loan Program. SBA said the rule would enhance job creation through increasing eligibility for loans under SBA's business loan programs and by modifying certain program participant requirements applicable to the 504 Loan Program. In addition, SBA revised Certified Development Company (CDC) operations requirements to clarify certain existing regulations. The rule was to have taken effect on April 21, 2014.

Of these seven missing major and significant rules, two were submitted to both the House of Representatives and the Senate, one was sent to one chamber but not the other, and four had not been sent to either chamber. However, because none of the rules had been submitted to GAO, none could technically take effect.

## Conclusions

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>102</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.

From 1996 through 2011, GAO checked the *Federal Register* regularly to determine whether all of the published final rules that are covered by the CRA had been submitted to GAO. During this 15-year period (covering three presidential administrations representing both major political parties), GAO discovered hundreds of covered rules that had not been submitted, and notified OMB (and sometimes the rulemaking agencies themselves) about their absence. Federal agencies ultimately submitted an average of just over 3,600 rules per year during this period, and the GAO database included about 88% of the final rules published in the *Federal Register*.

However, shortly after GAO decided in November 2011 to limit its examination of the rules published in the *Federal Register* to major rules, the number and percentage of published rules in the GAO database decreased substantially. The database indicates federal agencies submitted 2,660 rules that were published during 2012, and submitted 2,586 rules that were published during 2013. This represents about 71% of the final rules published in the *Federal Register* during those years. If federal agencies had submitted the same proportion of rules to GAO as had been historically submitted (88%), and assuming GAO promptly entered all of those rules, 1,242 more rules would have been in the database. Although many of these rules are likely administrative or informational in nature, among the final rules not in the GAO database were at least five “major” rules and at least 31 other “significant” rules.

During the first half of 2014 (January 1 through June 30), federal agencies published a total of 1,684 final rules in the *Federal Register*. As of July 15, 2014, only 835 (49.6%) of these rules were in the GAO database – 647 fewer than would have been submitted at the 88% historical rate of submission. Even if another 200 of these rules are ultimately submitted and logged into the GAO database, nearly 450 rules published during the first half of 2014 would remain unsubmitted. At least seven of

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<sup>102</sup> Joint statement of House and Senate Sponsors, 142 *Cong. Rec.* S3683, at S3686 (daily ed. April 18, 1996), at 142 *Cong. Rec.* S3683.

the unsubmitted rules were “significant” rules and/or were reviewed by OIRA prior to publication, including one “major” rule.

### Implications for Congressional Oversight

Some of these “major” and “significant” missing rules were submitted to both houses of Congress, but others do not appear to have been submitted. The CRA states 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>103</sup> Therefore, by not submitting these rules to Congress, the rulemaking agencies have arguably limited Congress’ ability to use 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 does not lessen agencies’ responsibilities to submit their rules to Congress in accordance with the act’s requirements.<sup>104</sup>

CRA resolutions of disapproval can be a valuable tool of congressional oversight even if the resolution is not ultimately enacted. Simply by introducing a resolution, a Member of Congress can draw attention to a rule of concern, and may put pressure on the issuing agency to delay or withdraw the rule.<sup>105</sup> Recorded votes on the resolutions can put Members on the record regarding controversial rules. All of these actions can help to reestablish a measure of congressional control over agency rulemaking.

### Unsubmitted Rules and Judicial Review

Section 801(a)(1)(A) of the CRA states that a covered rule generally cannot take effect until it has been submitted to both houses of Congress and to GAO.<sup>106</sup>

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<sup>103</sup> 5 U.S.C. §802(a). As noted earlier in this report, the Senate Parliamentarian has ruled that if GAO determines that an agency action is a covered rule that should have been submitted, a Member can introduce a resolution of disapproval starting on the date of GAO’s determination. See, for example, <http://www.finance.senate.gov/newsroom/chairman/release/?id=363028c1-c4fe-4ca9-b180-746e3e9daf82>.

<sup>104</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>105</sup> In his report for ACUS on the Congressional Review Act, Morton Rosenberg provides several examples of how introduction of a CRA resolution of disapproval affected agency rulemaking. See Rosenberg, *op. cit.*, pp. 14-17.

<sup>106</sup> As noted earlier in this report, Section 808 of the CRA states that when an agency invokes the good cause exception to notice and comment, and for certain other

However, Section 805 of the CRA states, “No determination, finding, action, or omission under this chapter shall be subject to judicial review.” A broad reading of this prohibition on judicial review would mean that if an agency did not submit a rule to GAO and both houses of Congress, no affected party could take the rulemaking agency to court to prevent enforcement of the regulation on that basis.

In a report prepared for the consideration of ACUS in 2012, Morton Rosenberg discussed this issue, noting that in 1997 the Department of Justice characterized the language in Section 805 of the CRA as “unusually sweeping,” and indicated that the language would presumably prevent judicial review of an agency’s failure to report a covered rule.<sup>107</sup> Rosenberg also said that DOJ succeeded with its preclusion argument in two early federal district court rulings,<sup>108</sup> and later in two appeals court decisions:<sup>109</sup>

In 2007 and 2009 federal appeals courts summarily dismissed claims that rules relied on by defendant agencies were not reported to Congress and were therefore unenforceable. In *Montanans for Multiple Use v. Barbouletos*<sup>110</sup> the D.C. Circuit rejected a challenge to a forest management plan promulgated by the U.S. Forest Service on the ground that the —language of Section 805 is unequivocal and precludes judicial review of this claim. The same clear language rationale supported a footnote dismissal of a similar challenge by the 10th Circuit in *Via Christie Regional Medical Center v. Leavitt*.<sup>111</sup>

However, Rosenberg also pointed out that “[n]one of the opinions of those courts came to grips with the seemingly unequivocal evidence of the contrary statements by the House and Senate sponsors of the CRA or the fact that such a reading of the Act could render it ineffectual.”<sup>112</sup> He noted that the joint explanatory statement provided by the principle authors of the CRA after the statute was enacted said the following:

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types of rules, the rule can be made effective “at such time as the Federal agency promulgating the rule determines.”

<sup>107</sup> Rosenberg report, op. cit., p. 24. Rosenberg cites a 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 pp 9-11.

<sup>108</sup> *Texas Savings and Community Bankers Assoc. v. Federal Housing Finance Board*, 1998 U.S. Dist. LEXIS 13470, 1998 WL842 181 (W. Texas), aff’d 201 F.3d 551 (5th Cir. 2000); *United States v. American Electric Power Service Corp.*, 218 F. Supp. 3d 931 (S.D. Ohio 2002). However, Rosenberg pointed out that in another case, the court reached a different conclusion. See *United States v. Southern Indiana Gas and Electric Co.*, 2002 U.S. Dist. LEXIS 20936; 55 ERC (BNA) 1597 (S.D. Ind. 2002).

<sup>109</sup> Quoted section is from Rosenberg, pp. 26-27.

<sup>110</sup> 568 F. 3d 225, 228 (D.C.Cir. 2009).

<sup>111</sup> 509 F. 3d 1259, 1271 n. 11 (10th Cir. 2007).

<sup>112</sup> *Ibid.*



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>113</sup>

DOJ has suggested that such post-enactment legislative history should not carry any weight,<sup>114</sup> and 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>115</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>116</sup> In the joint statement, Senator Nickles explained that, because the CRA 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>117</sup>

Rosenberg ultimately concluded that the CRA should be interpreted to permit judicial review of whether unsubmitted rules could be enforced.

[T]he statutory scheme appears geared toward congressional review of all covered rules at some time; and a reading of the statute that allows for easy avoidance would seem to defeat that purpose. Interpreting the judicial review preclusion provision to prevent court scrutiny of the validity of administrative enforcement of covered but non-submitted rules appears to be neither a natural nor warranted reading of the provision. Section 805 speaks to “determination[s], finding[s], action[s], or omission[s] under this chapter,” a plain reference to the range of actions authorized or required as part of the review process. Thus, Congress arguably did not intend... to subject to judicial scrutiny its own internal procedures, the validity of presidential determinations that rules should become effective immediately for specified reasons, the propriety of OIRA determinations whether rules are major or not, or whether the Comptroller General properly performed his reporting function. These are matters that Congress can remedy by itself. From one perspective, the

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<sup>113</sup> 142 Cong. Rec. 6929 (1996).

<sup>114</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>115</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>116</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>117</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.

potential of court invalidation of enforcement actions based on the failure to submit covered rules is necessary to assure compliance with submission requirements.<sup>118</sup>

Nevertheless, given the appeals court cases decided to date, it seems that any effort to take an agency to court for failure to submit a rule is unlikely to be successful.

## Congressional Options

Congress may conclude that ensuring compliance with the CRA's requirement that agencies submit covered rules to GAO and Congress is an administrative issue that should be resolved by GAO, OIRA, and the individual rulemaking agencies. However, should Congress want to take action to address this issue, several options are available, ranging from incremental changes to a complete reconsideration of the CRA and the rule submission process. These options could be considered and adopted individually, or in combination with one another.

### Incremental Changes

One incremental change would be to continue with the CRA's current scope and rule submission process, but to require GAO (either in freestanding legislation or as a condition to its appropriation) to resume its annual reviews of the *Federal Register* to identify *all* covered rules that have not been submitted (and not just focus on *major* rules).<sup>119</sup> Congress could also require GAO to (1) resume its notifications to OIRA (and possibly to the rulemaking agencies themselves) about the covered rules that were not submitted, (2) publish a list of unsubmitted rules in the *Federal Register* (as it did shortly after the CRA was enacted), and/or (3) notify the congressional committees of jurisdiction regarding unsubmitted rules.

Previous experience indicates that oversight of the CRA rule submission process works; from 2009 to 2010, after GAO and OIRA began notifying agencies of missing rules, the number of rules found to be missing from the GAO database fell substantially, and fell even more the following year. However, given that GAO began limiting its reviews of the *Federal Register* in late 2011 because of reductions in its annual appropriations, some increase in GAO's funding may be required to implement even these incremental changes.

### Reconsidering the Rule Submission Process

On the other hand, given the relatively large number of rules that appear to have not been submitted to GAO in 2012 and 2013, Congress may want to make more than just incremental changes to the CRA rule submission process. More substantive

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<sup>118</sup> Rosenberg, p. 28.

<sup>119</sup> Although Congress could require some other entity to perform such checks, it makes sense that GAO do so because the CRA already charges GAO with receiving all covered rules.

changes could involve limiting the number of rules required to be submitted, reengineering the process by which rules are submitted, or a combination of both approaches.

### Limiting the Number of Rules Submitted

As discussed earlier in this report, two ABA sections recommended in 1997 that relatively minor rules should not be required to be submitted to GAO or Congress.<sup>120</sup> Eliminating the submission requirement for such minor rules (even if Congress retained the ability to overturn all covered rules through the expedited CRA process) would greatly reduce the time and costs associated with sending rules to GAO and both houses of Congress. Doing so could also allow rulemaking agencies to better ensure that the covered rules are, in fact, submitted, and could allow Congress to better focus on the rules that are most likely to be the subject of a resolution of disapproval.<sup>121</sup>

However, some may argue that Congress should be provided all agency rules before they can take effect, regardless of their size or priority. Even if Congress agreed to limit the scope of the rule submission requirement, there may be disagreements regarding where to draw the line (e.g., requiring submission of only “major” rules, only “significant” rules, or some other level of priority).

As **Table 6** and **Figure 2** below illustrate, GAO data from the first 15 years of the CRA’s implementation indicate that of the more than 54,000 final rules that were submitted to GAO during this period, more than 38,000 (70%) were considered “routine” or “informational” in nature.<sup>122</sup>

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<sup>120</sup> ABA Report, *op. cit.*, Recommendation 1.

<sup>121</sup> Executive Order 12866 did much the same thing, reducing the number of rules that had to be submitted to OIRA from all rules (between 2,000 and 3,000 per year under Executive Order 12291) to a more limited group of “significant” rules (usually between 500 and 700 rules per year). OIRA has said that limiting review to these “significant” rules has allowed it to focus its attention on the rules that are more likely to need review.

<sup>122</sup> Since shortly after the CRA was enacted, agencies have had to fill out a form when submitting their rules to GAO indicating whether their rules were “major” or “non-major,” and whether their rules were “significant/substantive” or “routine/informational.” See <http://gao.gov/decisions/majrule/fedrule2.pdf> for a copy of this form. Similar categories of rule priority have been used for years in the Unified Agenda of Regulatory and Deregulatory Actions: (1) Economically Significant, (2) Other Significant, (3) Substantive, Nonsignificant, (4) Routine and Frequent, and (5) Informational and Other. See “Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions,” the current edition available at [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201310/Preamble\\_8888.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201310/Preamble_8888.html).

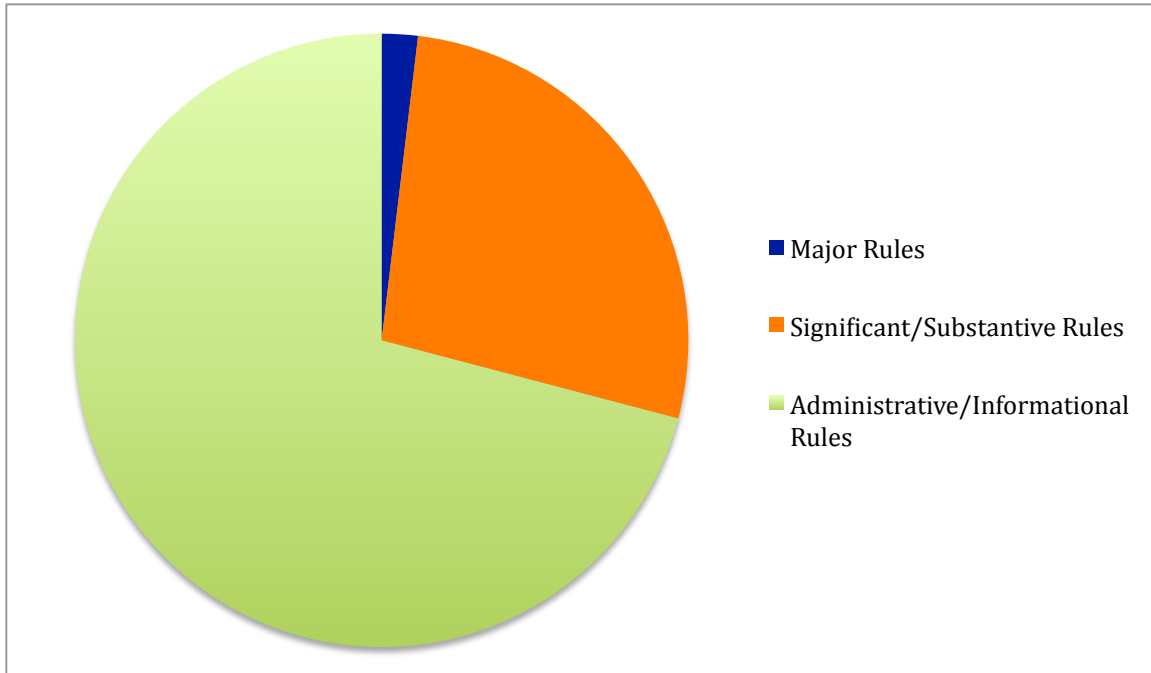
**Table 6: Number of Major, Significant/Substantive, and Routine/Informational Rules Submitted to GAO: 1997 through 2011**

Year	Major	Significant/ Substantive	Routine/ Informational	Total
1997	61	1,428	2,441	3,930
1998	76	1,357	2,955	4,388
1999	51	931	3,354	4,336
2000	76	993	3,010	4,079
2001	69	828	2,526	3,423
2002	50	953	2,556	3,559
2003	50	957	2,737	3,774
2004	65	912	2,684	3,661
2005	56	851	2,394	3,301
2006	55	897	2,112	3,065
2007	61	849	2,034	2,947
2008	94	969	2,021	3,085
2009	83	846	2,542	3,472
2010	100	923	2,238	3,261
2011	80	961	2,826	3,868

Note: The “significant/substantive” category does not include the rules listed as “major” rules, even though all “major” rules should be inherently considered “significant/substantive.” The 1997 through 2011 period was used because it appears that about 1,300 rules may not have been submitted to GAO in 2012 and 2013. The GAO database does not allow separation of the “significant” and “substantive” rules.

Source: GAO database, available at <http://gao.gov/legal/congressact/fedrule.html>.

**Figure 2: “Administrative/Informational” Rules Constituted More Than 70 Percent of All Rules Submitted to GAO From 1997 Through 2011**



Note: The GAO database indicates that 54,119 final rules were submitted from 1997 through 2011. Of these, 38,434 were coded as “routine/info/other,” 14,704 were coded as “significant/substantive,” and 1,027 were coded as “major.” The “significant/substantive” category does not include the rules listed as “major” rules, even though all “major” rules should be inherently considered “significant/substantive.”

Source: GAO database, available at <http://gao.gov/legal/congressact/fedrule.html>.

Of the more than 38,000 “routine” and “informational” rules that were submitted to GAO during this period, the data indicate that:

- More than 7,000 were FAA airworthiness directives intended to correct an unsafe condition in an aircraft, aircraft engine, propeller, or other aircraft appliance;
- Almost 3,500 were FAA airspace regulations for particular locations that involved such topics as the amount of separation required between aircraft in particular areas, standard instrument approach procedures at particular airports, and other safety procedures;<sup>123</sup>
- More than 8,000 were Coast Guard rules involving the establishment of “security zones” or “safety zones,” or “special local regulations” that restricted marine traffic within very specific areas (often for very short

<sup>123</sup> The FAA frequently notes in each of these regulations that it “only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current,” and is therefore not controversial.

periods of time in conjunction with fireworks displays, sporting events, dredging operations, bridge repairs, or military operations); and

- Almost 1,000 were Coast Guard rules on “drawbridge operations” that often amended the times that the bridges will be opened, reduce the hours that bridges are required to be staffed (often because of infrequent use), or eliminate previous regulations altogether when drawbridges are converted to fixed spans.<sup>124</sup>

Therefore, the above types of FAA and Coast Guard rules constituted about half of the more than 38,000 routine or informational rules submitted to GAO during the 15-year period from 1997 through 2011. Since the CRA was enacted, federal agencies have sent GAO (and presumably each house of Congress) more than 42,000 routine or informational rules. As the ABA sections noted in their 1997 recommendation to reduce submissions, “haystacks can be useful for concealing needles.” Requiring agencies to submit large numbers of routine or informational rules can potentially divert congressional attention from larger, more controversial rules.

On the other hand, because it is unlikely that any Member of Congress would introduce a resolution of disapproval regarding these kinds of routine and informational rules, it is unclear whether anyone is even reading these rules once they are submitted. The *Washington Post* recently reported that federal agencies are currently required to send more than 4,000 written reports to the Congress, and that many of them are on minor issues of little interest to Members (e.g., an annual report on “Dog and Cat Fur Protection”).<sup>125</sup> Not included in this total are the three copies of the more than 3,000 final rules that must be sent each year (one copy each to the House of Representatives, the Senate, and GAO) – most of which these administrative and informational rules.

### *Striking a Balance*

However, Congress would need to be careful not to reduce the submission requirement too far. For example, **Table 6** and **Figure 2** indicate that limiting the CRA rule submission requirement to only “major” rules would mean that agencies would only be required to submit an average of about 80 final rules to Congress and GAO each year (less than 2% of all final rules).

A more balanced approach could be to require submission of all “major” rules and all “significant/substantive” rules. The data from 1997 through 2011 in **Table 6**

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<sup>124</sup> The totals for Coast Guard rules do not include any of the thousands of “notices of deviation” or “notices of enforcement” involving safety zones or drawbridge operation regulations, and that are published in the “rules and regulations” section of the *Federal Register*.

<sup>125</sup> David A. Fahrenthold, “Unrequired Reading,” *Washington Post*, May 4, 2014, p. A1, available at <http://www.washingtonpost.com/sf/national/2014/05/03/unrequired-reading/>.

indicate about 1,000 major or significant/substantive rules would be submitted to Congress and GAO in an average year (nearly 30% of all rules), and submission of such rules would likely include any rule that would be considered controversial or worthy of a CRA resolution of disapproval. As is currently the case, Congress could generally require that these “major” and “significant/substantive” rules be submitted to Congress and GAO before they could take effect, with all other rules considered “submitted” to Congress and GAO when they are published in the *Federal Register* or otherwise promulgated to the public. Limiting the submission requirement in this way would likely reduce costs both to the agencies issuing the rules and to the recipients of the rules (GAO and Congress).

Of course agencies might try and “game” the system, characterizing a rule as “routine” or “informational” when it was, in fact, more substantive in nature. Or, a Member of Congress might want to introduce a CRA resolution of disapproval regarding a rule that really is administrative in nature, but that is nevertheless of concern to that Member. In such instances (as the 1997 ABA recommendation suggested), any Member of Congress could continue to be authorized to introduce a CRA resolution of disapproval, with the starting point for introduction of a resolution based on the date the rule was published in the *Federal Register* or otherwise promulgated to the public.

### Re-engineering the Rule Submission Process

Another non-incremental reform could involve reengineering the process by which the current group of rules is submitted. One such effort was attempted just over five years ago. On June 16, 2009, the House of Representatives unanimously passed H.R. 2247, the “Congressional Review Act Improvement Act,” which, if enacted, would have amended the CRA and eliminated the requirement that federal agencies submit their covered rules and related reports to both Houses of Congress before such rules can take effect. Agencies would have still been required to submit covered rules to GAO, and GAO would have been required to submit to each house of Congress 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 have been required to publish the GAO report in the *Congressional Record*, along with a statement of referral to the committee or committees of jurisdiction for each rule.<sup>126</sup> After passage by the House, H.R. 2247 was referred to the Senate Committee on Homeland Security and Governmental Affairs, but the bill was not acted on during the remainder of the 111<sup>th</sup> Congress. (The House of Representatives passed identical legislation during the 110<sup>th</sup> Congress (H.R. 5593), but the Senate also did not act on that bill.)

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

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<sup>126</sup> H.R. 2247 would have repealed the requirement that the House and the Senate provide copies of the rules and reports to the chairmen and ranking member of each committee responsible for review of the rules.

the legislative branch under the Congressional Review Act.”<sup>127</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>128</sup> In 2007, the House Parliamentarian testified that the flow of paper involved in this process posed a “significant increment of workload,” and said the sheer volume of rules “affects not only the parliamentarians who must assess their subject matter but also the clerks who must move the paper and account for dates of transmittal.”<sup>129</sup>

Several of the rulemaking agencies contacted during the preparation of this report indicated that the current process of submitting thousands rules to Congress and GAO is costly and time consuming, and that streamlining that process could lead to savings. One agency official noted that costs associated with the current submission process are primarily driven by the requirement in congressional procedures that, because the rules are considered “executive communications,” paper copies of the rules be sent to the House of Representatives and the Senate.<sup>130</sup> The official said those cost include staff time to prepare the submissions, copying costs, courier fees (currently at \$37.50 per 15 minutes), scanning in GAO receipts, and costs associated with other steps in the process. Agencies may bundle several rules together and only make one delivery every week or two to save on courier fees, but doing so could delay the effective dates of certain rules. There are also costs borne by staff in the offices of the House Parliamentarian and House Clerk, the Secretary and the Senate, and GAO’s Office of the General Counsel associated with receiving these rules (and, in the case of the House and the Senate, making sure that copies of the rules are delivered to the committee or committees of jurisdiction). If the average total cost to all involved of complying with the current CRA rule submission and referral process is \$300 per rule, then the total cost for all rules in a typical year (in which about 3,500 rules are delivered to the House, Senate, and GAO) would be

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<sup>127</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, available at <http://beta.congress.gov/111/crpt/hrpt150/CRPT-111hrpt150.pdf>.

<sup>128</sup> *Ibid.*, p. 3.

<sup>129</sup> Testimony of John V. Sullivan, Parliamentarian, U.S. House of Representatives, “Oversight of the Congressional Review Act,” Hearing before the Subcommittee on Commercial and Administrative Law, House Committee on the Judiciary, November 6, 2007.

<sup>130</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.



more than \$1 million. Permitting electronic delivery of rules only to GAO would likely reduce those costs substantially.

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>131</sup> However, the data in this report and in earlier reports on the implementation of the CRA indicate that fewer rules are sometimes submitted to GAO than to either the House or the Senate. Therefore, elimination of direct congressional reporting alone may have no effect on that rate of submission to GAO.

### A Combination of Reforms

Congress could decide to combine all three of the options discussed above – requiring GAO to reinstitute its checks and notifications, reducing the number of rules required to be submitted to GAO and Congress, and changing the submission process in a manner similar to that contemplated by H.R. 2247. Limiting the number of rules required to be submitted would likely reduce costs associated with implementing the CRA’s requirements, and make it more likely that Congress would be able to identify rules of potential concern. Allowing that more limited number of rules to be submitted only to GAO would likely reduce CRA implementation costs even further (because agencies could submit their rules electronically) while still allowing Congress and committees of jurisdiction to be notified about rules of potential concern (through the lists published in the *Congressional Record*).

Even if those changes are implemented, the findings of this report suggest that Congress may also want to require GAO to (1) reinstitute its checks of the *Federal Register* to ensure that all “major” and “significant/substantive” rules are being submitted, and (2) notify OIRA and rulemaking agencies when rules are discovered missing. As noted previously, placing such requirements on GAO may necessitate some additional funding, but the governmentwide savings associated with reducing the number of rules that have to be submitted and permitting electronic submission only to GAO would more than offset any small increase in GAO funding.

### Judicial Review

In addition to or instead of the above suggested reforms, Congress may want to consider explicitly permitting judicial review of agency compliance with the submission requirement in Section 801(a)(1)(A) of the CRA. Judicial review of compliance with this provision would permit any affected party to take the issuing

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<sup>131</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.

agency to court to prevent enforcement of a covered rule until it is submitted to GAO (and currently, to both houses of Congress). The threat of such legal action could result in greater agency compliance with the submission requirement, and less need for GAO to alert agencies when rules are not submitted.

Congress could make it clear that judicial review of the submission requirement does not permit judicial review of other aspects of the CRA process (e.g., OIRA's determination regarding which rules are "major," or congressional decisions to disapprove certain rules). Also, to help ensure that agency rulemaking does not become mired in court, Congress may want to permit judicial review of agency rule submission only after GAO has formally notified the agency that the rule had not been submitted, and the agency has had a certain period of time (e.g., 60 or 90 days) to submit the rule to GAO and Congress.