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Report to Congressional Committees

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# FEDERAL RULEMAKING

# Agencies Often Published Final Actions Without Proposed Rules

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The Honorable Fred Thompson
Chairman, Committee on Governmental Affairs
United States Senate

The Honorable Christopher Bond
Chairman, Committee on Small Business
United States Senate

The Honorable David McIntosh
Chairman, Subcommittee on National Economic
Growth, Natural Resources, and Regulatory Affairs
Committee on Government Reform and Oversight
House of Representatives

The Honorable George W. Gekas
Chairman, Subcommittee on Commercial and
Administrative Law
Committee on the Judiciary
House of Representatives

Federal agencies issue more than 4,000 regulatory actions each year on topics ranging from the timing of bridge openings to the permissible levels of certain contaminants in drinking water.[1] The basic process by which federal agencies develop and issue regulations is spelled out in section 553 of the Administrative Procedure Act of 1946 (APA).[2] Among other things, the APA requires agencies to (1) publish a notice of proposed rulemaking (NPRM) in the Federal Register; (2) allow interested persons an opportunity to participate in the rulemaking process by providing "written data, views, or arguments"; and (3) publish the final rule 30 days before it becomes effective. The APA allows agencies to issue final rules without the use of NPRMs in certain cases, such as when the agency determines for "good cause" that notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest." Although the good cause exception provides agencies with needed flexibility to dispense with notice and comment procedures in appropriate circumstances, the APA's legislative history and case law suggest that the exception is to be

[1]Throughout this report, we use the term "actions" to refer to the items agencies publish in the "Rules and Regulations" section of the Federal Register because not all of those items are rules. We also refer to the actions published in that section, including interim and direct final rules, as "final" actions because they are published for legal effect, in contrast to those items published in the "Proposed Rules" section regarding anticipated agency rulemaking.

[2]5 U.S.C. 553.

narrowly construed. When agencies use the good cause exception, the APA requires agencies to include a brief statement of their reasons for doing so in the preamble to the final rule when it is issued.[3]

In several previous assignments, we reported that agencies had published a number of final regulatory actions without having published NPRMs for those actions. To explore this subject further, you requested that we (1) identify the extent to which agencies published final regulatory actions without NPRMs during calendar year 1997, and the characteristics of those cases; (2) describe the reasons that the agencies gave for not publishing NPRMs; and (3) discuss the implications of publishing final actions without NPRMs. We addressed these issues by, among other things, examining a representative sample of all final rulemaking actions that were published in the Federal Register in 1997.

## Results in Brief

We estimate that about half of the 4,658 final regulatory actions published in the Federal Register during 1997 were published without NPRMs. Seven agencies accounted for about 70 percent of both the final actions in our sample and the actions without NPRMs. Most of the actions without NPRMs appeared to involve administrative or technical issues with limited applicability. However, 11 of the 61 final rules published during 1997 that were "major" rules under the congressional review provisions of the Small Business Regulatory Enforcement Fairness Act also did not have NPRMs.

The agencies most commonly cited the APA's good cause exception as their justification for not publishing NPRMs for final regulatory actions, frequently noting the time-sensitive nature of the actions being taken. The agencies also appeared to use categorical exceptions permitted in the APA (e.g., actions involving agencies' management or personnel) and, to a much lesser extent, specific statutory exceptions in other laws, as reasons for not publishing NPRMs. When an agency uses the good cause exception, the APA requires the agency to include a statement in the rule as to why an NPRM was impracticable, unnecessary, or not in the public interest. In the bulk of the good cause cases that we examined, the agencies provided clear explanations in the preambles to the actions. However, in other cases, the agencies' explanations in the preambles for why NPRMs were not used were not so clear or understandable. For example, in some of the actions, the agencies only made broad assertions in the preambles that an

[3]In this report, the "preamble" refers to the supplementary information that is printed in the Federal Register before the revisions to the text of the Code of Federal Regulations.

NPRM would delay the issuance of rules that were, in some general sense, in the public interest.

The APA recognizes that NPRMs are not always practical, necessary, or in the public interest. Sometimes, public safety or other factors require rules to be issued quickly. NPRMs may also be unnecessary or not in the public interest when minor, noncontroversial actions are being promulgated, or for other reasons. However, publishing rules without NPRMs generally limits the public's opportunity to participate in and have an impact on the regulatory decisions that agencies make and may restrict the ability of agencies to obtain new perspectives on their rules. Also, final actions that are published without NPRMs are not subject to statutory analytical or procedural requirements in the Regulatory Flexibility Act and other statutes that are triggered by the publication of a notice. At least two pieces of pending legislation would, if enacted, add to these current NPRM-triggered requirements. Some agencies specifically cited the absence of an NPRM as the reason they did not have to evaluate the impact on small entities of some of their rules under the Regulatory Flexibility Act.

## Background

The APA provides for both formal and informal rulemaking procedures. Formal rulemaking is used in ratemaking proceedings and in a limited number of other cases in which rules are required by statute to be made "on the record" after an opportunity for a trial-type agency hearing. Because few statutes require on-the-record hearings, formal rulemaking is used infrequently.

Informal rulemaking, also known as notice and comment rulemaking, has become standard practice for most agency rulemaking proceedings. In informal rulemaking, the APA generally requires that the agency publish an NPRM in the Federal Register containing (1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. After giving "interested persons" an opportunity to comment on the proposed rule, and after considering the public comments, the agency may then publish the final rule, incorporating a general statement of its basis and purpose. Although the APA does not specify the length of this comment period, agencies commonly allow at least 30 days. Finally, the act states that the rule cannot become effective until at least 30 days after its publication unless (1) the rule grants or recognizes an exemption or relieves a restriction, (2) the rule is an interpretative rule or a statement of

policy, or (3) the agency determines that the rule should take effect sooner for good cause and publishes that determination with the rule.

Other statutes also affect the APA informal rulemaking process. For example, the congressional review provisions in the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) require that agencies submit all of their final rules to each House of Congress and the Comptroller General before the rules take effect. SBREFA also requires agencies to delay the effective dates of major rules for at least 60 days after their publication in the Federal Register or their submission to Congress, whichever is later.[4] Under SBREFA, Congress can disapprove those rules that it believes are too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable. Major rules can become effective in less than 60 days under SBREFA if the agencies issue the rules without NPRMs, based on the use of the APA's good cause exception to the notice and comment requirements.[5]

In addition to these statutory requirements, Executive Order 12866 also affects the informal rulemaking process. Under the executive order, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) is identified as "the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency . . . ." The executive order also makes OIRA responsible for providing "meaningful guidance and oversight" to ensure that each agency's regulatory actions are consistent with applicable law, the president's priorities, and the principles in the order. Finally, the executive order requires OIRA to review all significant regulatory actions from executive departments and agencies (other than independent regulatory agencies). The order defines "significant regulatory actions" as ones that may (1) have an annual effect on the economy of $100 million or more or have other adverse economic effects; (2) create a serious inconsistency or interfere with an action planned or taken by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or alter the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues. According to data from

[4]SBREFA defines a "major" rule as one that the Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs finds has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.

[5]For a discussion of this issue, see Congressional Review Act: Update on Implementation and Coordination (GAO/T-OGC-98-55, June 17, 1998).

the Regulatory Information Service Center (RISC), OIRA reviewed about 500 regulatory actions in 1997, of which 237 were final actions.[6]

## Exceptions to NPRM Requirement

Although the APA generally requires agencies to publish NPRMs before promulgating a final rule, the act provides exceptions to this requirement. For example, the APA states that the notice and comment procedures generally do not apply when an agency finds, for "good cause," that those procedures are "impracticable, unnecessary, or contrary to the public interest." When agencies use the good cause exception, the act requires that they explicitly say so and provide a rationale for the exception's use when the rule is published in the Federal Register. The APA also provides explicit exceptions to the NPRM requirement for certain categories of regulatory actions, such as rules dealing with military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts. Further, the APA says that the NPRM requirements do not apply to interpretive rules; general statements of policy; or rules of agency organization, procedure, or practice. In addition to the APA exceptions, Congress sometimes includes specific exemptions from notice and comment procedures in other statutes. For example, section 161(d) under title I of the Federal Agriculture Improvement and Reform Act of 1996 instructed the Secretary of Agriculture and the Commodity Credit Corporation to issue regulations not later than 90 days after the date of enactment of the title, without regard to the notice and comment provisions of section 553 of the APA.[7] An agency's invocation of an exception to notice and comment procedures is subject to judicial review.

The legislative history of the APA makes it clear that Congress did not believe that the act's good cause exception to the notice and comment requirements should be used as an "escape clause." According to the Senate committee report accompanying the APA, a "true and supported or supportable finding of necessity or emergency must be made and published" when an agency uses the good cause exception.[8] Also, as previously noted, federal agencies' use of the good cause exception is subject to judicial review. After having reviewed the totality of circumstances, the courts can and sometimes do determine that the

[6]RISC is part of the General Services Administration and works closely with OMB to provide information to the president, Congress, and the public about federal regulations. RISC maintains a database that includes information on all regulatory actions reviewed by OIRA.

[7]Public Law No. 104-127, 110 Stat. 934-935 (1996).

[8]Senate Committee on the Judiciary, "Administrative Procedure Act: Legislative History," Senate Document 248, 79th Congress, 2nd Session (1946).

agencies' reliance on the good cause exception was not authorized under the APA.[9] The case law has generally reinforced the view that the good cause exception should be "narrowly construed."[10]

The APA's legislative history also indicates that Congress envisioned agencies using the notice and comment procedures even in some cases in which the act's exceptions applied, and some agencies have indicated that they intend to do so. For example, in 1971, the Secretary of Agriculture issued a statement of policy that said the APA exceptions would be used "sparingly," and that it was the Department's policy to "give notice of proposed rule making and to invite the public to participate in rule making where not required by law." The Administrative Conference of the United States (ACUS) also encouraged the use of notice and comment procedures where not strictly required, and recommended that Congress eliminate or narrow several of the exceptions in the APA.[11]

ACUS also encouraged agencies to use two procedures for noncontroversial and expedited rulemaking actions that, although not specifically mentioned in the APA, were designed not to involve NPRMs.[12] One of these procedures, known as "direct final" rulemaking, involves agency publication of a rule in the Federal Register with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (e.g., 30 days). However, if an adverse comment is filed, the direct final rule is withdrawn and the agency may publish the rule as a proposed rule under normal NPRM procedures.[13] Direct final rulemaking can be viewed as a particular application of the APA good cause exception in which agencies claim NPRMs are "unnecessary." One of the Vice-President's National Performance Review (NPR)

[9]For discussions of these court cases, see Ellen R. Jordan, "The Administrative Procedure Act's 'Good Cause' Exemption," Administrative Law Review, 36 (Spring 1984), pp. 113-178; and Catherine J. Lanctot, "The Good Cause Exception: Danger to Notice and Comment Requirements Under the Administrative Procedure Act," Georgetown Law Journal, 68 (February 1980), pp. 765-782.

[10]American Federation of Government Employees, AFL-CIO v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981). See also Mobay Chemical Corp. v. Gorsuch, 682 F.2d 419, 426 (3rd Cir.), cert. denied, 459 U.S. 988 (1982). In another case (Action on Smoking and Health v. CAB, 713 F. 2d 795, 800 [D.C. Cir. 1983]), the court said that allowing broad use of the good cause exception would "carve the heart out of the statute."

[11]ACUS was established by statute as an independent agency in 1964 to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions. ACUS was abolished in 1995.

[12]See recommendation 95-4 at 60 FR 43108 (Aug. 18, 1995).

[13]As will be discussed later in this report, the Environmental Protection Agency's method of direct final rulemaking varies somewhat from this general procedure.

recommendations encouraged agencies to use direct final rulemaking for noncontroversial rules.[14]

ACUS also endorsed the use, in certain circumstances, of what is known as "interim final" rulemaking, in which an agency issues a final rule without an NPRM that is generally effective immediately, but with a post-promulgation opportunity for the public to comment.[15] If the public comments persuade the agency that changes are needed in the interim final rule, the agency may revise the rule by publishing a final rule reflecting those changes. Interim final rulemaking can be viewed as another particular application of the good cause exception in the APA, but with the addition of a comment period after the rule has become effective.

## Previous Studies Indicated Final Rules Were Issued Without NPRMs

In several previous reviews of agencies' rulemaking actions, we reported that agencies had not issued NPRMs before publishing certain final rules. For example, in our January 1998 report on the extent to which agencies documented changes made to their rules, we focused on 82 significant final rules that OIRA reviewed between January 1, 1996, and March 1, 1997.[16] Because the documentation requirements in Executive Order 12866 apply to both the proposed and final rulemaking stages, we obtained a list of any related NPRMs for these final rules from RISC. The RISC data indicated that there were 40 associated proposed rules for the 82 final rules included in our review.

In February 1998, we reported on the implementation of the Unfunded Mandates Reform Act of 1995 (UMRA) with regard to 110 economically significant rules that were promulgated in the first 2 years of UMRA's implementation, of which 66 were final rulemaking actions.[17] The RISC database and other information indicated that there were no associated NPRMs for 18 of these 66 final actions.

[14]Improving Regulatory Systems: Accompanying Report of the National Performance Review, Office of the Vice President, September 1993.

[15]ACUS said that "agencies should use post-promulgation comment procedures (so called 'interim final rulemaking') for all legislative rules that are issued without pre-promulgation notice and comment because such procedures are either 'impracticable' or 'contrary to the public interest.'"

[16]Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented (GAO/GGD-98-31, Jan. 8, 1998).

[17]Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions (GAO/GGD-98-30, Feb. 4, 1998). "Economically significant" rules are those that have an annual effect on the economy of $100 million or more or have other adverse economic effects.

In April 1998, we reported on the 122 major rules that agencies submitted to us in the first 2 years of the congressional review requirements in SBREFA (April 1996 through March 1998).[18] We noted that 23 of these 122 major rules (19 percent) were issued without a previous NPRM. Nine of these 23 rules were interim final rules, and 8 others were final rules based on previous interim final rules. Two other rules were direct final rules. The remaining four rules were notices published by the Department of Health and Human Services related to the Medicare program for which the agency contended that the statutes provided no discretion.

In one of the few quantitative analyses of federal agencies' use of the NPRM exceptions, a study published in the Administrative Law Journal in 1989 concluded that NPRMs were not published for about one-third of the 2,190 regulatory actions in the "Rules and Regulations" section of the Federal Register during a 6-month period in 1987.[19] The study found that agencies invoked the good cause exception in about one-quarter of the actions, and that about 9 percent of the actions were issued using NPRM exceptions other than good cause.

## Objectives, Scope, and Methodology

The objectives of our review were to (1) identify the extent to which agencies published final regulatory actions without NPRMs during calendar year 1997, and the characteristics of those cases; (2) describe the reasons that the agencies gave for not publishing NPRMs, and (3) discuss the implications of publishing final regulatory actions without NPRMs. To address the first objective and part of the second objective, we used a commercial electronic Federal Register database to develop a list of all 4,658 final regulatory actions published in the "Rules and Regulations" section of the Federal Register during 1997. We tested the reliability of the database we used to generate our list of all final regulatory actions by duplicating our search parameters using other Federal Register databases, and the results were generally consistent.

Based on our previous work identifying and reviewing major and significant rules and using database search parameters designed to identify interim and direct final regulatory actions, we selected a stratified sample of 250 final regulatory actions and analyzed their regulatory histories to determine if they had been published without NPRMs. The

[18]Regulatory Reform: Major Rules Submitted for Congressional Review During the First 2 Years (GAO/GGD-98-102R, Apr. 24, 1998).

[19]Juan J. Lavilla, "The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act," The Administrative Law Journal, 3 (Fall 1989), pp. 317-423.

sample was composed of three strata to permit further analyses on interim and direct final actions and major rules submitted to us pursuant to the congressional review requirements in SBREFA. One strata contained all 61 major rules published in 1997. A second strata was a sample of 40 actions from the 718 interim and direct final regulatory actions published in 1997. A third strata was a sample of 149 actions from all other remaining final regulatory actions published during 1997.[20] For the latter two strata, we selected actions using a random-start systematic sampling procedure. To determine whether NPRMs were published, we reviewed any preambles for the final actions that were published; checked corresponding entries in the Unified Agenda of Federal Regulatory and Deregulatory Actions; and followed up on any cited notices, including notices for related rules published before 1997.[21] We also compared our findings with those of another quantitative study of NPRM rulemaking, and obtained data on interim final and direct final rulemaking actions in previous years.

To further address our second objective, we first reviewed the APA and its legislative history, relevant court cases, and the general procedural requirements that govern federal agency rulemaking. For those actions that we determined were published without an NPRM, we coded the reasons the agencies gave for not having NPRMs into one of three types of NPRM exceptions—good cause, categorical, and statute-specific. We also noted the clarity of agencies' good cause explanations and how the agencies addressed certain regulatory reform requirements (e.g., the Regulatory Flexibility Act) in these actions.

The results of our analysis are generalizable to final regulatory actions published in 1997. They are not generalizable to regulatory actions published in years other than 1997. Our estimates for 1997 are subject to some uncertainty or sampling error. Our estimate of the number of 1997 final regulatory actions published without NPRMs has a 95 percent confidence interval of ±7 percent. In other words, if we had reviewed all of the 4,658 final actions published during 1997, the chances are 95 out of 100 that the results obtained would not differ from our sample estimate by more than ± 7 percentage points. Depending on the particular analysis of

[20]We originally selected 150 actions for the third strata, but upon detailed review of our sample, we determined that one of these sampled actions had been actually and appropriately published under the "Presidential Documents" section of the Federal Register, not the "Rules and Regulations" section. This action was eliminated from our sample because it was not in the population of interest and therefore was outside of the scope of this review. Consequently, there were 149 sampled actions from the third strata and 250 actions in the total sample.

[21]Since 1978, federal agencies have been required by executive orders to publish agendas of regulatory and deregulatory activities. The Unified Agenda is published in the Federal Register twice each year by RISC and provides uniform reporting of data on the regulatory activities under development throughout the federal government.

actions without NPRMs, our estimates have confidence intervals ranging from ± 1.5 to ± 15 percent around the estimate. Confidence intervals are reported in subsequent sections of this report either in footnotes or in parentheses following the percent estimate.

We supplemented our work addressing the second objective by conducting the just described analysis on the 60 major and significant rules without NPRMs identified in our previous work.[22] These 60 rules are not a sample, and confidence intervals cannot be computed. Also, the results from our review of these rules are not generalizable to the universe of all significant or major rules.

We obtained additional information on the reasons no NPRMs were published from agency officials in four agencies with large numbers and varieties of regulatory actions in our reviews of both the 1997 sample and the 60 rules identified from our previous work—the Departments of Agriculture (USDA), Housing and Urban Development (HUD), and Transportation (DOT), and the Environmental Protection Agency (EPA). Our judgments regarding the clarity or understandability of the agencies' explanations were subjective determinations based on the language in the rulemaking preambles. Although we reviewed the preambles of the rules in which agencies relied on the good cause exception in order to note the agencies' stated rationales for using the exception, we did not examine the legality of any of these agency actions in this respect or determine whether they were authorized under the APA.

We addressed the third objective by reviewing the analytical and procedural requirements in existing statutes and pending regulatory reform legislation, analyzing the individual regulatory actions identified in our sample and previous jobs, and meeting with cognizant agency officials.

We conducted our work between January 1998 and June 1998 at OMB, USDA, HUD, DOT, and EPA headquarters in Washington, D.C., in accordance with generally accepted government auditing standards. We provided a draft of this report to the Director Designate of OMB; the Secretaries of Agriculture, Housing and Urban Development, and Transportation; and the

[22]The number of actions without an NPRM from all three previous assignments is less than the sum of such actions in each assignment because of overlaps in the rules covered. Also, because we used a different methodology in this review, we discovered notices for some of the regulatory actions in the previous assignments that we had previously reported did not have NPRMs. This total set of 60 major and significant rules from previous assignments included 12 rules published in 1997 that were also part of our overall sample of final regulatory actions.

Administrator of EPA for their review and comment. Their views are presented at the end of this letter, along with our evaluation.

## About Half of the Final Actions in 1997 Were Published Without NPRMs

On the basis of our analysis, we estimated that agencies published about half of the final regulatory actions during calendar year 1997 without NPRMs. Most of these actions without NPRMs were published by seven agencies, and most appeared to involve routine, administrative, or technical issues. However, nearly one-fifth of the major final rules published during 1997 did not have NPRMs. Some data suggest that the proportion of regulatory actions being published without NPRMs may be increasing. Furthermore, the number of direct final rules increased between 1992 and 1997.

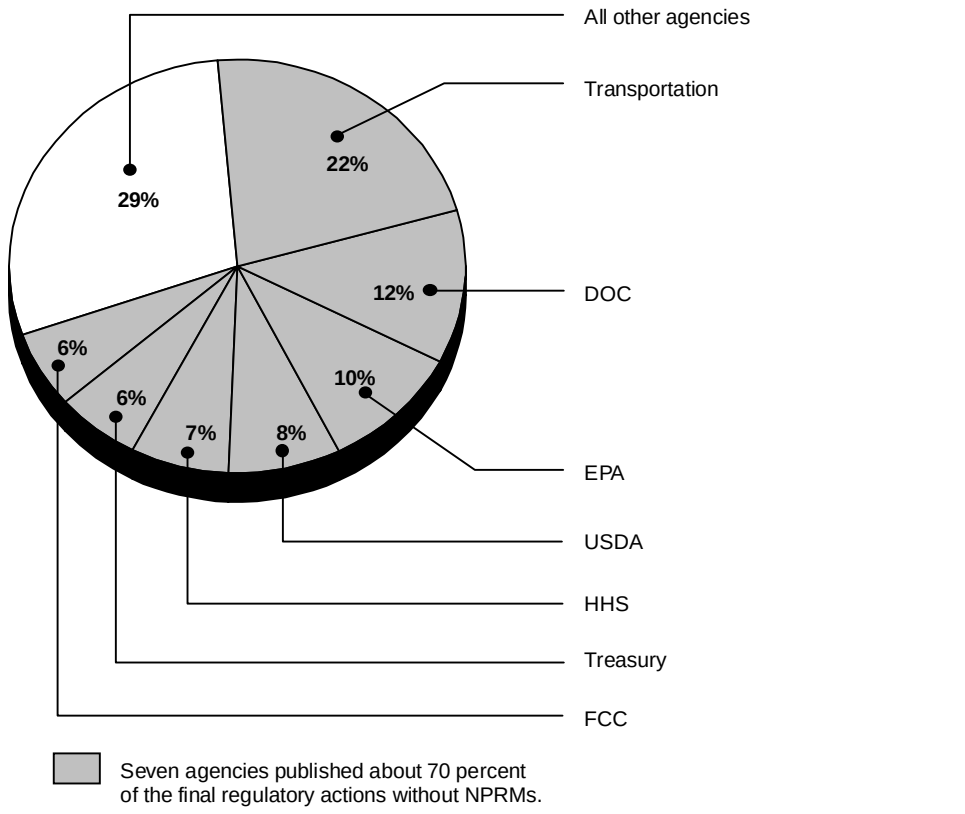
### Most Actions Without NPRMs Involved Routine or Minor Issues

During calendar year 1997, federal agencies published 4,658 final regulatory actions in the Federal Register. Analysis of our sample of 250 of these actions indicated that about 51 percent, or 2,360, were published without NPRMs. Therefore, applying the 95 percent confidence interval of ± 7 percent, we estimated that there were no associated proposed rules for between 44 and 58 percent of the final regulatory actions published during 1997. Within the overall sample, there appeared to be differences in the extent to which different types of final actions did not have proposed rules. For example, nearly 63 (± 15) percent of the interim and direct final rules published during 1997 did not have an associated NPRM, compared with about 49 (± 8) percent of all other final actions.[23]

As figure 1 shows, we estimated that seven agencies published about 70 (± 9) percent of the final regulatory actions without NPRMs in 1997. These agencies were DOT, the Department of Commerce (DOC), EPA, USDA, the Department of Health and Human Services (HHS), the Department of the Treasury (Treasury), and the Federal Communications Commission (FCC). That these agencies accounted for the bulk of the actions without NPRMs is not surprising given that these agencies accounted for nearly three-quarters of all final regulatory actions published in 1997.

[23]As explained later in this report, although direct final rulemaking was envisioned as a means by which agencies could publish final rules without an NPRM, at least one agency published NPRMs at the same time that direct final rules were published.

**Figure 1: Seven Agencies Accounted for the Bulk of Final Regulatory Actions Without NPRMs in 1997**




Note: For estimated percentages of less than 10 percent, the sampling error is ± 5 percent. Estimated percentages of 10 percent or more have sampling errors ranging from ± 6 percent to ± 9 percent.

Source: GAO analysis of a sample of Federal Register notices for final regulatory actions.

The Unified Agenda of Federal Regulatory and Deregulatory Actions classifies the priority of agencies' regulatory actions into five categories of descending significance: (1) economically significant; (2) other significant; (3) substantive, nonsignificant; (4) routine and frequent; and (5) informational/administrative/other. Although the agencies did not assign a priority to every action without an NPRM in our sample, about a fifth of the actions without NPRMs were "substantive," "significant," or "economically significant." Our review of the actions in our sample also indicated that most of the actions involved routine matters or minor

amendments and corrections to previously issued rules. For example, the actions without NPRMs in our sample included the following:

- DOC's National Marine Fishery Service issued a number of routine regulatory actions that involved temporarily limiting the harvesting of certain species of fish within particular economic zones.
- DOT's U.S. Coast Guard published a temporary final rule to establish a safety zone during the Astoria Regatta fireworks display on the Columbia River in Oregon.
- The Department of Justice's Immigration and Naturalization Service published a final rule to add the Missouri Botanical Garden to the listing of American Institutions of Research.
- The Federal Communications Commission issued a final rule amending the Table of FM Allotments under Minnesota to add Channel 290A to Belview, Minnesota, as that community's first local broadcast service.
- DOT's Federal Aviation Administration (FAA) published a direct final rule to confirm the effective date of an amendment to "Class E Airspace" in Sidney, Nebraska.

FAA also issued a number of "airworthiness directives" without NPRMs that it described as "routine and frequent" rules involving very specific adjustments in parts of particular aircraft. For example, one such directive required replacement of the main gear box input bevel pinion in Eurocopter France Model SA-360C helicopters. This amendment was prompted by service reports of bevel pinion fatigue cracking. However, in a number of other cases, FAA issued airworthiness directives after publishing proposed rules.

## Some Major Rules Did Not Have NPRMs

Although most of the regulatory actions without NPRMs in the sample appeared to involve routine or minor issues, our previous work indicated that some of the most significant regulatory actions that agencies have published in recent years also did not have NPRMs. As previously noted, our April 1998 review of 122 major rules submitted to us during the first 2 years of the congressional review provisions of SBREFA indicated that 23 of the rules did not have associated NPRMs. In order to have a common basis of comparison with our overall sample, we examined the subset of 61 major rules that were published during calendar year 1997. Of these, 11 did not have NPRMs. Although the APA permits agencies to issue rules, including major rules, without NPRMs in appropriate circumstances, it is nonetheless notable that nearly one-fifth of the major rules published during 1997 did not have notices.

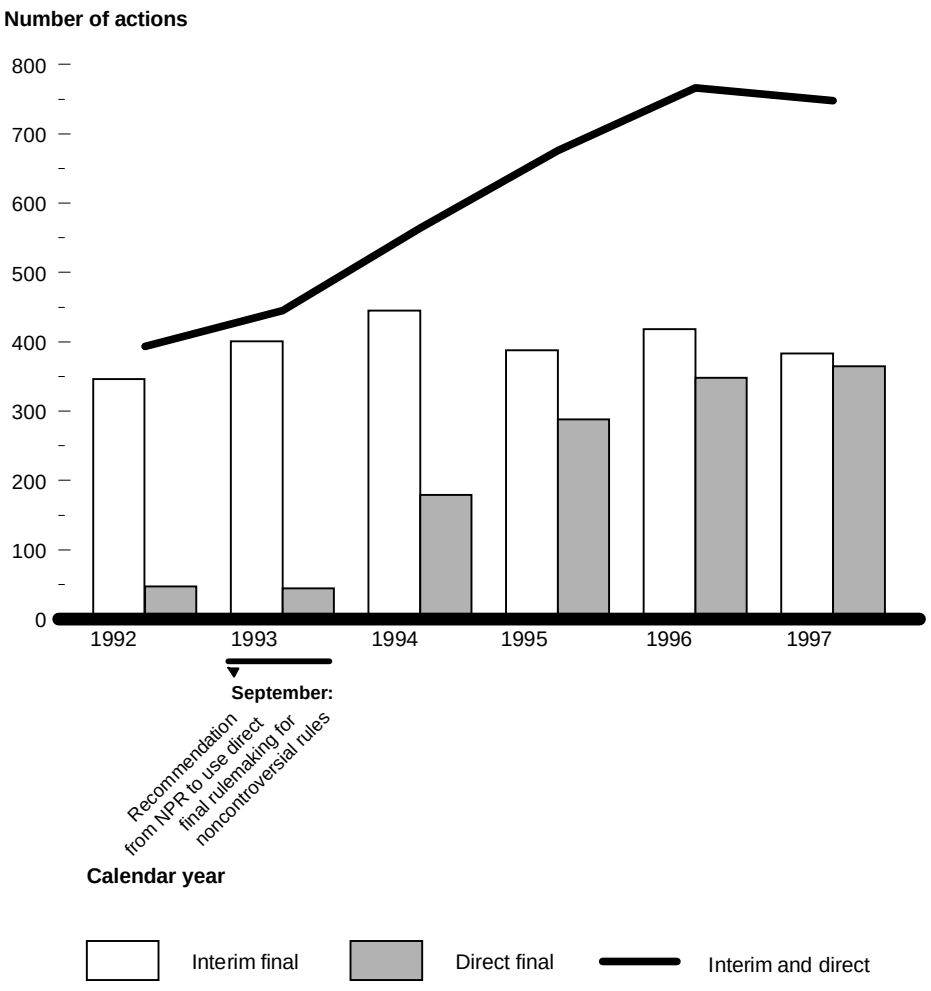
## Use of Direct Final Rulemaking Has Increased

As previously noted, a study published in 1989 reported that about one-third of the final regulatory actions published during a 6-month period in 1987 did not have associated proposed rules. Comparison of that study's results with ours suggests that the proportion of regulatory actions being published without NPRMs may be increasing. However, we cannot be sure of that conclusion because of differences in the methodologies used in the studies and the limited amount of research on this subject.

Although it is sometimes difficult to determine which final rules were issued without NPRMs, it is relatively easy to identify two specific types of regulatory actions that were designed to be published without NPRMs—interim and direct final rules—and to determine whether their prevalence in the rulemaking process has increased or decreased over time. We electronically searched the Federal Register and found that the percentage of all final regulatory actions that were interim or direct final rules had increased from 9.6 percent of all final actions published in 1992 to 16.0 percent in 1997.[24] As figure 2 shows, most of this increase was caused by direct final rules being used more frequently. Agencies published about 400 interim final rules per year throughout this period, but the number of direct final rules increased steadily, going from 47 in 1992 to 365 in 1997.

[24]EPA originally used the term "immediate final" rather than "direct final" when it started using the rulemaking procedure in the 1980s. For purposes of this time-series research, we therefore included "immediate final" rules in the direct final rule category.

**Figure 2: Agencies' Use of Direct Final Rulemaking Increased Between 1992 and 1997**




Source: GAO analysis of Federal Register database for final regulatory actions.

EPA published at least 65 percent of the direct final rules in each of these years, often using the approach for what it considered to be noncontroversial amendments, such as approvals of state air quality implementation plans and new chemical uses, and on which it anticipated no adverse comments. EPA's use of this type of rulemaking differed from the other agencies' (and from how it was described by ACUS and NPR) in

that the agency published an NPRM on the same day as the direct final rule in the event that adverse or critical comments were filed. Under the agency's procedure, if EPA received adverse or critical comments about the direct final rule, EPA would withdraw the direct final rule before its effective date by publishing a subsequent document, and all public comments received under the direct final rule then would be addressed in a subsequent final rule based on the proposed rule. In doing so, EPA has only one public comment period (the one for the direct final), not two periods as in other agencies that republish the withdrawn direct final rule as a proposed rule. Also, because there was an associated proposed rule for each EPA direct final rule in our sample, we coded all of the EPA direct final rules as having NPRMs. However, there was no notice published in the Federal Register for these rules before they were published as direct final rules.

## Agencies Most Commonly Cited "Good Cause" as the Reason for Publishing Final Actions Without NPRMs

As previously noted, agencies can publish final regulatory actions without NPRMs using either good cause, categorical, or statute-specific exceptions to the APA's notice and comment requirements. Our review indicated that, in 1997, agencies most commonly used the good cause exception. Within that category, the agencies often determined that public notice and comment procedures were "impracticable" because of the time-sensitive nature of the actions being taken. Agencies also used the categorical and, to a much lesser extent, statute-specific NPRM exceptions.

### Agencies Cited Good Cause for Multiple Reasons

Our analysis of the sample cases indicated that federal agencies cited the good cause exception to the APA's notice requirement in about 59 (± 10) percent, or about 1,400, of the final regulatory actions published without NPRMs in 1997. The APA permits the use of the good cause exception when the agency issuing the rule finds that notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest." The act's legislative history defines these terms as follows:

"'Impracticable' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. 'Unnecessary' means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. 'Public interest' supplements the terms 'impracticable' or 'unnecessary;' it requires that public rule-making procedures shall not

prevent an agency from operating and that, on the other hand, lack of public interest in rule-making warrants an agency to dispense with public procedure."[25]

In our review, the agencies often cited more than one reason per case for why they used the good cause exception. However, the agencies most frequently indicated that NPRMs were impracticable because of the time-sensitive nature of the regulatory actions being taken. For example, in eight of the actions, the agencies indicated that some kind of emergency made issuance of an NPRM impracticable or contrary to the public interest. In one such case, the Administrator of USDA's Animal and Plant Health Inspection Service determined that an emergency existed after a trapping survey revealed that the Oriental fruit fly had moved into parts of Los Angeles County. The Service then issued an interim final rule without an NPRM to expand an existing quarantine area and thereby prevent the fruit fly from spreading to noninfested areas of the United States. In seven of the sample actions, the agencies cited statutory deadlines that required the prompt promulgation of the action at issue. For example, the Department of Veterans Affairs said that it published a final rule on guidelines for furnishing veterans with "sensori-neural aids" (e.g., eyeglasses, contact lenses, and hearing aids) without an NPRM because a provision in the Veteran's Health Care Eligibility Reform Act of 1996 required that the guidelines be established "(n)ot later than 30 days after the date of the enactment of this Act."[26]

In eight of the cases in our sample, the agencies indicated that they used the good cause exception because the regulatory actions being taken were matters of public safety. For example, the Coast Guard published a final rule without an NPRM that established a temporary safety zone near the mouth of the Severn River in Annapolis, Maryland, to protect marine traffic and spectators from potential hazards during an event involving the U.S. Navy's Blue Angels. In another case, the FAA published a final rule without an NPRM (but with a request for subsequent public comments) that amended the effective hours for airspace areas at Mount Clemens near the Selfridge (Michigan) Air National Guard Base to coincide with the associated control tower's hours of operation. FAA said that this modification was needed "to promote the safe and efficient handling of air traffic in these areas."

In still other cases in our sample, agencies indicated that an NPRM was unnecessary and the good cause exception applied because the action

[25]Senate Document No. 248, 79th Congress, 2d Session at 200 (1946) .

[26]Public Law 104-262, sec. 103.

being taken was noncontroversial. A number of these cases were FAA direct final changes to air space rules that the agency said only involved "an established body of technical regulations that require frequent and routine amendments to keep them operationally current."

## Agencies Also Cited Categorical and Specific Statutory Exceptions

We estimated that 30 (± 9) percent, or about 710, of the final actions that federal agencies published without NPRMs in 1997 did not have a notice because the agencies indicated that the actions were covered by broad categorical exceptions permitted in the APA—e.g., actions involving military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts. For example, one of the sample cases that appeared to involve foreign affairs was a final rule amendment issued by the Department of the Treasury's Foreign Assets Control Office involving overflight payments to North Korea. One of the final rules that appeared to trigger the agency management or personnel exemption was issued by the Office of the Secretary of Transportation and involved, among other things, the organization and delegation of powers and duties to the agency's chief information officer.

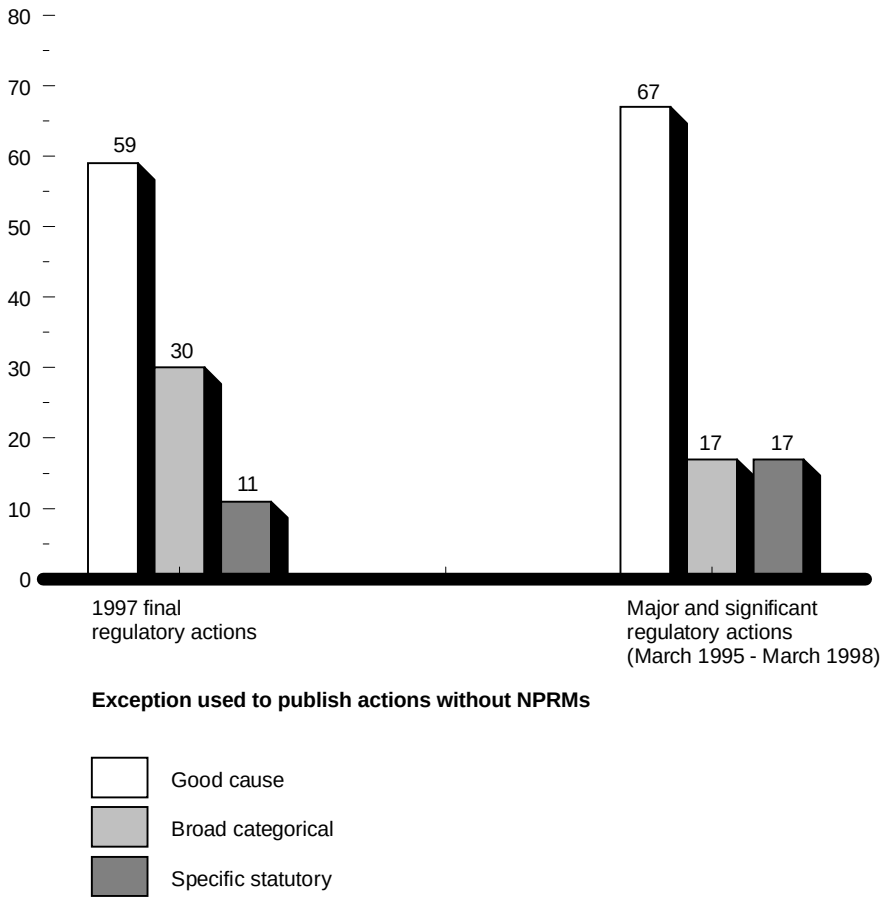
About 11 (± 6) percent, or about 260, of the final actions published without NPRMs in 1997 appeared exempt from the notice requirements because of specific statutory exceptions in their underlying statutes. For example, two of the actions in our sample were EPA final rules promulgated in response to petitions to grant pesticide tolerances. Under a 1996 amendment to the Federal Food, Drug, and Cosmetic Act, tolerances established on the basis of a petition do not require issuance of a proposed rule. Also, three of the final rules in the sample that were published by HHS' Food and Drug Administration involved new animal drugs, a subject that the agency indicated was not subject to the APA public notice and comment requirements because of language in the Federal Food, Drug, and Cosmetic Act. In another action in our sample, HUD published a rule without an NPRM because the underlying appropriations act directed the department to issue interim regulations to implement loss mitigation procedures within 30 days of the enactment of the act.

## Agencies Used the Good Cause Exception for Most "Major" or "Significant" Actions Without NPRMs That We Reviewed

We also examined 60 "major" or "significant" regulatory actions without NPRMs that we had identified in 3 previous assignments to determine whether the reasons agencies published final regulatory actions without NPRMs varied depending on the priority of the actions taken. These 60 actions included 12 that were published without NPRMs during 1997, as well

as 48 other major or significant final actions published in recent years. Our review indicated that, as was the case in the overall sample, the agencies issuing these 60 rules most often cited the good cause exception to the use of notice procedures (see fig. 3). The agencies used categorical and specific statutory exceptions for about 34 percent of the major and significant rules that we reviewed, compared with about 41 percent in the overall sample.

**Figure 3: Agencies Cited the Good Cause Exception for Most Final Regulatory Actions Without NPRMs**




Note 1: The data on all 1997 final actions without NPRMs show percentages estimated on the basis of our sample results.

Note 2: The data on major and significant actions show the percentages for final actions without NPRMs that were identified during previous assignments. These actions were published between March 1995 and March 1998.

Source: GAO analysis of Federal Register notices for final regulatory actions.

As in the overall sample, the agencies that said they published major and significant final rules without NPRMs for good cause most frequently

indicated that they did so because of the time-sensitive nature of the regulatory actions being taken. However, the agencies issuing these major or significant rules cited statutory deadlines as the reason for their time sensitivity much more frequently than in the overall sample.

## Agencies' Explanations in Preambles for Using the Good Cause Exception Were Sometimes Not Clear

Section 553(b)(B) of the APA requires agencies using the good cause exception to the notice and comment requirements to indicate in the issued rules that they are using the exception and to include "a brief statement of reasons therefor . . . ." We examined the preambles to the rules in our review for which the agencies used the good cause exception and, in the bulk of those cases, concluded that it was clear why the agency had claimed that obtaining comments was impracticable, unnecessary, or not in the public interest. As noted previously, a number of the actions in our sample appeared to involve routine or minor actions on which public comments would not seem to be necessary. For example, in several of the actions we reviewed, agencies were merely removing obsolete provisions or streamlining and consolidating requirements in existing regulations. In other, more substantive, cases in our review, it was clear from the agencies' explanations in the preambles to the rules that waiting for public comments would not have been in the public interest. For example, regulations in our review cited the need to deal quickly with emergency situations, such as incidents involving the transport of oxygen generators as cargo on board passenger-carrying aircraft, the outbreak of exotic Newcastle disease in nondomestic poultry that might be imported into the United States, the spread of the Mediterranean fruit fly in Florida, and damage that was being caused to a reef within the Florida Keys National Marine Sanctuary.

However, in other rules in our review, the rationales that the agencies offered in the preambles for using the good cause exception were not as clear or understandable. In several of the rulemaking actions, the agencies cited statutory or other deadlines that prevented them from issuing NPRMs, some of which had already passed by the time the rules were issued, and the preambles did not provide a clear explanation for why an opportunity for notice and comment could not have been provided. For example, the preamble to a May 31, 1995, significant interim rule that took effect immediately stated that the rule was being issued without prior opportunity for comment because an executive order, issued in October 1993, required the implementation and incorporation of its policies into federal regulations by April 1994. Other than the April 1994 deadline that had been missed, the agencies issuing the rule provided no other rationale

for why an NPRM was not issued. In the case of another significant rule that we reviewed, the agency issued the rule on February 26, 1998, but said in the preamble that notice and public comment before implementation of the regulation were "impracticable" because of a January 1, 1997, statutory deadline for certain provisions.[27] The preamble did not elaborate on this explanation or explain why additional time for an NPRM period was impractical even though the deadline had been missed by nearly 14 months.

In other cases that we examined, the regulations contained very general assertions that the good cause exception applied because an NPRM would delay the issuance of rules that were in the "public interest." Those cases included the following:

- In one of the cases from our sample, the preamble to the interim rule stated that the agency was issuing the rule based on the APA's good cause exception "[b]ecause this rule will facilitate tourist and business travel to and from Slovenia," and therefore delaying the rule to allow for public comments before the interim rule was published "would be contrary to the public interest."
- In another case from our sample, the preamble to the interim rule stated that use of notice and comment procedures would be "contrary to the public interest" because the rule implemented statutory provisions that were intended to protect the public and American businesses from counterfeit copyrighted and trademarked products.
- In the preamble to a significant interim rule, the issuing agency said that soliciting public comment on the rule before publishing it for effect was "contrary to the public interest" because the rule authorized a "new and creative method of financing the development of public housing," which would help alleviate low-income housing shortages. The preamble went on to say that the development of public housing units within a development would "promote the economic and social integration of low income families within the broader community, thereby providing greater opportunities for the upward mobility of such families."
- In the preamble to another significant interim rule, the issuing agency said that good cause existed to dispense with public comments because the rule added exclusions to the definitions of annual income for purposes of enabling families to qualify for housing assistance programs, which would benefit residents and tenants "without adversely affecting any other group." The preamble also said that delaying implementation of the

[27]The agency also said that prior notice and comment would "serve no practical purpose," and were therefore unnecessary, because the other provisions in the rule were nondiscretionary.

interim rule would be "contrary to the public interest" because it (1) was "essential for achieving [the agency's] goals of ensuring economic opportunity, empowering the poor and expanding affordable housing opportunities"; and (2) would promote "long-term upward mobility, educational achievement and entrepreneurship," thereby possibly decreasing the number of families dependent on social services programs and resulting in future cost savings that could offset the short-term costs of the changes.[28]

- The preamble to another significant interim final rule involving a disaster assistance program stated that a prepublication comment period was "impracticable" because "major disasters continue to occur." The preamble also stated that obtaining public comments on the final rule before its publication was "contrary to the public interest" because of problems in the agency's current regulations that would continue to be in effect during the comment period. However, the preamble also said that the agency had identified these problems in connection with disasters that occurred 1 to 2 years before the interim final rule was published.

We did not examine agencies' rationales beyond the preambles to the rules to determine whether the good cause exception was used properly in these cases.[29] However, these examples show that, in some cases, rulemaking preambles do not contain enough detail to enable the interested public to clearly understand the agencies' rationales for asserting "good cause."

As noted previously, Executive Order 12866 gives OIRA a significant role in the rulemaking process. In commenting on a draft of this report, the Acting Director of OIRA said that the good cause exception should only be used when good cause truly exists, and that agencies can consult with the Justice Department if they need guidance on this issue.[30] He also said that, as part of their review of significant final rules, OIRA staff typically examine the preamble explanation when an agency uses the good cause exception. However, OIRA officials said that OIRA does not currently notify agencies that they should clearly explain in the rules why they used the good cause exception or that OIRA will address whether agencies clearly explained

[28]In the final rule, the agency said that the cost of the rule "would not exceed $10 million."

[29]As noted previously, agencies' use of the good cause exception is subject to judicial review. Courts reviewing agencies' assertions of good cause look to the totality of the circumstances relating to the regulation in question and the factors that led the agency to rely on the exception. See Petry v. Block, 732 F. 2d 1193 (D.C. 1984).

[30]The only written governmentwide guidance that we are aware of is the Attorney General's Manual on the Administrative Procedure Act, which was issued by the Department of Justice in 1947 but that has not been updated to reflect subsequent case law.

why the good cause exception was being used in its reviews of agencies' significant rules.

## Implications of Publishing Final Rules Without NPRMs

The APA represents an attempt by Congress to strike a balance between the public's right to be involved in the process by which rules are developed and the agencies' need to carry out their missions in an efficient and effective manner. In particular, the APA recognizes that it is not always practical, necessary, or in the public interest to publish an NPRM in the Federal Register and allow interested persons an opportunity to provide comments before the proposed rule becomes effective. In those situations, issuing a final rule without an NPRM is an appropriate course of action. Frequently, there are situations in which agencies must act quickly to, for example, ensure the safety of food products or respond to natural disasters. Many agency rules are essentially administrative or ministerial in nature and may involve issues in which the public has no particular interest. In these and other appropriate cases, the APA provides agencies with needed flexibility to publish regulations without issuing an NPRM.

The goal of preserving agency flexibility can sometimes compete with other goals the APA is intended to serve. When a regulation is published without an NPRM, the public's ability to participate in the regulatory process is limited. Also, because NPRMs can allow agencies to obtain information and perspectives on their rules that they might not otherwise obtain, publishing final rules without NPRMs may limit the ability of agencies to improve the quality of their rules and build public support for them.[31]

Agencies can and do solicit the public's input in ways other than NPRMs, such as allowing the public to comment on final, direct final, and interim final rules when they are published without NPRMs. In about 45 (± 9) percent, or about 1,060, of the final regulatory actions published without NPRMs in 1997, the agencies requested some form of public comments or provided for a public comment period. In the major or significant regulatory actions without NPRMs that we reviewed, agencies requested or provided an opportunity for public comments in about 70 percent of the cases. However, none of these post-publication comment procedures allows the public to comment on the agencies' rules until after they are published in the Federal Register as final rules. By that point in the rulemaking process, agencies have already determined the regulatory

[31]For a discussion of this issue, see Asbestos Information Association v. OSHA, 727 F.2d 415, 426 (5th Cir. 1984).

approaches they plan to take. NPRMs, on the other hand, permit the public to comment on agencies' intentions before they are announced as final actions and at a point when public participation is most likely to have the greatest impact on agencies' decisionmaking. As one court said in a case involving the timing of public comments, the APA notice and comment procedures "ensure that affected parties have an opportunity to participate in and influence agency decisionmaking at an early stage, when the agency is more likely to give real consideration to alternative ideas."[32] Agencies' actions that only allow the public to comment on their regulatory decisions after they are made, while not prohibited by the APA, are not likely to be as effective as NPRMs in allowing meaningful public participation in the rulemaking process.

## Actions Without NPRMs Do Not Trigger Regulatory Reform Requirements

During the past 20 years, Congress has enacted a number of statutes that were designed to improve the operation of the federal rulemaking process. Those statutes typically require agencies to undertake some form of analysis or require that certain procedures be followed during the rulemaking process, with the ultimate goals being better regulations and greater consideration by agencies of the effects of their rules on regulated entities. In several of those statutes, the required analyses and regulatory procedures are triggered (either directly or indirectly) by the publication of an NPRM. Therefore, if an agency does not publish an NPRM either because of the good cause or categorical exceptions that are permitted in the APA, or because Congress directs an agency not to use notice and comment procedures, the foregoing regulatory reform requirements do not take effect.

For example, Congress passed the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601-612) in response to concerns about the effect that federal regulations can have on small entities. The RFA states that federal agencies must either (1) certify that their rules will not have a "significant economic impact on a substantial number of small entities" or (2) prepare and make available for public comment initial regulatory flexibility analyses that describe the anticipated effects of their proposed rules on small entities, and (3) prepare final regulatory flexibility analyses at the end of the rulemaking process. However, the RFA stipulates that the initial analysis must be done "[w]henever an agency is required by section 553 of [the APA], or any other law, to publish a general notice of proposed rulemaking." The act also says that the final regulatory flexibility analysis is required "[w]hen an agency promulgates a final rule under section 553 of

[32]U.S. Steel Corp. v. U.S. Environmental Protection Agency, 595 F.2d 207, 214 (5th Cir. 1979).

[the APA], after being required by that section or any other law to publish a general notice of proposed rulemaking." Therefore, if an agency is not required to publish an NPRM for one of its rules, the agency is not required to prepare a regulatory flexibility analysis. An agency that uses one of the APA exceptions to the notice and comment requirements, or that is expressly prohibited from following these procedures in authorizing legislation, is therefore not required to conduct a regulatory flexibility analysis.

In 1996, Congress passed SBREFA to strengthen the RFA's protections for small entities. Among other things, SBREFA requires that, before publishing their initial regulatory flexibility analyses, EPA and the Occupational Safety and Health Administration (OSHA) convene a small business advocacy review panel for any draft rule that they believe will have a significant economic impact on a substantial number of small entities.[33] However, those analyses are only triggered when the agencies are required to publish an NPRM. Therefore, EPA and OSHA are not required to convene an advocacy review panel on any rule for which they were not required to publish an NPRM.

SBREFA also requires federal agencies to delay the effective dates of their major rules for 60 days after their publication in the Federal Register or their submission to Congress, whichever is later. SBREFA allows agencies to be excepted from the 60-day delay period if the agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest . . . ." The language of this "good cause" exception under SBREFA mirrors the APA's good cause exception for NPRMs. Therefore, the SBREFA good cause exception is only available if an NPRM was not published pursuant to the APA's good cause exception. As a result, under SBREFA, a rule could become effective in fewer than 60 days if the agency had used the good cause exception to NPRMs.

The Unfunded Mandates Reform Act (UMRA) of 1995 requires federal agencies to take certain actions during the rulemaking process for certain types of rules. For example, section 202 of UMRA generally requires agencies to prepare "written statements" containing specific information for any rule that includes a federal mandate that may result in the expenditure of $100 million or more by state, local, and tribal government, in the aggregate, or by the private sector, in any 1 year. One of the

[33]For a discussion of these panels, see Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements (GAO/GGD-98-36, Mar. 18, 1998).

elements that the act requires the written statements to contain is a qualitative and quantitative assessment of the anticipated costs and benefits of the mandate. Section 205 of the act states that, before promulgating any rule for which a written statement is required under section 202, agencies must identify and consider a reasonable number of regulatory alternatives and select the one that is least costly, most cost-effective, or least burdensome. However, the act says that the section 202 written statements are required "before promulgating any general notice of proposed rulemaking" and "before promulgating any final rule for which a general notice of proposed rulemaking was published." Therefore, if an agency issues a final rule without an NPRM, the requirements in sections 202 and 205 of UMRA do not apply to the rule.

In addition to these existing statutes, at least two pieces of regulatory reform legislation currently pending before Congress would, if enacted, also use the publication of an NPRM as the trigger for certain analytical requirements. Section 623 of S. 981, the "Regulatory Improvement Act of 1998," states that agencies must prepare and place in the rulemaking file a cost-benefit analysis and, if required, a risk assessment for each major rule that it issues. However, the bill says that these actions must be taken "[w]hen an agency publishes a notice of proposed rule making for a major rule." Similarly, section 623 of S. 1728, the "Federal Regulatory Risk Assessment Act of 1997," states that "[w]hen an agency publishes a notice of proposed rule making for a major rule," the agency must prepare and place in the rulemaking file an initial risk assessment, "and shall include a summary of such assessment in the notice of proposed rule making." However, the analytical requirements that would be imposed by these bills would not apply to a rule if the agency issuing the rule did not publish an NPRM.

The inapplicability of regulatory reform requirements when NPRMs are not published, combined with the fact that agencies frequently publish final regulatory actions without NPRMs, initially suggests that many rules may not be subject to these requirements because of the absence of NPRMs. However, even if NPRMs had been published for all final actions, some of those requirements would not have been applicable to many of these actions. For example, the UMRA written statement requirements do not apply to independent regulatory agencies, such as the FCC and the Securities and Exchange Commission. Also, the written statement requirements only apply to issued rules that require "expenditures" of $100 million or more in any 1 year by state, local, and tribal government, in the aggregate, or by the private sector. The number of rules that require

$100 million in expenditures by these groups is a subset of "economically significant" rules that have a $100 million impact on the economy,[34] and RISC data indicate that nonindependent agencies only issued 36 economically significant rules during 1997. Even if a nonindependent agency's rule required $100 million in expenditures by the public or private sectors, the UMRA written statement requirements would only apply if the rule also imposed an "enforceable duty" that was not a condition of federal financial assistance or that did not arise from participation in a voluntary federal program. The SBREFA advocacy review panel requirements only apply to two agencies (EPA and OSHA), so the absence of NPRMs may also have a limited effect on these requirements. Also, the SBREFA requirement that agencies delay the effective dates of their rules for 60 days only applies to major rules for which the agencies have not used the good cause exception to the APA's notice and comment requirements—again, only a small portion of all rules.

However, the absence of NPRMs may have a more substantial effect on whether agencies prepare regulatory flexibility analyses under the RFA. In a recent edition of the Unified Agenda, agencies indicated that more than 800 of their pending and recently completed regulatory actions would have a significant economic impact on a substantial number of small entities, thereby triggering the initial and final regulatory flexibility analysis requirements.[35] More than 300 of these actions were "significant" rules as defined in Executive Order 12866.

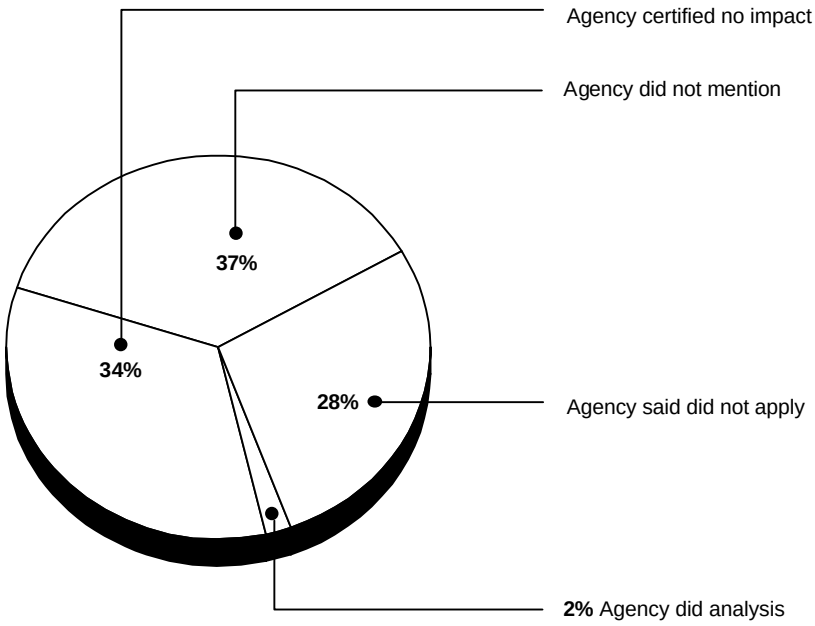
As figure 4 shows, we estimated that in about 28 (± 9) percent, or about 650, of the regulatory actions published without NPRMs in 1997, the agencies included an explicit statement that, because an NPRM was not required, the RFA was not applicable or that a regulatory flexibility analysis was not required. In about 37 (± 9) percent, or about 870, of the actions, the agencies did not mention the RFA. However, agency officials told us that they did not have to mention the RFA when they had previously indicated that an NPRM was not required. In about 34 (± 9) percent, or about 800, of the actions, the agencies certified that the actions would not have a significant economic impact on a substantial number of small entities. In most of these cases, the agencies explained why they made

[34]For example, rules that involve $100 million in expenditures by the federal government or that will result in $100 million in savings to the public or private sectors would be economically significant under Executive Order 12866, but would not require $100 million in expenditures by the public or private sectors and therefore would not require a written statement under UMRA.

[35]Some agency officials told us that they believed the Unified Agenda overstates the number of regulatory actions that would trigger regulatory flexibility analyses. For example, an EPA official said that its entries in the Unified Agenda reflect whether the rules will have any impact on small entities, not just a significant impact on a substantial number of small entities.

their determinations, sometimes including detailed information on the numbers of small entities likely to be affected by the actions and their estimated costs and benefits. In a few cases, the agencies did a regulatory flexibility analysis, even though they technically did not have to do so.

**Figure 4: Agencies Addressed RFA Requirements in a Variety of Ways in Final Regulatory Actions in 1997 Without NPRMs**




Note 1: The RFA requirements do not apply to any action for which an NPRM was not required to be published.

Note 2: The "did not mention" category may imply that the agency considered the RFA requirements not applicable if the agency had indicated elsewhere in the Federal Register notice that an NPRM was not required for that action. Because the agency did not include any explicit statement, however, we are reporting this category separately from the "said did not apply" category.

Note 3: Percentages do not add up to 100 percent due to rounding.

Note 4: Estimated confidence interval for actions with RFA analysis is 0.1 percent to 5.6 percent.

Source: GAO analysis of a representative sample of Federal Register notices for final regulatory actions.

In 30 percent of the 60 major and significant regulatory actions that we reviewed, the issuing agencies specifically stated that, because an NPRM was not required, the RFA was not applicable or that a regulatory flexibility analysis was not required. The agencies did not mention the RFA in about 7 percent of the major and significant actions. In nearly 52 percent of the actions, the agencies certified that the actions would not have a significant impact on a substantial number of small entities, and in about 12 percent of the actions, the agencies did a regulatory flexibility analysis.

## Conclusions

The informal rulemaking process established by the APA generally requires agencies to involve the public in that process by publishing an NPRM and allowing the public to provide comments on the proposed rule. The APA does provide for exceptions to the general requirement that permits agencies to publish final rules without NPRMs in appropriate cases. Our analysis indicated that about half of all final regulatory actions in 1997 were published by federal agencies without NPRMs, and that the agencies most commonly used the APA's good cause exception. Furthermore, some data suggest that the proportion of regulatory actions being published without NPRMs may be increasing. Use of these exceptions was not confined to minor regulatory actions; almost 20 percent of the major rules issued in the past 2 years were published without NPRMs.

Agencies need the flexibility to publish final rules without NPRMs in order to respond quickly to emergencies and in other appropriate situations. However, when agencies issue final rules without NPRMs and cite the good cause exception, the APA requires the agencies to explicitly say so and provide an explanation for the exception's use when the rule is published in the Federal Register. In the bulk of the final regulatory actions that agencies issued without NPRMs in 1997, the explanations that the agencies presented in the preambles to the rules clearly stated why the agencies used the exceptions to the APA's notice and comment requirements. The agencies did not publish NPRMs for many rules when they involved routine or minor issues on which public comments did not seem to be necessary, or when obtaining public comments was impracticable because of the need to respond to emergencies or statutory deadlines. In other cases, the regulatory actions involved issues on which NPRMs were either specifically not required (e.g., foreign or military affairs) or were expressly prohibited by certain statutes.

However, in some of the actions that we reviewed, the rationales that the agencies offered in the preambles for using the good cause exception were

not clear or understandable. For example, in one such action, the agencies said in the preamble that a 1993 executive order that imposed a 1994 deadline for implementation and incorporation of its policies into regulations prevented the agencies from obtaining public comments before issuing a final rule in 1995. In other actions, the agencies only made broad assertions in the preambles that an NPRM would delay the issuance of rules that were, in some general sense, in the public interest.

When an agency issues a final rule without an NPRM, the public's opportunity to comment on the rule during the period when those comments can be most effective may be limited or absent. In issuing final rules without NPRMs, agencies also limit their ability to obtain new perspectives and to build public support for their rules. Final rules without NPRMs are also not subject to analytical and procedural requirements in several regulatory reform statutes that were designed to improve the operation of the federal rulemaking process, but are only triggered when agencies issue NPRMs.

Agencies' extensive issuance of rules without NPRMs appears to particularly affect the coverage of the regulatory flexibility analysis requirements in the RFA. Federal agencies recently indicated that more than 800 of their pending and recently completed regulatory actions (300 of which involved significant rules) may be subject to those requirements. We estimate that in over one-fourth of the more than 2,000 regulatory actions published in 1997 without NPRMs, the agencies specifically stated that the RFA was not applicable or that a regulatory flexibility analysis was not required because the action was not preceded by an NPRM. On the other hand, some agencies conducted RFA analyses even when they did not publish an NPRM and, therefore, were not required to do so.

OIRA can help ensure that agencies' issuance of rules without NPRMs is consistent with the APA's requirements. Executive Order 12866 states that OIRA is the repository of expertise concerning regulatory issues, including procedures that affect more than one agency. The executive order also requires the Administrator of OIRA to provide meaningful guidance and oversight so that agencies' regulatory actions are consistent with, among other things, applicable laws. OIRA is also required to review all significant rules (other than those issued by independent regulatory agencies) before they are published as proposed and final rules. Thus, OIRA has a significant role to play in improving the process that agencies follow in issuing rules. For example, OIRA could take steps to ensure that, when agencies use the

good cause exception, they provide a clear explanation for why an NPRM should not have been issued.

## Recommendations

We recommend that the Acting Administrator of OIRA notify executive departments and agencies that the statements in the rules providing the agencies' reasons for using the good cause exception should clearly explain why notice and comment was impracticable, unnecessary, or not in the public interest. We also recommend that the Acting Administrator notify executive departments and agencies that OIRA will, as part of its review of significant final rules, focus on whether agencies clearly explained why the good cause exception was being used.

## Agency Comments and Our Evaluation

On June 18, 1998, we sent a draft of this report for their review and comment to the Director Designate of OMB; the Secretaries of the Departments of Agriculture, Housing and Urban Development, and Transportation; and the Administrator of EPA. HUD officials told us that they had no comments on the draft report. On July 2, 1998, the Acting Administrator of OIRA provided OMB's comments on the draft report, which are reprinted in appendix I. The draft report he reviewed recommended that OIRA issue guidance to executive departments and agencies on how to use the APA notice and comment exceptions properly, particularly the good cause exception. The Acting Administrator said that OIRA strongly supports the idea of obtaining public comments during the development of rules, and appreciated our concerns about the agencies' use of the good cause exception to the notice and comment requirements. However, he did not agree with our recommendation, and stated that the APA vests with the rulemaking agencies the authority to determine whether good cause exists. He further stated that guidance is available from court decisions construing the exception and from the Department of Justice. If additional guidance is needed, he said, it is not clear that OIRA is the appropriate agency to provide that guidance. Nevertheless, the Acting Administrator said that OIRA would, as part of its regulatory review, "address the agencies' reliance on the 'good cause' exception and will reiterate to the agencies, as appropriate, that the exception should be used only when 'good cause' truly exists." He also said that OIRA staff typically examine the explanations in the preambles to the rules they review and, if necessary, can raise any questions with the agencies about those explanations.

The Acting Administrator's statement that OIRA will, as part of its regulatory review and "as appropriate," inform agencies about the use of

the good cause exception and continue to examine the agencies' preamble explanations addresses some but not all of the issues that we believe are important. First, the only final rules that OIRA reviews are those that are "significant" under Executive Order 12866—a small portion of all actions in which the good cause exception could be claimed. RISC data indicate that OIRA reviewed 237 final rules during 1997—about 5 percent of all final actions published that year. Also, the Acting Administrator did not indicate that OIRA would notify agencies that they must clearly explain why they used the good cause exception. However, in light of the Acting Administrator's comments and our recognition that, under the APA, it is the primary responsibility of the rulemaking agencies to determine whether good cause exists, we changed our recommendation to state that the OIRA Acting Administrator should notify executive departments and agencies that the statements in the rules providing the agencies' reasons for using the good cause exception should clearly explain why notice and comment was impracticable, unnecessary, or not in the public interest. We also recommended that the Acting Administrator notify executive departments and agencies that OIRA will focus part of its review of significant final rules on whether agencies clearly explained why the good cause exception was being used.

On June 26, 1998, the Director of the Office of Budget and Program Analysis within the Office of the Secretary of Agriculture provided written comments on the report. The Director said that, given its diverse regulatory missions, it was not surprising that USDA was one of the seven agencies that accounted for the bulk of regulatory actions published without an NPRM. He noted that, as the draft report indicated, most of the USDA actions in our sample involved administrative or technical issues not requiring advance notice. The Director said that USDA has detailed procedures by which NPRM exceptions are reviewed within the Department. However, the Director said that the concerns raised in the draft report would be brought to the attention of senior agency management to ensure that USDA fully justifies the publication of final rules without prior NPRMs.

On June 29, 1998, we received written comments from the Assistant General Counsel for Regulation and Enforcement, Office of the Secretary of Transportation, indicating that his major concern was not with the substance of the draft report, but rather how it presented two issues. First, he said that the information in the report on the extent to which agencies published rules without NPRMs should be presented alongside our conclusion that many of these actions were minor rulemaking actions, and

were therefore justified. However, we believe that the report does not need altering in this respect. In several places, the report notes in the same sentence that most of the actions that were published without NPRMs involved routine or minor issues. Also, full discussions of the frequency of rulemaking without NPRMs and the reasons for such actions are presented in separate sections of the report, because they were separate reporting objectives. The Assistant General Counsel's second concern was that the report should not separately note that some agencies (1) did not do RFA analyses when NPRMs were not issued and (2) were doing the analyses even though not technically required to do so. However, we disagree that these two issues are separately presented because the report presents them within the same paragraphs. Therefore, we did not change the report. However, we made several clarifying and correcting changes to the report as a result of the Assistant General Counsel's other specific comments. For example, we made it clear that SBREFA requires agencies to delay the effective dates of major rules (not all rules) for 60 days. We also changed the report to note that use of the good cause exception is not the only way in which major rules can be made effective in less than 60 days.

On June 30, 1998, we received written comments from the Director of EPA's Regulatory Management Division, which are reproduced in full as appendix II. The Director noted the nature of each of EPA's actions without an NPRM, which coincided with our determinations of how each of the actions should be coded. He also said that it is EPA's policy to consider the impact of every rule on small entities, minimizing that impact to the extent feasible. For EPA actions without an NPRM, the Director said that the requirements that apply to traditional notice and comment rulemakings are met because EPA generally uses this type of action only for technical amendments, temporary regulatory relief, and other rulemakings to which the affected parties are unlikely to object. He said that performing a regulatory flexibility analysis in such cases "is unlikely to mitigate impacts on small entities, which is the intended purpose of such analyses." We disagree with the thrust of the Director's comments. First, the analytical and procedural requirements in the RFA and other regulatory reform statutes that apply to NPRM rulemakings do not apply to rules issued without NPRMs, and therefore are not "met." For example, for each of their draft rules for which an NPRM is required, the RFA requires agencies either to prepare a regulatory flexibility analysis or to certify that the rule will not have a significant economic impact on a substantial number of small entities. However, agencies are not required either to conduct the analysis or issue the certification if the final rule is appropriately issued without an NPRM. Also, in the absence of either a certification or a regulatory

flexibility analysis, the public does not know whether the rule has a significant economic impact on a substantial number of small entities. The Director also suggested changing the title of the report to "Agencies' Use of Exceptions to Notice and Comment Requirements is Legitimate." We did not change the title because the conclusion suggested by his proposal is outside of the scope of the report. Finally, the Director provided a number of detailed comments on the draft report as an enclosure. Those comments, and our responses, are included in appendix II.

We are sending copies of this report to the Ranking Minority Members of the Senate Committee on Governmental Affairs, the Senate Committee on Small Business, the House Committee on Small Business, the House Committee on the Judiciary's Subcommittee on Commercial and Administrative Law, and the House Committee on Government Reform and Oversight's Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs; the Director of OMB; the Secretaries of the Departments of Agriculture, Housing and Urban Development, and Transportation; and the Administrator of EPA. We will also make copies available to others on request

Major contributors to this report are listed in appendix III. Please contact me on (202) 512-8676 if you have any questions concerning this report.

L. Nye Stevens
Director, Federal Management
and Workforce Issues

# Contents



## Figures

## Abbreviations

| | |
|---|---|
| APA | Administrative Procedure Act |
| ACUS | Administrative Conference of the United States |
| DOC | Department of Commerce |
| DOT | Department of Transportation |
| EPA | Environmental Protection Agency |
| FAA | Federal Aviation Administration |
| FCC | Federal Communications Commission |
| HHS | Department of Health and Human Services |
| HUD | Department of Housing and Urban Development |
| NPR | National Performance Review |
| NPRM | Notice of Proposed Rulemaking |
| OIRA | Office of Information and Regulatory Affairs |
| OMB | Office of Management and Budget |
| OSHA | Occupational Safety and Health Administration |
| RFA | Regulatory Flexibility Act of 1980 |
| RISC | Regulatory Information Service Center |
| SBREFA | Small Business Regulatory Enforcement Fairness Act of 1996 |
| UMRA | Unfunded Mandates Reform Act of 1995 |
| USDA | Department of Agriculture |

# Comments From OIRA

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUL 2 1998

L. Nye Stevens
Director
Federal Management and
Workforce Issues
General Government Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Stevens:

Thank you for your letter of June 18, 1998, in which you ask us to review the draft GAO report on "Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules." We appreciate the opportunity to comment on the draft report.

I would like to comment on the draft report's recommendation "that the Administrator of OIRA provide executive departments and agencies with guidance on how to use the APA notice and comment exceptions properly. That guidance should, in particular, delineate the circumstances under which agencies can issue a final rule without an NPRM for good cause." The draft report goes on to recommend that "the Administrator should notify executive departments and agencies that OIRA will, as part of its review of significant final rules, focus on whether agencies that submit those rules without an NPRM should have previously issued a notice of proposed rulemaking." (Draft Report, pp. 51-52) As explained below, while we do not agree with the recommendation that OIRA issue guidance to the agencies on the APA's "good cause" exception, OIRA during the course of its regulatory review will address the agencies' reliance on the "good cause" exception and will reiterate to the agencies, as appropriate, that the exception should be used only when "good cause" truly exists.

As an initial matter, I want to assure you that OIRA believes firmly in the value of a rulemaking agency obtaining public comment during its development of a rule. Public comment can assist the rulemaking agency, and improve the decision-making process, by providing new factual information, by offering different perspectives on an issue, and by suggesting alternative approaches for addressing a problem. However, as Congress recognized when it enacted the "good cause" exception in 1946, as part of the original Administrative Procedure Act (APA), there are situations in which it would be "impracticable, unnecessary, or contrary to the public interest" for a rulemaking agency to seek public comment before acting. Under the APA, the authority to determine whether "good cause" exists in a particular case is assigned to the rulemaking agency, subject to judicial review, and when an agency finds that "good cause" exists, it includes an explanation for that finding in the rulemaking preamble.

Accordingly, when an agency submits a draft interim final rule to OMB for review under Executive Order No. 12866, one issue that OIRA staff will typically address is the rulemaking preamble's explanation for why it has found that "good cause" exists to issue an interim final rule rather than a notice of proposed rulemaking. If OIRA staff have a question about the explanation, as with other parts of the rulemaking package, the staff can raise it with the rulemaking agency during the interagency discussions. It remains the case, though, that the APA vests with the rulemaking agency the authority to determine whether "good cause" exists.

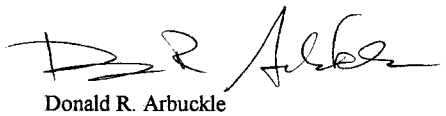
We do not agree with the draft report's recommendation that OIRA issue guidance to agencies on the "good cause" exception. Whether "good cause" exists in a particular situation is a legal question that has been addressed for over 50 years, and in a variety of contexts, by the rulemaking agencies, the Justice Department, and the courts. In fact, within one year of the APA's enactment, the Justice Department in 1947 issued the Attorney General's Manual on the Administrative Procedure Act, which provided Federal agencies with the Department's interpretation and guidance on the APA's provisions. The Attorney General's Manual (at pp. 30-31) specifically addressed the "good cause" exception, which was found in Section 4(a) of the APA, and was later codified at 5 U.S.C. 553(b)(3)(B). Relying on the Justice Department's guidance, agencies thereafter made determinations as to whether "good cause" existed for particular rulemakings. When a rulemaking agency has found that "good cause" existed, that determination could be challenged in court. As the draft GAO report indicates, the courts have issued numerous rulings in cases involving the "good cause" exception.

Thus, based on the Federal government's half century of experience under the "good cause" exception, rulemaking agencies can seek guidance not only from the Attorney General's Manual, but also from the judicial decisions construing the exception. As a result, we are not persuaded by the draft report that the rulemaking agencies need additional general guidance on this matter. If a rulemaking agency needs guidance on this legal issue with respect to a particular rulemaking, it may do what rulemaking agencies have done for decades, which is to consult with the Justice Department. In this same vein, even if additional general guidance to the agencies were needed, it is not at all clear that OIRA is the appropriate agency to provide that guidance. Unlike the Justice Department, OIRA's institutional expertise does not lie in offering legal guidance on the APA and the case law construing it.

Although we do not believe that the issuance of OIRA guidance would be appropriate, we appreciate GAO's concern that agencies may have relied in the past upon the "good cause" exception in cases where prior comment would not be "impracticable, unnecessary, or contrary to the public interest." Accordingly, during the course of its regulatory review, OIRA will address the agencies' reliance on the "good cause" exception and will reiterate to the agencies, as appropriate, that the exception should be used only when "good cause" truly exists.

Thank you again for the opportunity to comment on the draft report.

Sincerely,



Donald R. Arbuckle
Deputy Administrator
Office of Information
and Regulatory Affairs

# Comments From EPA

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF POLICY

JUN 30 1998

Mr. L. Nye Stevens, Director
Federal Management and Workforce Issues
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Stevens:

This responds to your letter of June 18, 1998, seeking comments on your draft report "Federal Rulemaking: Agencies Often Publish Final Actions Without Proposed Rules." We appreciate the opportunity to comment on the draft report.

Your data indicate that of the 35 EPA regulatory actions reviewed by GAO for this report, 11 (31%) did not have a Notice of Proposed Rulemaking (NPRM). We would like to note that of these eleven actions:

- Three actions were not rules. These include an ANPRM, denial of an industry petition and a technical correction.
- Two actions had specific statutory exemptions. In addition, both of these actions were responses to industry requests for pesticide tolerance levels.
- Three actions were emergency provisions. Two of these actions established time-limited tolerance levels for pesticide in order to prevent significant loss of crops; another action extended alternate waste treatment standards until analytical problems could be resolved.
- Three actions were finalized with good cause exemptions. Two of these actions were deregulatory provisions intended to streamline a program or withdraw Federal regulation where State regulations are no less stringent; another of these actions shortened the ozone monitoring season for 3 States.

Beyond the requirements of the Regulatory Flexibility Act (RFA), it is EPA's policy to consider the impact of every rule on small entities and minimize any impact to the extent feasible, regardless of the size of the impact or number of small entities. Preambles to EPA NPRMs and final rules must discuss EPA's assessment of the impact to small entities, its outreach efforts and the steps taken to minimize any adverse effects. For EPA's final actions without an NPRM, the requirements that would apply to traditional notice-and-comment

rulemakings are met because EPA generally uses this type of action only for technical amendments, temporary regulatory relief and other rulemakings to which the affected parties are unlikely to object. When we claim emergency, statutory or good cause exemptions from notice and comment, performing a Regulatory Flexibility Analysis is unlikely to mitigate impacts on small entities, which is the intended purpose of such analyses.

We would also note that EPA's practice for inclusion in the "Small Entities Affected" section of the Unified Agenda differs from that of most other executive branch agencies. Specifically, EPA includes rules that have any adverse impact at all, not simply those with significant and substantial impacts.

Finally, taking into account the Report's conclusions, EPA believes that the current title of the draft Report is somewhat misleading. We suggest, "Agencies' Use of Exceptions to Notice and Comment Requirements is Legitimate."

Thank you again for this opportunity to comment on the draft Report. We have also enclosed a more detailed list of comments on the draft Report to help clarify EPA's use of exceptions to the APA's notice and comment provisions. If you have any questions or concerns, please contact me at (202) 260-5482.

Sincerely,

Paul Lapsley, Director
Regulatory Management Division

cc: Margaret Schneider, OA
Mark Badalamente, OA
Steering Committee Reps.

See comment 1.

See comment 2.

Now on p. 2.

Now on p. 15.

See comment 3.
Now on p. 14.
Now on p. 15.

Now on p. 16.

See comment 4.
Now on p. 16.

**ENCLOSURE**

**Detailed Comments on draft GAO report, "Federal Rulemaking: Agencies Often Publish Final Actions Without Proposed Rules."**

1. The report generally discusses the APA requirements for informal rulemaking and the exceptions from notice-and-comment rulemaking contained in section 553(b) (the "good cause" exceptions). Although the report notes that most of the rules published without NPRMs were done so under "good cause" findings, it would be helpful if the report indicated how many rules in the GAO study were expressly exempted from notice-and-comment by Congress in enabling statutes and to discuss those rules separately from rules agencies exempted as an exercise of discretion under section 553(b).

2. The term, "agencies," is used very broadly throughout the report and the discussion and conclusions appear to encompass *all* agencies. The report also appears to combine the analysis for "good cause" exceptions with the analysis for "direct final rules," which is confusing and potentially misleading for agencies, such as EPA, for which these terms have different meanings. EPA generally does not publish an NPRM for a "good cause" rule consistent with the report's statement on page 3 that agencies most commonly use the good cause exception as justification for not publishing NPRMs for *certain* final rules. EPA, however, generally *does* publish a companion NPRM in the same *Federal Register* for each direct final rule. The report does not indicate this until page 22. For clarification, GAO should recognize EPA's practice earlier in the report or there should be a general explanation when direct finals are first discussed that indicate agencies follow various practices when issuing direct finals, with an indication that EPA issued a companion proposal in the same *Federal Register* issue whenever it published a direct final rule. The conclusions also should clearly indicate which statements are applying to which types of rules.

3. On page 20, GAO notes that "it is relatively easy to identify two specific types of regulatory actions that are frequently published without NPRMs — interim and direct final rules . . .." [Emphasis added.] On page 22, GAO then states that EPA published at least 65% of all direct final rules each year, leading one to conclude at this point that EPA does not publish an NPRM for the overwhelming majority of direct final rules published. It is not until later on page 22 that GAO notes that **EPA always publishes a companion proposal with its direct finals** and thus, GAO properly coded EPA's direct final rules as having NPRMs. Moreover, since 65% of the direct final rules do have NPRMs, it is arguable whether it is accurate to state that "agencies" do not "frequently" publish direct final rules without NPRMs.

4. The statements on page 22 with respect to EPA's direct final practices are not entirely accurate. The draft report erroneously states that "there was no prior notice in the Federal Register for [EPA's direct final rules]." Both the direct final rule and the companion proposal provide prior notice. The direct final rule provides prior notice by not being

effective until after the public has an opportunity to comment, and then only if the agency has determined correctly that no one takes issue with the agency's announced action. If a member of the public disagrees with EPA's contemplated course of action and submits an adverse comment, the direct final is withdrawn and traditional notice-and-comment rulemaking process is followed. Specifically, the companion NPRM requests comments, generally within 30 days of the *Federal Register* notice. If none are received, the direct final is effective at a later date (generally 60 days after publication). If adverse comments are received, the direct final is withdrawn and EPA issues a final rule based upon the companion NPRM after considering the comments received. In either event, the public has prior notice and an opportunity to influence the agency's thinking if they so choose. Moreover, although GAO is correct when it writes on page 22 that "if a direct final rule is withdrawn in response to public comments, EPA does not republish the rule nor resolicit comments[,]" this is not an anomaly from the rulemaking requirements of section 553. If a direct final rule is withdrawn, the companion NPRM moves forward. The NPRM clearly indicates that this will be the only comment period provided (similar to the stated period of time the public is told it has to provide comment in any notice-and-comment rulemaking). Thus, the public is given advance notice that if it wants to comment, it must do so now, both to cause the withdrawal of the direct final and to provide input for EPA to consider when it promulgates the final rule. If EPA were to publish a direct final rule without a companion NPRM, the public still is given prior notice of an effective date in the future and an opportunity to comment. If adverse comment is received, the direct final is withdrawn as before and an NPRM would be published in a subsequent *Federal Register* with a new opportunity for public comment.

Now on p. 16.

5. The discussion at the top of page 20 states " it is nevertheless notable that agencies did not follow standard APA notice and comment procedures for nearly one-fifth of the actions that they said were 'major' rules," which could lead someone to reach an erroneous conclusion that some/all were incorrectly promulgated. No context is given for this statement. It would be more helpful if GAO indicated what explanations were given for these rules. For example, the report could indicate how many of these rules Congress expressly exempted in another statute from notice and comment rulemaking procedures versus those that contained "good cause" findings.

See comment 5.
Now on p. 13.

6. Similarly, at the top of page 39, GAO concludes that "when agencies issue final rules without NPRMs, the public's opportunity to participate in issues that affect their lives is restricted." While this statement may be true in some instances, it can be read as implying that this is the reason for agencies' use of this methodology. Additionally, the statement fails to acknowledge that in a number of rulemakings, it is *Congress*, not an agency that has determined that public comment is unnecessary when it passes legislation that exempts certain rulemakings from notice and comment.

See comment 6.
Now on p. 24.

7. The following statement at the top of page 41 is too broad: "Therefore, final, direct final, and interim final rules that allow the public to comment on agencies' decisions after they are made are inherently inferior to NPRMs as ways to allow the public to participate in the rulemaking process." Again, this statement fails to recognize EPA's use of direct

See comment 7.
Now on p. 25.

finals, which allows the public to adversely comment on the agency's contemplated course of action and thereby cause the agency to withdraw the final rule. EPA does not view this process as "inherently inferior to NPRMs" because the public has the same right to comment as the traditional sequential NPRM, comment period, final rule process. EPA's use of direct finals simply shortens the time period between proposal and promulgation both in the instance where no adverse comments are received and the direct final becomes generally 30 days after the comment period, and in the instance when the direct final is withdrawn because the NPRM is published concurrently with the direct final.

See comment 8.
Now on p. 27.

8. Page 44: GAO notes that many rules may not be subject to regulatory requirements "because of the absence of NPRMs." GAO is correct that rules that are issued pursuant to a "good cause" finding are exempt from many regulatory statutes, such as RFA and UMRA. EPA notes, however, that when it publishes a direct final rule (as opposed to one containing a good cause finding), it addresses these regulatory requirements (e.g., RFA, UMRA) in both the direct final rule and companion proposal (the proposals generally cross-reference the analysis in the direct final). As noted previously, EPA generally uses direct final rules for technical amendments and other rulemakings for which it believes the public is not interested; thus, by their very nature, these rulemakings do not impose impacts of $100M or more (thereby not being subject to UMRA), nor do they impose a significant economic impact on a substantial number of small entities (SISNOSE); thus, EPA is able to certify the rule under the RFA. Thus, the requirements that would apply were EPA to follow traditional notice-and-comment rulemaking are met, not avoided. (To do otherwise, would invite adverse comment, leading to the withdrawal of the direct final rule.) This same analysis very likely applies to a number of "good cause" rules issued by agencies in general (see below).

See comment 9.
Now on p. 27.

9. At the bottom of page 44, GAO does note that many of the above regulatory requirements would not be applicable because they do not apply to independent agencies, such as the FCC and SEC, or rules that do not result in expenditures of $100M or more. EPA suggests reminding the reader of the point made earlier in the report that generally agencies use direct finals for routine, administrative matters. Such rules generally are not economically significant, nor impose a SISNOSE and thus, may be certified under the RFA. Thus, agencies could expressly comply with these statutes (to the extent they are not expressly so stating), not avoiding them by their use of direct finals.

See comment 10.

10. General: GAO should consider using full case citations (e.g., name of case, as well as court and year of decision) in its footnotes.

The following are GAO's comments on the Environmental Protection Agency's June 30, 1998, letter.

## GAO Comments

1. EPA commented that it would be helpful if the draft report indicated how many rules were statutorily exempted from notice and comment, and to discuss those rules separately. However, the draft report that we provided to EPA separately identified and discussed the proportion of rules in our sample that used the good cause and specific statutory exceptions. Therefore, we did not change the report.

2. EPA commented that the draft report should recognize EPA's practice of issuing a proposed rule when it issues a direct final rule as early as possible. We added a footnote in the background section of this report indicating that EPA's direct final rulemaking procedures vary somewhat from the general direct final rulemaking procedures as described by ACUS and NPR.

3. EPA commented that the draft report indicates that agencies frequently do not publish direct final rules without NPRMs, but also notes that EPA does publish NPRMs with its direct final rules. We amended the report to state that direct final regulatory actions "were designed to be" published without an NPRM.

4. EPA commented that the draft report was in error in stating that there was no prior notice in the Federal Register for EPA's direct final rules. Although EPA is correct in that the public is allowed to comment on its direct final rules before they take effect, we do not believe that this procedure is substantively the same as allowing the public to comment on proposed rules. EPA's own justifications for these actions frequently stated that the agency was "publishing this action without prior proposal . . . ." However, we clarified the language in the final report to note that there was no notice published in the Federal Register prior to the publication of the direct final rule.

5. EPA suggested that we indicate what explanations agencies gave for the major rules issued without NPRMs, for example, how many of these rules Congress expressly exempted from notice and comment rulemaking procedures versus those that contained "good cause" findings. The draft report already provided the information that EPA suggested, noting that agencies used the good cause exception for about two-thirds of the major and significant actions that we reviewed without NPRMs. Furthermore, the

draft report indicated that categorical and specific statutory exceptions each accounted for 17 percent of major and significant rules without NPRMs. Therefore, we did not change the report.

6. EPA said the draft report's statement that the public's opportunity to participate is restricted when agencies issue final rules without NPRMs could imply that this is the reason for agencies' use of this method. EPA also said the report failed to acknowledge that, in a number of rulemakings, it is Congress, not an agency, that has determined that public comment is unnecessary. We disagree that the referenced statement in the draft report can be read in the manner that EPA suggested. The statement is factual, and does not suggest that agencies were attempting to limit public participation in the rulemaking process. Also, the draft report that we provided to EPA clearly stated that Congress determines that public comment is unnecessary in a number of rulemaking actions. Therefore, we did not substantively change the report.

7. EPA said the draft report's statement that ". . . final, direct final, and interim final rules that allow the public to comment on agencies' decisions after they are made are inherently inferior to NPRMs as ways to allow the public to participate in the rulemaking process" was too broad and fails to recognize EPA's use of direct final rules. We disagree. As we indicated in the draft report, allowing the public to comment on agencies' final rules after they are published in the Federal Register cannot be considered equivalent to allowing the public to comment on proposed rules at a point in the rulemaking process when the agency is more likely to give real consideration to alternative ideas. However, in order to encompass rulemaking actions other than interim, direct final, and final rules, we changed the above-referenced sentence in the report to state that agencies' actions that only allow the public to comment on their regulatory decisions after they are made are not as likely to be as effective as NPRMs in allowing meaningful public participation in the rulemaking process (emphasis added).

8. EPA commented on the draft report section in which we noted that rules may not be subject to regulatory requirements because of the absence of NPRMs. EPA noted that, when it publishes a direct final rule, it addresses these regulatory requirements. EPA's discussion of the referenced paragraph in the draft report focuses on what actions EPA takes in reference to regulatory requirements that they are not strictly required to address. However, the paragraph in the draft report focused on explaining why some of those requirements would not have been applicable to many

rules issued without NPRMs. The paragraph did not discuss actions that EPA or any other agency chooses to take over and above those requirements. Therefore, we did not change the report.

9. EPA commented, with regard to regulatory requirements triggered by NPRMs, that agencies generally use direct final rules for routine administrative matters, and that such rules generally are not economically significant nor do they impose a significant economic impact on a substantial number of entities. EPA suggested that agencies could expressly comply with the regulatory reform statutes, not avoid them, by their use of direct final rules. We disagree. The determination of whether rulemaking actions will have a significant economic impact on a substantial number of small entities must be made on a case-by-case basis. Even rules that appear, on the surface, to be routine or administrative in nature may have a significant effect on small entities. Therefore, we did not change the report as EPA suggested.

10. EPA suggested that we use full case citations in the footnotes of the report. We used full case citations the first time that each case was mentioned. However, we used abbreviated citations for subsequent references.

# Major Contributors to This Report

| | |
|---|---|
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