

A new [Government Accountability Office report](#) finds that federal agencies did not go through notice-and-comment rulemaking for over one-third of the major rules issued between 2003 and 2010. This means that a significant percentage of new regulations expected to have an impact of \$100 million or more on the economy are given the force of law without public input. GAO finds a sharp increase in the practice of issuing a final regulation without first seeking public comment in 2009, when 40 percent of all major final rules were issued without notice and comment, compared to 26 percent in 2008. It recommends that the executive branch take greater care to ensure agencies consider and address public comments on new rules, but Congress is also responsible for this trend and could take steps to ensure regulations are more transparent and accountable.

For almost 70 years, the US federal regulatory system has been grounded in the principle that new regulations should not be enforceable until agencies consider views and information provided by the public. The [Administrative Procedure Act of 1946](#) generally requires agencies to (1) publish a notice of proposed rulemaking (NPRM) in the [Federal Register](#); (2) allow interested parties an opportunity to comment on the rulemaking process by providing “written data, views, or arguments;” and (3) issue a final rule accompanied by a statement of its basis and purpose (including the agency’s response to comments received on the NPRM).

The APA provides a “good cause” exemption to these notice and comment procedures when they are “impracticable, unnecessary, or contrary to the public interest.” GAO finds that, in issuing rules without first seeking public comment, agencies invoke the APA good cause exemption as well as other statutory exceptions, such as when a “statute: (1) either required or authorized [the agency] to issue the rule without an NPRM, (2) prescribed the content of the rule, or (3) set a deadline for a rule or program which the agency stated did not allow sufficient time to issue an NPRM.”

GAO reports that some agencies – the Environmental Protection Agency, for example – did not use any of these exemptions during the 8-year window covered by the report, and sought public comment before issuing all their final rules. Two agencies, the Department of Agriculture (USDA) and the Department of Health and Human Services (HHS), published the majority (roughly 62 percent) of the major rules without an NPRM in GAO’s sample. These two agencies, in particular, point to authorizing statutes as justification for bypassing public input for their rulemaking, citing the 2008 Farm Bill and 2009 Affordable Care Act, respectively.

Between 2008 and 2010, USDA cited the 2008 Farm Bill to rationalize issuing 14 major rules without seeking public comment. Many of these regulations affect government outlays, and together direct tens of billions of tax dollars to support agricultural interests. Others, such as the statutory requirement that foods be labeled as to their country of origin, impose billions of dollars in costs on growers, producers, processors, wholesalers, retailers and ultimately, consumers.



In 2010 alone, HHS issued 11 major rules pursuant to the Affordable Care Act without first seeking comment. These included fee schedules for services, as well as insurer and provider requirements that affect insurance coverage and patient choices. For example, one rule defined a “pre-existing condition” under the Act. According to GAO, HHS received 4,627 comments on this final rule, but has not revised the rule accordingly nor published a response to those comments.

The GAO report recognizes the need for expedited rulemaking in some cases, but it encourages agencies to seek and respond to public input, even on rules that do not follow notice-and-comment procedures. GAO notes that the rules it reviewed “cover important issues ranging from national health care policies to manufacturing incentive programs,” and concludes by recommending that “the Director of OMB, in consultation with the Chairman of ACUS, issue guidance to encourage agencies to respond to comments on final major rules, for which the agency has discretion, that are issued without a prior notice of proposed rulemaking.”

Given that many of the final rules in GAO’s study are driven by statutory requirements, however, Congress also bears responsibility for regulations that deny the public the opportunity to comment. When statutes set tight deadlines by which agencies must issue regulations, not only does public input get short shrift, but issuing agencies do less thorough analysis, and interagency discussion is truncated. Needlessly rushing regulations and circumventing the public notice and comment process jeopardizes the transparency and accountability of the US regulatory system.

