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ERRORS AND INCONSISTENCIES IN GAO'S REPORTS ON THE CONGRESSIONAL REVIEW ACT

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Abstract

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In a March 2018 report to Congress and subsequent congressional testimony, the Government Accountability Office (GAO) concluded that federal agencies were frequently violating the Congressional Review Act (CRA) by not delaying the effective dates of their major rules for 60 days. However, the GAO report appears to contain substantive legal and methodological errors that raise questions about this conclusion. The report is also incorrect when it concluded that by not delaying the effective dates, the agencies had reduced Congress' ability to use the CRA to disapprove rules. In addition, an examination of GAO's recent reports on major rules revealed that many of those reports are inconsistent, incomplete, and/or appear to reach the wrong conclusion regarding agencies' compliance with the CRA. The errors in these reports raise questions about the validity and reliability of the information that GAO provides to Congress and the public regarding the CRA – just as the act is increasingly viewed as a way to change the direction of a range of public policies, and as GAO has increasingly been asked to determine whether certain agency actions constitute rules that could be disapproved using the CRA.

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Introduction

The Congressional Review Act (CRA, 5 U.S.C. §§ 801-808) was enacted in 1996 to reestablish a measure of legislative control over agency rulemaking.[2] Section 801(a)(1)(A) of the act generally requires federal agencies to send almost all of their final rules to both houses of Congress and the U.S. Government Accountability Office (GAO) before those rules can take effect. As soon as a rule is "received by Congress," any Member of Congress may introduce a CRA resolution of disapproval, and the Senate may use expedited procedures to act on the resolution.[3] If a rule is disapproved using the CRA, the act generally prohibits the rule from taking effect (or, if already in effect, continuing in effect), and says the rule "may not be reissued in substantially the same form" unless later authorized by law.[4]

Section 801(a)(3) of the CRA requires agencies to delay the effective date of each "major" rule (e.g., those with a $100 million annual impact on the economy) for 60 days after the date the rule is published in the *Federal Register*, or the date the rule is received by Congress, whichever is later. However, Section 808(2) of the act allows major rules to take effect in fewer than 60 days if the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The CRA requires GAO to prepare a report for Congress on each major rule, including an assessment of the issuing agency's compliance with certain rulemaking requirements.[5]

GAO's March 2018 Report and Testimony

On March 13, 2018, GAO issued a statutorily required report to Congress on "Federal Rulemaking," which assessed multiple characteristics of rules issued during recent presidential transition and nontransition periods.[6] The next day, GAO testified before the House Committee on Oversight and Government Reform on that report, and other issues.[7] One of the report's primary findings (and the subject of its only recommendation) was that federal agencies were frequently not providing the CRA-required 60-day delay in the effective dates of their major rules, resulting in a "failure to provide Congress the required time to review and possibly disapprove regulations."[8] Specifically, GAO said that 132 of 527 (25%) major rules that it examined did not comply with certain CRA requirements, and that the most common failure was that the issuing agencies did not provide the required 60-day delay in the effective dates for major rules. Of the 132 noncompliant rules, GAO said that 95 rules did not provide the

2 For an excellent discussion of the CRA, see Congressional Research Service (CRS), The Congressional Review Act: Frequently Asked Questions, R43992, November 17, 2016, available at https://fas.org/sgp/crs/misc/R43992.pdf.
3 5 U.S.C. § 802.
4 5 U.S.C. § 801(b).
5 5 U.S.C. § 801(a)(2)(A). To view an index to GAO's major rule reports, or to research those reports, see https://www.gao.gov/fedrules.html.
6 U.S. Government Accountability Office (hereafter, GAO), Federal Rulemaking: OMB Should Work with Agencies to Improve Congressional Review Act Compliance during and at the End of Presidents' Terms, GAO-18-183, March 13, 2018. The review was required by a provision in Section 5 of the Edward "Ted" Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015 (P.L. 114-136, § 5 130 Stat. 301, 307–308 (2016)).
7 GAO, Federal Regulations: Opportunities to Improve the Effectiveness and Transparency of Regulatory and Guidance Practices, GAO-18-436T, March 14, 2018.
8 GAO-18-183, op. cit., Highlight Page.

required delay between the submission of the rule to Congress and the effective date, and that 74 rules did not provide the required delay between publication in the *Federal Register* and the effective date.[9] GAO also said that 17 of 23 agencies in its review had at least one noncompliant regulation, with the Department of Health and Human Services (HHS) and the Department of Transportation (DOT) having "higher rates of noncompliance than the government-wide percentages."[10]

Based on these findings, GAO recommended that the Director of the Office of Management and Budget (OMB) ensure that OMB staff, as part of the regulatory review process, "examine the planned timeframes for implementing economically significant regulations or major rules and identify regulations that appear at potential risk of not complying with the Congressional Review Act's delay requirements and then work with the agencies to ensure compliance with these requirements."[11]

Substantive Legal and Methodological Errors

However, GAO's March 2018 report appears to contains at least three substantive legal or methodological errors:

- The report misinterprets the CRA's "good cause" exception when assessing whether agencies were required to delay the effective dates of their major rules.
- The report uses the wrong methodology to determine whether agencies had properly delayed the effective dates for their major rules for 60 days.
- The report incorrectly characterizes how any failure to delay the effective dates for major rules affects the ability of Congress to use the CRA to disapprove those rules.

As a result of these errors, the March 2018 report's overall findings regarding agencies' compliance with the CRA, and the effects of noncompliance on Congress' ability to disapprove rules, are in question. These three issues are discussed in the following three major sections of this report.

Also, many of the major rule reports that GAO has issued in recent years appear to be inconsistent or contain errors, with GAO interpreting the CRA's "good cause" exception in different ways, and frequently mischaracterizing agencies' compliance with the CRA's 60-day delay requirement. Those reports are also often not transparent in that they frequently do not contain all of the information that Congress and the public needs to understand to how GAO reached its conclusions regarding CRA compliance, and whether those conclusions are correct.

Why This Matters

As discussed more fully in the final section of this report, although some may view GAO's errors as minor, technical issues involving an obscure statute, the errors are actually quite important. During the

9 Ibid, p. 23.
10 Ibid, p. 24.
11 Ibid, p. 36. In response to this recommendation, OMB noted that federal agencies, not OMB, are responsible for complying with the CRA's requirements.

past 18 months, the CRA has become viewed as a "secret weapon" by which Congress and the President have been able to change the direction of public policy in a wide range of areas, from guns to internet privacy to environmental protection.[12] Also, the scope of the CRA is now viewed more broadly than ever, and can include unsubmitted agency guidance documents – even if the guidance was issued years earlier. Therefore, it is more important than ever that public statements and written materials regarding the CRA be as accurate as possible.

This is particularly true with regard to GAO's reports and testimonies on the CRA. GAO has long been regarded as Congress' (and the public's) objective, nonpartisan "watchdog" – and is generally considered to be a source of consistently valid and reliable information about a range of issues. Also, GAO has taken on a significant role in the CRA disapproval process, increasingly determining which agency actions are and are not considered covered rules that can be disapproved. Therefore, if GAO's public statements on the CRA contain substantive errors, then the administration of the act and GAO's overall credibility in this area are called into question.

12 See, for example, Fred Barnes, "Congressional Republicans' Secret Weapon," The Weekly Standard, May 25, 2018, available at https://www.weeklystandard.com/fred-barnes/congressional-republicans-secret-weapon; and Michael Grunwald, "Trump's Secret Weapon Against Obama's Legacy," Politico Magazine, April 10, 2017, available at https://www.politico.com/magazine/story/2017/04/donald-trump-obama-legacy-215009.

Misinterpretation of the CRA's "Good Cause" Exception

In its March 2018 report, GAO said that of the 132 regulations found to be in violation of the CRA, "none of these regulations included agencies claiming 'good cause,' which would have allowed them [not] to delay the effective date."[13] Under the Administrative Procedure Act (APA, 5 U.S.C. § 551 et seq.), federal agencies are generally required to publish a notice of proposed rulemaking (NPRM) in the *Federal Register*, take comments from the public, and publish the final rule with an effective date of at least 30 days after the date the final rule is published.[14] In the report's methodological appendix, GAO correctly noted that the APA contains two types of "good cause" exceptions to regular rulemaking procedures:[15]

- 5 U.S.C. § 553(b)(3)(B)) permits an agency to waive the requirement to publish an NPRM before publishing a final rule "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."
- 5 U.S.C. § 553(d)(3)) permits an agency to waive the required 30-day delay in effective date "as otherwise provided by the agency for good cause found and published with the rule."

However, GAO then said that "[o]nly claims of 'good cause' to waive the delay in effective date requirements (i.e., 5 U.S.C. § 553(d)(3)] are relevant to CRA."[16] (Emphasis added.)

This interpretation of the CRA's "good cause" exception in Section 808(2) is arguably incorrect, based on: (1) the specific wording of the provision, (2) the CRA's limited legislative history, (3) OMB guidance on this issue, (4) interpretation of the exception by the Congressional Research Service, and perhaps most notably (5) GAO's previous position in its reports and congressional testimonies during at least the first 10 years of the CRA's implementation.

Wording of CRA's "Good Cause" Identical to Notice/Comment "Good Cause"

As noted previously, Section 808(2) of the CRA permits an agency to waive the 60-day effective date delay for its major rules if the agency:

- "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

This language is identical to the language in Section 553(b)(3)(B) of the APA that allows an agency to waive notice and comment rulemaking procedures if the agency:

- "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

On the other hand, the language in Section 808(2) of the CRA is not at all similar to the language in Section 553(d)(3) that permits waiver of the APA's effective date delay requirement ("as otherwise provided by the agency for good cause…."). Furthermore, it is not clear what the phrase "notice and public procedure" in Section 808(2) of the CRA refers to if that section is interpreted to refer to the waiver of effective date delay under Section 553(d)(3) of the APA.

One of the basic principles of statutory interpretation is that "statutory text is thought to be the ending point as well as the starting point for interpretation."[17] As GAO itself said in 1998, because the language in Section 808(2) of the CRA "mirror's the language in section 553(b)(3)(B), not section 553(d)(3), we believe that it is clear that the drafters intended the good cause exception to be invoked only when an NPRM has not been

13 GAO-18-183, op. cit., pp. 21-22. Actually, GAO said in the report that had the agencies claimed "good cause" for these rules, doing so would have "allowed them to delay the effective date." In a May 4, 2018, email to the author of this report, Charles Young, Managing Director of GAO's Office of Public Affairs, said GAO agreed that this statement was incorrect, but noted that GAO had made correct statements about this issue in other parts of the report.

14 CRS, The Federal Rulemaking Process: An Overview, RL32240, June 17, 2013, pp. 5-6, available at https://fas.org/sgp/crs/misc/RL32240.pdf.

15 GAO-18-183, op. cit., p. 45, footnote 17.

16 Ibid.

17 CRS, Statutory Interpretation: General Principles and Recent Trends, CRS Report 97-589, September 24, 2014, p. 4.

published and comments have not been received."[18] If GAO's interpretation of Section 808(2) was correct in 1998, GAO's interpretation in its March 2018 report appears to be incorrect.

Post-Enactment Legislative History

There is very little pre-enactment legislative history for the CRA. The final text of the act was the subject of informal negotiations between House and Senate sponsors before it was added to a much larger bill. However, shortly after the CRA was enacted, the principal Senate and House sponsors of the act published a joint statement in the *Congressional Record* providing a detailed explanation of its provisions and its legislative history. Senator Don Nickles explained that, because the legislation did not go through the committee process, the joint statement "is intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms."[19]

Regarding the CRA's "good cause" exception, that joint statement says:

> *There are four exceptions to the required delay in the effectiveness of a major rule in the congressional review chapter. . . . The third is in subsection 808(2), which excepts certain rules from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3) if the relevant agency finds "for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This "good cause" exception in subsection 808(2) is taken from the APA and applies only to rules which are exempt from notice and comment under subsection 553(b)(B) or an analogous statute.* (Emphasis added.)[20]

The principal House and Senate sponsors of the CRA made it clear that an agency could claim "good cause" to not delay the effective date for a major rule only if the agency claimed "good cause" under 5 U.S.C. § 553(b)(3)(B) (or an analogous statute) to waive the APA's notice and comment procedures. Therefore, the position that GAO took in its March 2018 report and testimony regarding this issue is at odds with the position taken by the Members of Congress who wrote the CRA.

OMB Guidance on the CRA

In the FY 1999 omnibus appropriations bill, Congress directed OMB to issue guidance on certain CRA requirements, including the "good cause" language in Section 808(2) of the CRA. In its March 1999 guidance issued pursuant to this requirement, OMB said that the "good cause" exception in Section 808(2) referred to rules in which the agencies did not publish a prior proposed rule. Specifically, OMB said:

> *An agency may invoke Section 808(2) in the case of rules for which the agency has found "good cause" under the APA (5 U.S.C. 553(b)(B)) to issue the rule without providing the public with an advance opportunity to comment. Application in other circumstances will be considered on a case-by-case basis.*[21]

Therefore, the position that GAO took in its March 2018 report regarding the "good cause" exception in Section 808(2) of the CRA is clearly at odds with OMB's guidance to federal agencies on this issue.

Congressional Research Service Reports

The Congressional Research Service (CRS) has also taken a position on the meaning of Section 808(2) of the CRA. For example, in a 2009 report on the CRA rule submission requirement, CRS said the "good cause" language in Section 808(2) "refers to an exception to the notice and comment rulemaking requirement in the Administrative Procedure Act (APA), which allows agencies to publish final rules without previously seeking comments from the public on an earlier proposed rule."[22]

CRS made a similar statement in its November 2016 report on "Frequently Asked Questions" regarding the CRA, saying that the "good cause" language in Section 808(2) "refers to an exception to the notice and com-

18 GAO, Regulatory Reform: Major Rules Submitted for Congressional Review During the First 2 Years, GAO-GGD-98-102R, April 24, 1998, p. 11.
19 *Congressional Record*, April 18, 1996, p. S3683.
20 *Congressional Record*, April 18, 1996, p. S3685. See also *Congressional Record*, April 19, 1996, p. E576.
21 Memorandum from Jacob J. Lew, Director, Office of Management and Budget, for the Heads of Departments, Agencies, and Independent Establishments, "Guidance for Implementing the Congressional Review Act," M-99-13, March 30, 1999, p. 6, available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/1999/m99-13.pdf.
22 CRS, Congressional Review Act: Rules Not Submitted to GAO and Congress, R40997, December 29, 2009, p. 3, available at http://www.thecre.com/forum2/wp-content/uploads/2014/08/CRS-Report-GAO.pdf.

ment rulemaking requirements of the APA."[23]

GAO's Previous Positions on the CRA's "Good Cause" Exception

In at least five previous congressional testimonies and reports on the CRA, GAO consistently interpreted the CRA's "good cause" exception in Section 808(2) differently than it did in its March 2018 report and testimony. For example:

- In March 1997, less than a year after the CRA was enacted, the GAO General Counsel testified that the "good cause" exception in Section 808(2) of the CRA "is only available for rules that do not involve notice and public comment procedures."[24]
- In March 1998, the GAO General Counsel testified "Section 808(2) states that, notwithstanding section 801, 'any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest' shall take effect at such time as the federal agency promulgating the rule determines. This language mirrors the exception in the Administrative Procedure Act (APA) to the requirement for notice and comment in rulemaking. 5 U.S.C. § 553(b)(3)(B). In our opinion, the 'good cause' exception is only available if a notice of proposed rulemaking was not published and public comments were not received."[25]
- In an April 1998 report, GAO said the CRA's "good cause exception to providing the 60-day delay is only available if an NPRM was not published and public comments were not received." In response to a claim that the other "good cause" exception in 5 U.S.C. § 553(d)(3) should be used, GAO said "Because [the CRA's] congressional review provision's section 808(2) mirrors the language in section 553(b)(3)(B), not section 553(d)(3), we believe that it is clear that the drafters intended the good cause exception to be invoked only when an NPRM has not been published and comments have not been received."[26]
- In June 1998, the GAO General Counsel testified that "Since CRA's section 808(2) mirrors the language in section 553(b)(B), not section 553(d)(3), it is clear that the drafters intended the 'good cause' exception to be invoked only when there has not been a notice of proposed rulemaking and comments received."[27]

At a March 2006 hearing commemorating the 10th anniversary of the CRA's enactment, the Managing Director of GAO's Strategic Issues team testified:

> *One reason for noncompliance with the 60-day delay is that the agencies have misapplied the "good cause" exception which waives the delay of the rule if it would be impracticable, unnecessary, or contrary to the public interest. Since the enactment of CRA, our office has consistently held that the "good cause" exception is only available if a notice of proposed rulemaking was not published and public comments were not received.*[28]

GAO Agrees March 2018 Report Used a "Different" Position on Good Cause

The author of this report contacted GAO in late March 2018, pointing out that GAO had consistently taken a different approach to "good cause" in its previous reports and testimonies than it had in its March 2018 report. On May 4, 2018, GAO responded via email with the following statement:

> *For purposes of this [March 2018] report, we looked at whether the agency promulgating a rule claimed good cause to waive the 60 day delay requirement under the Congressional Review Act (CRA). This methodology is different from the approach taken in the testimonies you cite and was fully disclosed in the report.*[29] (Emphasis added.)

Therefore, GAO agreed that the interpretation of the CRA's "good cause" exception in its March 2018 report was "different" than its interpretation in its previous testimonies and reports, but defended this reversal by saying that the new interpretation was "fully disclosed" in the report.

23 CRS, R43992, op. cit., p. 18, footnote 90.
24 GAO, Congressional Review Act, GAO/T-OGC-97-29, March 6, 1997, p. 3.
25 GAO, Congressional Review Act: Implementation and Coordination, GAO/T-OGC-98-38, March 10, 1998, pp. 3-4.
26 GAO-GGD-98-102R, op. cit., p. 11.
27 GAO, Congressional Review Act: Update on Implementation and Coordination, GAO/T-OGC-98-55, June 17, 1998, p. 4.
28 GAO, Federal Rulemaking: Perspectives on 10 Years of Congressional Review Act Implementation, GAO-06-601T, March 30, 2006, p. 5.
29 Email from Charles Young, Managing Director, GAO's Office of Public Affairs, May 4, 2018.

Although it is true that GAO's new interpretation of the CRA's "good cause" exemption was disclosed in the report, GAO did not "fully disclose" that this interpretation was, in fact, a new interpretation of the CRA for the agency. Only those familiar with the CRA and its history would have recognized that GAO was taking a new position regarding this issue, or would have realized the potential implications of that new position on GAO's findings and recommendation in the March 2018 report.

GAO Changes Its Position Again

Curiously, GAO appears to have changed its position again, after the March 2018 report and testimony. The author of this report contacted GAO in late March and pointed out two major rule reports that were issued in January 2018 in which GAO did not allow the use of notice and comment "good cause" to justify avoiding the 60-day delay requirement. In its May 4, 2018, email response, GAO said:

> *Thank you for bringing to our attention the statements in the cover letters to reports B-329681 and B-329682 that the rules did not comply with the 60 day delay requirement. We have issued amended reports to correct those statements and note that the agencies claimed good cause to waive notice and comment.*[30]

On April 26, 2018 – about one month after the author of this report contacted GAO – GAO published amended reports for those major rules "to correct a statement in the original report[s]… that CMS [the Centers for Medicare & Medicaid Services within HHS] did not comply with the 60-day delay in effective date requirement of 5 U.S.C. § 801(a)(3)(A)." In the amended reports, GAO said: "CMS found good cause to waive publication of a proposed rule and solicitation of public comment and thus the 60-day delay requirement does not apply."[31] (Emphasis added.)

Therefore, GAO appears to have come full circle. In at least five congressional testimonies and reports during at least the first 10 years of the CRA's implementation, GAO repeatedly said that that the act's "good cause" exception was only available if a notice of proposed rulemaking was not published and public comments were not received pursuant to a claim of "good cause" under 5 U.S.C. § 553(b)(3)(B). In its March 2018 report, GAO took a "different" position, stating that only claims of "good cause" to waive the delay in effective date requirements (i.e., 5 U.S.C. § 553(d)(3)] are relevant to the CRA's "good cause" exception. One month later, though, GAO returned to its original position—that a claim of "good cause" to waive notice and comment under 5 U.S.C. § 553(b)(3)(B) allows the agency to waive the CRA's 60-day delay requirement.

30 Ibid.

31 GAO, B-329681, April 26, 2018, p. 2, available at https://www.gao.gov/assets/690/689388.pdf; and B-329682, April 26, 2018, p. 2, available at https://www.gao.gov/assets/690/689409.pdf.

Mistakes When Counting Days Elapsed Between Publication and Effective Dates

Examination of the March 2018 report also indicated that GAO incorrectly measured the length of the 60-day effective date delay period when determining whether federal agencies had complied with the CRA. Section 801(a)(3) of the CRA states that a major rule would be allowed to take effect on "the later of the date occurring 60 days after the date on which—(i) the Congress receives the [rule]; or (ii) the rule is published in the *Federal Register*, if so published." Therefore, the starting point for the required 60-day delay period is the later of two dates: (1) the date that Congress receives the major rule, or (2) the date that the rule is published in the *Federal Register*.

Notably, though, the March 2018 GAO report sometimes referred to the starting point of the 60-day delay period as when rules were submitted to Congress and to GAO. For example:

- GAO said it examined agencies' compliance with the CRA's requirements to (among other things) "provide the required delay between submission of the regulation to Congress and us and its effective date."[32] (Emphasis added)
- GAO said that of the 132 economically significant rules found to be non-compliant with the CRA, "95 did not provide the required delay between the submission of the regulation to Congress and us and the effective date."[33] (Emphasis added)

However, further examination of the March 2018 report revealed that GAO used the date that GAO received the rule as the initial, but not final, determinant of compliance with the CRA's effective date delay requirement. For example, in a footnote following the above sentence, GAO said "For regulations that appeared potentially noncompliant based on the date submitted to us, we checked the *Congressional Record* to see if the regulation had been submitted to at least one House of Congress within the required timeframe."[34] Similarly, in the report's methodological appendix, GAO said:

> *We used the date a regulation had been submitted to us when assessing whether a regulation's stated effective date was consistent with CRA requirements. We also reviewed whether agencies had claimed "good cause" for not delaying the effective date. For regulations not submitted to us or those regulations submitted to us after they should have been submitted, we conducted additional checks of the* Congressional Record *to see if we could find evidence that the agency had provided a copy of the regulation to either of the Houses of Congress in time for the regulation's stated effective date to be consistent with CRA requirements. If we could find evidence that any of these requirements had been met, we removed the regulation from further consideration as potentially noncompliant. As such, our methodology was designed to identify instances of noncompliance.*[35]

In a May 2018 email to the author of this report, GAO said "we were using the date submitted to us as a proxy for the date received by Congress," and that "the date submitted to us was a starting point, not the final determinant of the finding."[36] GAO went on to say that this approach "is consistent with GAO's approach on major rule reports."

Methodological Problems With GAO's Approach

There appear to be several methodological problems with the approach that GAO said that it used in its March 2018 report (and in its major rule reports). First, and perhaps most importantly, when determining the starting point of the required 60-day delay period for major rules, the CRA says nothing at all about when GAO receives a rule.[37] The only relevant factors that can be considered are the dates that (1) Congress receives the rule, and (2) the rule is published in the *Federal Register*. Whichever of those two dates is latest is the starting point for the 60-day delay period. Therefore, GAO should not have used the date GAO received the rules to determine the length of the 60-day delay requirement, even as an initial step in the

32 GAO-18-183, op. cit., p. 20.
33 Ibid, p. 23.
34 Ibid, p. 23, footnote 34.
35 Ibid, p. 45.
36 Email from Charles Young, Managing Director, GAO's Office of Public Affairs, May 4, 2018.
37 Although the CRA (5 U.S.C. § 801(a)(1)(A)) requires all rules to be submitted to GAO and Congress before they can take effect, the act says nothing about when GAO receives a rule in determining the length of the 60-day delay period.

compliance determination process.

Second, GAO said that it only checked the date that Congress received a rule if the rule appeared to be non-compliant in regard to the date of submittal to GAO. Following this procedure, GAO would have missed any rule that was submitted to GAO in a timely manner, but was not submitted to Congress until much later – which happens frequently. For example, assume a rule is published in the *Federal Register* and submitted to GAO on March 1, 2018, with an effective date of April 30, 2018 – exactly 60 days later. Using the procedure that GAO said that it used to develop its reports, GAO would not have checked the dates that the House of Representatives or the Senate received the rule, and would have concluded that the rule was in compliance with the CRA's delay requirement. But if either House of Congress did not receive the rule until after March 1, then the rule's effective date would not have been delayed for the required 60 days.

Third, GAO said that when a rule appeared to be non-compliant based on the date submitted to GAO, "we checked the *Congressional Record* to see if the regulation had been submitted to at least one House of Congress within the required timeframe."[38] (Emphasis added.) Similarly, in the methodological appendix, GAO said if a rule was submitted to GAO fewer than 60 days prior to the effective date, GAO would check the *Congressional Record* "to see if we could find evidence that the agency had provided a copy of the regulation to either of the Houses of Congress in time for the regulation's stated effective date to be consistent with CRA requirements."[39]

However, the date that one House of Congress receives a rule is not the same as the date that Congress as a whole receives the rule. Section 801(a)(3) of the CRA states that a major rule generally cannot take effect until at least 60 days after "the Congress" receives the rule. The House and Senate parliamentarians do not consider a rule to have been received by Congress as a whole until both chambers have received it. [40]

Therefore, treating receipt of a rule by one House of Congress as receipt by Congress as a whole can lead to erroneous conclusions. For example, in the hypothetical example mentioned above, if the rule with the effective date of April 30, 2018, was published on March 1, 2018, but not submitted to GAO until March 5, 2018, GAO (following its stated methodology) would have checked the *Congressional Record* to see if either the House of Representatives or the Senate had received the rule by March 1. If the *Congressional Record* indicated that the House of Representatives received the rule on March 1, GAO would have considered the rule in compliance with the CRA, and would not have checked the *Congressional Record* to determine when the Senate received the rule – which may have been much later. Furthermore, according to GAO's methodology, it would not matter when the Senate received the rule (as GAO considered receipt by "either of the Houses of Congress" sufficient to satisfy the CRA's requirement).

The approach that GAO used in its March 2018 report – treating receipt of a rule by one House of Congress as equivalent to congressional receipt – is different than the approach that GAO had advocated in a previous legal opinion. In that case, a CMS Medicaid rule was submitted to the House of Representatives on February 14, 2002, but the Senate did not receive the rule until March 15, 2002. GAO said:

> *Section 801(a)(1)(A) makes clear that compliance with the requirements of the CRA necessitates submission of a rule to both Houses of Congress. Therefore, in this instance, the start of the 60-day delay period would have been March 15, 2002, the date of receipt by the Senate. Accordingly, we find that the Medicaid rule should not be effective under the provisions of the CRA until May 14, 2002.*[41]

38 GAO-18-183, op. cit., p. 23, footnote 34.
39 Ibid, p. 45.
40 See CRS, R43992, op. cit., p. 12, which says "For purposes of the act, a rule is considered to have been 'received by Congress' on the later date of its receipt in the Office of the Speaker of the House or its referral to Senate committee." As this quote illustrates, the Senate parliamentarian does not technically consider a rule to have been "received" in the Senate until it is referred to the relevant Senate committee (or committees), which is reflected by the date in which the receipt of the rule is published in the Senate version of the *Congressional Record*. Therefore, if the President of the Senate receives a rule on March 1, but the rule is not referred to the relevant committee until March 5, then the Senate did not technically "receive" the rule until March 5. However, for simplicity sake, in this report, a rule was considered "received" by the Senate on the date that the *Congressional Record* indicates that it was received, not the date of referral to a Senate committee.
41 GAO, B-289880, April 5, 2002, available at https://www.gao.gov/products/472196#mt=e-report.

The Effect of the 60-Day Delay on the Ability of Congress to Use the CRA

In addition to the legal and methodological errors discussed in the two previous sections of this report, the March 2018 GAO report also mischaracterized the effect of the 60-day effective date delay on the ability of Congress to use the CRA to disapprove agency rules. For example, in the "Highlights" section of the report, GAO said:

> *The most common CRA deficiency was agencies' failure to provide Congress the required time to review and possibly disapprove regulations…."*

On p. 26 of the report, GAO said:

> *Agencies' noncompliance with CRA has the overall effect of making it more difficult for Congress to exercise its oversight role under CRA.*

In the conclusions section of the report (p. 36), GAO said:

> *Ensuring that agencies consistently provide Congress with the required time to review, and possibly disapprove regulations, is important throughout a President's term, and particularly following a presidential transition when Congress typically has a larger number of regulations to potentially review.*

GAO made a similar statement in its March 14, 2018, testimony on the report, which was then cited in press reports:

> *The most common CRA deficiency for economically significant regulations was agencies' failure to provide Congress the required time to review and possibly disapprove regulations….*[42]

These statements are not correct. Although providing a 60-day delay in the effective date of a major rule can help ensure that Congress has an opportunity to review and possibly disapprove the rule before the rule takes effect, failing to provide the 60-day delay has no effect on Congress' overall ability to use the CRA to review and disapprove agency rules.[43]

Congress Expected to Disapprove Rules After They Took Effect

In fact, Congress explicitly designed the CRA to be used before or after rules have taken effect. The text of the CRA clearly indicates that Congress expected to be able to disapprove agency rules even after the rules had taken effect. For example, Section 801(f) of the act states:

> *Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.*

Section 801(b) states that if Congress enacts a resolution of disapproval, the rule "shall not take effect (or continue)." (Emphasis added.) Also, Section 803(a) states:

> *In the case of any deadline for, relating to, or involving any rule which does not take effect (or the effectiveness of which is terminated) because of enactment of a joint resolution under section 802, that deadline is extended until the date 1 year after the date of enactment of the joint resolution. (Emphasis added.)*

CRA Procedures Available for More Than 60 Days

Also, the period for introduction of resolutions of disapproval can extend well past the 60-day delay period. Section 802 of the CRA allows Members of Congress to introduce resolutions of disapproval for 60 "days of continuous session" after Congress receives a rule – which excludes all calendar days when either the House or the Senate is adjourned for more than three days. Given congressional adjournment schedules, using all 60 "days of continuous session" has historically taken

42 GAO-18-436T, op. cit., p. 14. For press account, see Charles S. Clark, "GOP Lawmakers Fault Agencies for Issuing Too Much Guidance," Government Executive, March 14, 2018, available at https://www.govexec.com/oversight/2018/03/gop-lawmakers-fault-agencies-issuing-too-much-guidance/146676/.

43 In some parts of the March 2018 report (e.g., p. 20), GAO correctly indicated that the 60-day delay requirement helped ensure that Congress could review the rules "before they become effective." In other places, though (e.g., p. 26), GAO indicated that the 60-day delay facilitated congressional review "before the agency potentially starts enforcement actions." However, a rule's "effective date" may be months or even years before its "enforcement date" or "compliance date."

more than 60 calendar days. Therefore, even if the effective dates for every major rule that GAO examined had been delayed for 60 days from the date that Congress received the rules, Members of Congress likely would have still been able to introduce resolutions of disapproval after the rules had taken effect. The CRA's expedited procedures in the Senate would have been available even longer, as Senate "session days" include only the days when the Senate is actually in session.

Furthermore, if a rule is submitted to Congress with less than 60 "session days" (in the Senate) or "legislative days" (in the House) prior to sine die adjournment, Section 801(d) of the CRA requires that the rule be carried over to the next session of Congress, and it is treated as if it was submitted on the 15th legislative or session day – thereby starting the clock for a new 60 "days of continuous session" during which Members of Congress can introduce resolutions of disapproval. This restart of the CRA process in a new session of Congress occurs even if no resolution of disapproval had been introduced regarding the rule during the preceding session of Congress. "Session days" and "legislative days" refer to days when the Senate and the House are actually in session, and counting backward from sine die adjournment 60 session or legislative days historically takes about six months. Therefore, for rules that are published during the last six months of any year (which includes most of the "transition period" rules in GAO's March 2018 report), Members are allowed to introduce resolutions of disapproval regarding rules that could have taken effect months earlier.[44]

For example, assume a major rule was published in the *Federal Register* and submitted to GAO and Congress on September 25, 2017, and the rule was scheduled to take effect 60 calendar days later, on November 24, 2017. Because there were fewer than 60 legislative days (House) or session days (Senate) left in the first session of the 115th Congress after September 25, 2017, the rule would have been rolled over to the next session of Congress, and treated as if it was submitted to Congress on the 15th House legislative day (which was January 25, 2018) or 15th Senate session day (which was January 23). In each chamber, resolutions of disapproval could then be introduced at any point in the 60 "days of continuous session" of Congress that follow these dates, and the Senate may use expedited procedures on the resolution during the 60 days of session that follow the 15th session day. Therefore, for the major rule that was published on September 25, 2017, and that took effect on November 24, 2017, a Member of Congress could have introduced a resolution of disapproval in late March 2018 – about four months after the rule took effect. (Again, expedited procedures in the Senate would be available regarding the rule even longer, as "session days" includes only days when the Senate is actually in session.)

Summary

Given that Congress clearly designed the CRA to be used to disapprove rules well after the rules had taken effect, and expected that to happen, it would have been helpful for the GAO report to clearly point out that delaying the effective dates of major rules for 60 days would likely have no effect on the ability of Congress to use the CRA to disapprove agency rules. Instead, by characterizing the lack of a full 60-day delay in effective dates as "failure to provide Congress the required time to review and possibly disapprove regulations," the GAO report incorrectly indicated the opposite.

When the author of this report raised this issue to GAO at the end of this review, GAO stood by its characterization, saying that the March 2018 report's "description of the effect of agency failure to comply with the 60 day delay requirement is fair and accurate."[45]

44 For more on this issue, see CRS, Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress, RL34633, September 3, 2008, available at https://fas.org/sgp/crs/misc/RL34633.pdf.

45 Email from Charles Young, Managing Director, GAO's Office of Public Affairs, May 4, 2018.

GAO Major Rule Reports Are Inconsistent and Contain Errors

The March 2018 report did not identify the 132 major rules that GAO considered noncompliant with the 60-day delay requirement in the CRA. When the author of this report requested a list of those 132 rules, GAO said it was not sure whether any such list existed for public release, and suggested filing a Freedom of Information Act (FOIA) request, which would "trigger a review to see if we had it in our work papers and whether it can be released."[46] Without a list of those rules (and the rules that GAO considered in compliance with the CRA), it is impossible to determine what effect the legal and methodological errors had on GAO's compliance determinations. For example, it is not possible to know how many of the 132 noncompliant rules would have been considered in compliance had GAO used its historical interpretation of the CRA's "good cause" exception (and, conversely, how many rules that GAO deemed to be in compliance would have been considered noncompliant). Nevertheless, it is reasonable to conclude that the number could be substantial because (as GAO itself previously reported) rulemaking agencies frequently invoke "good cause" to waive notice and comment.[47]

Rather than go through what could have been a lengthy FOIA-type disclosure process, the author decided to see how GAO treated specific major rules by reviewing all of GAO's major rule reports for a three-year period – the 242 reports on major rules that were published in the *Federal Register* from April 1, 2015 through March 31, 2018. Examination of those major rule reports revealed that many of them are inconsistent, incomplete, and/or appear to reach the wrong conclusion regarding agencies' compliance with the CRA.

Major Rule Reports Vary in How CRA "Good Cause" Is Interpreted

Examination of the major rule reports revealed that GAO has not been consistent in how it has interpreted the "good cause" exception in Section 808(2) of the CRA, sometimes allowing and disallowing claims under both types of "good cause" in the APA, and sometimes treating one claim of "good cause" as the other.

"Good Cause" to Waive Delay in Effective Date Under Section 553(d)(3)

In some of the major rule reports, when the rulemaking agency claimed "good cause" to waive the 60-day delay requirement under 5 U.S.C. § 553(d)(3), GAO concluded that the agency complied with the CRA. For example, a rule issued by the Employee Benefits Security Administration (EBSA) within the Department of Labor was published in the *Federal Register* and delivered to Congress on April 7, 2017 – only three days before it was scheduled to take effect.[48] GAO noted in its major rule report that EBSA claimed "good cause" to make the rule effective in fewer than 60 days, and concluded that the agency had "complied with the applicable requirements" when it issued the rule.[49]

However, in another major rule report published five months earlier, GAO concluded that the rulemaking agency did not comply with the CRA's delay requirement, even though the agency had made a similar Section 553(d)(3) "good cause" claim. CMS published the rule on December 22, 2016, with a stated effective date of January 17, 2017 – only 26 days later.[50] GAO noted in the major rule report that the 60-day delay requirement could be waived under Section 553(d)(3), and said the agency had done so.[51] Nevertheless, GAO ultimately concluded that CMS had not complied with the CRA's 60-day delay requirement.

46 Email from Charles Young, Managing Director, GAO's Office of Public Affairs, April 23, 2018. Although GAO is not subject to the Freedom of Information Act (FOIA, 5 U.S.C. § 552), GAO reportedly "follows the spirit of the act consistent with GAO's duties and functions as an agency with primary responsibility to the Congress." See https://www.gao.gov/about/freedom_of_information_act.

47 GAO, Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments, GAO-13-21, December 20, 2012. GAO said about 35% of major rules had no notice of proposed rulemaking, with agencies frequently citing "good cause."

48 82 *Federal Register* 16902.

49 GAO, B-328986, April 20, 2017, available at https://www.gao.gov/assets/690/684307.pdf.

50 81 *Federal Register* 94058.

51 GAO, B-328694, January 5, 2017, available at https://www.gao.gov/assets/690/682165.pdf.

Good Cause to Waive Notice and Comment Under 5 U.S.C. § 553(b)(3)(B)

In other major rule reports, the rulemaking agencies made their rules effective fewer than 60 days after publication and congressional receipt after claiming "good cause" under 5 U.S.C. § 553(b)(3)(B) to waive notice and comment requirements, and GAO said that the agencies had complied with applicable rulemaking requirements. For example, the Drug Enforcement Administration (DEA) within the Department of Justice published a final rule on January 23, 2018, with an effective date of January 22, 2018 (i.e., the day before it was published).[52] In its major rule report, GAO said:

> *CRA also provides that "any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Federal agency promulgating the rule determines." 5 U.S.C. § 808(2). DEA found that there is good cause to issue the final rule without notice and comment, because it conforms the implementing regulations with recent amendments …that have already taken effect. Therefore, DEA determined this final rule will take effect January 22, 2018.*[53]

GAO then concluded that DEA had "complied with the applicable requirements."[54]

However, in other major rule reports, when an agency claimed "good cause" under 5 U.S.C. § 553(b)(3)(B) to waive notice and comment procedures for a major rule, GAO concluded that the agency had not complied with the CRA. For example, CMS published a final rule with comment period and an interim final rule with comment period on November 16, 2017, with a stated effective date of January 1, 2018 – i.e., only 47 days after the date of publication.[55] GAO noted in its major rule report that CMS found good cause to waive notice and comment for the interim final rule, and said the interim final rule addressed "extreme and uncontrollable circumstances" that eligible clinicians may face as a result of "widespread catastrophic events affecting a region or locale in CY 2017, such as Hurricanes Irma, Harvey, and Maria." However, GAO concluded that CMS did not comply with the 60-day delay requirement.[56]

Interpreting Section 553(b)(3)(B) Good Cause as Section 553(d)(3) "Good Cause"

In a number of other major rule reports, although the rulemaking agencies had only claimed "good cause" to waive notice and comment under 5 U.S.C. § 553(b)(3)(B), GAO characterize such claims as "good cause" to waive the delay in the rules' effective dates under 5 U.S.C. § 553(d)(3), and then concluded that the agency was in compliance with the CRA.[57]

For example, Customs and Border Protection (CBP) within the Department of Homeland Security published a final rule on October 20, 2016, with the rule taking effect that day.[58] CBP claimed "good cause" to avoid notice and comment under 5 U.S.C. § 553(b)(3)(B), but did not claim "good cause" to make the rule effective immediately under 5 U.S.C. § 553(d). In its major rule report, GAO interpreted the agency's claim of waiving notice and comment under 5 U.S.C. § 553(b)(3)(B) as satisfying the requirement under 5 U.S.C. § 553(d) as well as the CRA, and concluded that "CBP complied with the applicable requirements."[59]

GAO did the same thing in its major rule reports for two CMS rules. The rules were both published in the *Federal Register* on November 15, 2016, with a stated effective date of January 1, 2017 – i.e., only 47 days

52 83 *Federal Register* 3071.
53 GAO, B-329747, February 7, 2018, available at https://www.gao.gov/assets/700/690078.pdf.
54 For other examples of GAO allowing use of "good cause" under 5 U.S.C. § 553(b)(3)(B) to waive notice and comment as a way to have major rules take effect in less than 60 days, see B-327566, November 25, 2015, available at https://www.gao.gov/assets/680/674045.pdf; and B-327900, March 21, 2016, available at https://www.gao.gov/assets/680/676022.pdf.
55 82 *Federal Register* 53568. Interim final rulemaking can be viewed as a particular application of the good cause exception in the APA, but with the addition of a comment period after the rule has become effective.
56 GAO, B-329620, December 11, 2017, available at https://www.gao.gov/assets/690/689166.pdf.
57 In a footnote in the methodological appendix for its March 2018 report (p. 45), GAO said it "recognized that agencies used varying terminology for claiming 'good cause' for not delaying the effective date and if there was unclear language that could potentially be interpreted as doing this, we removed those regulations from further consideration as noncompliant, unless the agency failed to submit the regulation to us."
58 81 *Federal Register* 72481.
59 GAO, B-328513, November 3, 2016, available at https://www.gao.gov/assets/690/680911.pdf.

later.[60] In both of these rules, the agencies only claimed "good cause" to waive notice and comment under 5 U.S.C. §553(b)(3)(B). Nevertheless, GAO cited the provision relating to "good cause" for waiving effective date delays (5 U.S.C. §553(d)(3)), and said that CMS "complied with applicable requirements" in both rules.[61]

Major Rule Reports Are Frequently Incorrect/Unclear Regarding the 60-day Delay Requirement

Examination of GAO's major rule reports for rules published in the *Federal Register* from April 2015 through March 2018 indicated that GAO frequently made several different kinds of mistakes in determining whether the agencies had properly delayed the effective dates of those rules. Some of those mistakes seemed to flow from treating the date that GAO receives a rule as a "proxy" for congressional receipt. In other cases – even when it received rules fewer than 60 days prior to their effective dates – GAO appears not to have checked the dates of congressional receipt, or did not use the information contained in its own major rule reports or its own CRA database.

Treating GAO Receipt as a "Proxy" for Congressional Receipt

In at least 15 of its major rule reports, GAO appears to have used the dates that it received the rules as a proxy for congressional receipt, but did not check the actual dates that Congress received the rules, which was in each case later and fewer than 60 days before the effective date. As a result, GAO erroneously concluded that each of the 15 rules were in compliance with the delay requirement. For example:

- The Department of Defense (DOD) published a final major rule on July 22, 2015, with the rule taking effect on October 1, 2015. GAO received the rule on July 27, 2015 (more than 60-days before the effective date) and concluded that DOD had "complied with the applicable requirements."[62] GAO did not mention in its major rule report when Congress received the rule. According to the *Congressional Record*, the House of Representatives did not receive the rule until August 28, 2015 – only 35 days before the effective date.[63]
- The Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) published a final major rule on October 29, 2015, with an effective date of December 28, 2015 (i.e., more than 60 days later). GAO received the rule the same day it was published, and concluded in its major rule report that the agency had complied with the CRA's delay requirement.[64] (The report did not mention when Congress received the rule.) However, the House of Representatives did not receive the rule until December 1, 2015 – only 27 days prior to the effective date.[65] Therefore, GAO should have said the rule was not in compliance with the CRA's delay requirement.
- The Food and Drug Administration (FDA) within HHS published a final major rule on April 6, 2016, with a stated effective date of June 6, 2016. GAO received the rule on April 7, 2016 – i.e., exactly 60 days before the effective date. In its major rule report, GAO did not mention when Congress received the rule, but said that FDA "complied with the applicable requirements."[66] However, according to the *Congressional Record*, the Senate did not receive the rule until April 11, and the House of Representatives did not receive it until April 14.[67] Therefore, Congress as a whole did not receive the rule until April 14 – only 53 days before the effective date.
- FDA published three major final rules on May 27, 2016, with an effective date of July 26, 2016 – i.e., 61 days after their publication date. In its major rules reports, GAO said it received the rules the day they were published, but did not mention the date of congressional receipt. Nevertheless, GAO said FDA "complied with the applicable requirements" for all

60 81 *Federal Register* 80060, and 81 *Federal Register* 80063.
61 GAO, B-328576, November 28, 2016, available at https://www.gao.gov/assets/690/681645.pdf; and B-328581, November 28, 2016, available at https://www.gao.gov/assets/690/681663.pdf.
62 GAO, B-327241, August 11, 2015, available at https://www.gao.gov/assets/680/672091.pdf. Notably, in this and other cases cited in this section, GAO's major rule reports were issued before Congress received the rules.
63 *Congressional Record*, September 10, 2015, p. H5940.
64 GAO, B-327509, November 13, 2015, available at https://www.gao.gov/assets/680/673796.pdf.
65 *Congressional Record*, December 2, 2015, p. H8968.
66 GAO, B-327982, April 22, 2016, available at https://www.gao.gov/assets/680/676890.pdf.
67 For receipt by the House of Representatives, see *Congressional Record*, April 18, 2016, p. H1799.

three rules.[68] However, the House of Representatives did not receive the three rules until June 7, 2016 – only 50 days before they were scheduled to take effect.[69]

- The Department of Housing and Urban Development published a major final rule on December 5, 2016, with an effective date of February 3, 2017 – i.e., 60 days after the publication date. GAO said in its major rule report that it had also received the rule on December 5, 2016, and concluded that HUD had "complied with the applicable requirements," but GAO did not mention in its report when Congress received the rule.[70] However, the House of Representatives and the Senate did not receive the rule until December 13, 2016—only 49 days before it was scheduled to take effect.[71]
- The Department of Veterans Affairs published a major final rule on January 13, 2017, with an effective date of March 14, 2017 – i.e., 60 days after the publication date. GAO did not indicate in the major rule report when it received the rule, but the GAO database indicates that GAO received it on the date that it was published – January 13. GAO concluded that DVA had "complied with the applicable requirements," but GAO did not mention in its report when Congress received the rule.[72] According to the *Congressional Record*, the Senate received the rule on January 18, 2017, and the House of Representatives received the rule on January 19 – only 54 days before the rule took effect.[73]
- USDA's Food Nutrition Service published a major final rule on January 6, 2017, with an effective date of March 7, 2017 – i.e., 60 days after the publication date. GAO did not indicate in its major rule report when it or either House of Congress received the rule, but nevertheless concluded that the agency had "complied with the applicable requirements."[74] According to GAO's database, GAO received the rule on January 6, 2017 – the day it was published. However, the *Congressional Record* indicates that the House of Representatives and the Senate did not receive the rule until January 11 – only 55 days before it was scheduled to take effect.[75]
- The Department of Education published a major final rule on May 16, 2017, and GAO said in its major rule report that it had received the rule on May 17. The report did not indicate when the rule was to take effect, or when Congress received the rule, but GAO nevertheless concluded that the Department had "complied with the applicable requirements."[76] The rule itself indicated that it would take effect on July 17, 2017 – i.e., 62 days after publication and 61 days after GAO received it. According to the *Congressional Record*, the Senate received the rule on May 16, but the House of Representatives did not receive the rule (and therefore "Congress" did not receive the rule) until May 19—only 59 days before the rule took effect.[77]
- The Patent and Trademark Office within the Department of Commerce published a major final rule on November 14, 2017, with an effective date of January 16, 2018 – i.e., 63 days after publication. GAO said in its major rule report that it had received the rule on November 6, 2017, but did not indicate in the report when either House of Congress had received the rule.[78] Nevertheless, GAO concluded that the agency had "complied with the applicable requirements." The *Congressional Record* indicates that the Senate received the rule on November 13, 2017, but the House of Representatives did not receive it (and therefore "Congress" did not receive it) until November 20, 2017 – only 57 days before the rule took effect.[79]

GAO received each of these rules at least 60 days before they were scheduled to take effect, but Congress did not. Therefore, GAO's policy of using the date of GAO receipt as a "proxy" for congressional receipt, and only checking the actual dates of congressional receipt if the

68 GAO, B-328134, June 13, 2016, available at https://www.gao.gov/assets/680/677965.pdf; B-328136, June 10, 2016; available at https://www.gao.gov/assets/680/677968.pdf; and B-328135, June 10, 2016, available at https://www.gao.gov/assets/680/677970.pdf.
69 For receipt by the House of Representatives, see *Congressional Record*, June 8, 2016, p. H3562; June 9, 2016, p. H3661; and June 9, p. H3662.
70 GAO, B-328649, December 15, 2016, available at https://www.gao.gov/assets/690/682027.pdf.
71 For receipt by the House of Representatives, see *Congressional Record*, December 20, 2016, p. H7620, Executive Communication 7934.
72 GAO, B-328750, January 30, 2017, available at https://www.gao.gov/assets/690/682600.pdf.
73 For receipt by the House of Representatives, see *Congressional Record*, January 23, 2017, p. H607, Executive Communication 319.
74 GAO, B-328735, January 18, 2017, available at https://www.gao.gov/assets/690/682427.pdf.
75 For receipt by the House of Representatives, see *Congressional Record*, January 13, 2017, p. H541, Executive Communication 180.
76 GAO, B-329093, May 31, 2017, available at https://www.gao.gov/assets/690/685195.pdf.
77 For receipt by the House of Representatives, see *Congressional Record*, May 23, 2017, p. H4501, Executive Communication 1410.
78 GAO, B-329591, November 29, 2017, available at https://www.gao.gov/assets/690/688761.pdf.
79 For receipt by the House of Representatives, see *Congressional Record*, December 11, 2017, p. H9788, Executive Communication 3360.

GAO date was fewer than 60 days before the effective date, appears to have led to erroneous conclusions that the agencies had complied with the CRA's effective date delay requirement.

GAO Not Following Its Stated Procedure

In several other major rule reports, GAO did not appear to have followed the procedure that was stated in the March 2018 report. Although GAO received these major rules fewer than 60 days prior to their effective dates, there was no indication that GAO checked to see when either House of Congress received the rules. In these reports, GAO erroneously concluded that the issuing agencies had complied with the CRA's delay requirement. For example:

- USDA/APHIS published two major final rules on July 2, 2015, with effective dates of August 31, and September 1, 2015 – 60 and 61 days later. In its major rule reports for these rules, GAO said it did not receive them until July 6, 2015 (i.e., less than 60 days prior to the effective date), but did not mention when either House of Congress received them.[80] Nevertheless, GAO said APHIS "complied with the applicable requirements." According to the *Congressional Record*, the House of Representatives did not receive the rules until July 7 – only 55 days before the effective date.[81]
- DOE published a major rule on January 8, 2016, with an effective date of March 8, 2016. Although GAO did not receive the rule until January 13, 2016 (i.e., 55 days prior to the effective date), GAO did not indicate in its major rule report when Congress received the rule.[82] Nevertheless, GAO said DOE "complied with the applicable requirements." According to the *Congressional Record*, the House of Representatives received the rule on January 14, 2016 – only 54 days before the rule took effect.[83]
- The Food and Nutrition Service within USDA published a rule on July 29, 2016, with an effective date of September 27, 2016 – exactly 60 days after the date of publication. GAO's major rule report stated that GAO received the rule on August 2, 2016 (i.e., 56 days prior to the effective date), but does not mention any dates of congressional receipt. Nevertheless, GAO concluded, "FNS complied with the applicable requirements."[84] The *Congressional Record* indicates that the Senate received the rule on August 5, 2016, but the House of Representatives did not receive it until August 24, 2016 – only 34 days before it was scheduled to take effect.[85]
- DOE published a rule on January 19, 2017, with an effective date of March 20, 2017 – exactly 60 days later.[86] In its report on this rule, GAO said it received the rule on January 24, 2017 (i.e., 55 days before the effective date), but did not mention when Congress had received the rule. Nevertheless, GAO said DOE had "complied with the applicable requirements."[87] However, the *Congressional Record* indicates that the House of Representatives did not receive the rule until February 1, 2017,[88] and the Senate did not receive the rule until February 14, 2017 – only 34 days before the rule was scheduled to take effect.[89]

Not Using Information in Major Rule Reports or GAO's CRA Database

In several other major rule reports, GAO concluded that the rulemaking agency was in compliance with the CRA's 60-day delay requirement, but the information needed to determine noncompliance was contained in the GAO major rule reports or GAO's CRA database. For example:

- CMS published a final major rule in the *Federal Register* on June 9, 2015, with an effective date of August 3, 2015 – only 55 days later. GAO's major rule report contained the date of publication, and

80 GAO, B-327137, July 20, 2015, available at https://www.gao.gov/assets/680/671674.pdf; and B-327141, July 20, 2015, available at https://www.gao.gov/assets/680/671675.pdf.
81 *Congressional Record*, July 8, 2015, p. H4952.
82 GAO, B-327720, February 1, 2016, available at https://www.gao.gov/assets/680/675208.pdf.
83 *Congressional Record*, January 25, 2016, p. H368.
84 GAO, B-328327, August 18, 2016, available at https://www.gao.gov/assets/680/679344.pdf.
85 For the date that the House of Representatives received the rule, see *Congressional Record*, September 6, 2016, p. H5093, Executive Communication 6654.
86 Although the rule had an effective date of March 20, 2017, the standards in this rule would apply to ceiling fans manufactured in, or imported into, the United States on and after January 21, 2020.
87 GAO, B-328780, February 8, 2017, available at https://www.gao.gov/assets/690/682939.pdf.
88 *Congressional Record*, February 3, 2017, p. H974, Executive Communication 480.
89 *Congressional Record*, February 17, 2017, p. S1394, Executive Communication 738. (Although not mentioned in the major rule report, and not relevant to the 60-day delay requirement, GAO's database indicates that GAO received the rule on February 8.)

the GAO database indicated when the rule would take effect. Nevertheless, GAO said the agency had "complied with the applicable requirements." [90]

- The Commodity Futures Trading Commission published a major rule on January 6, 2016, with an effective date of February 5, 2016 – less than a month later. GAO concluded that the Commission "complied with the applicable requirements," even though the major rule report contained the date of publication (and the date GAO received the rule—December 18, 2015), and the GAO database indicated when the rule would take effect.[91]
- CMS published a final rule in the *Federal Register* on November 4, 2016, with an effective date of January 1, 2017 – only 58 days later. Although GAO's major rule report contained these dates, GAO nevertheless stated that CMS "complied with the applicable requirements." [92]
- CMS published another final rule on November 30, 2016, with an effective date of January 20, 2017 – 51 days later. Although GAO's major rule report contained these dates, GAO nevertheless stated that CMS "complied with the applicable requirements."[93]

Major Rule Reports Are Often Not Transparent

A review of more than 200 major rule reports for rules that were published from April 2015 through March 2018 revealed that, although GAO almost always mentioned when it received the rules and when the rules were published in the *Federal Register*, GAO only rarely mentioned when the House of Representatives, the Senate, or Congress as a whole received the rules. Also, GAO frequently did not mention the effective date of the rule being discussed. Without all three relevant pieces of information – (1) the date that Congress (i.e., the last chamber) received the rule, (2) the date the rule was published in the *Federal Register*, and (3) the effective date of the rule – it is not clear to readers of the reports how GAO determined that a particular rule was or was not in compliance with the CRA's 60-day delay requirement, or whether that determination was correct.

For example, in one such major rule report, GAO said "We received the rule on April 7, 2016. It was published in the *Federal Register* as a final rule on April 6, 2016."[94] GAO did not mention in its report when the rule was scheduled to take effect, or when either House of Congress received the rule. Nevertheless, GAO concluded that the agency "complied with the applicable requirements." However, the *Congressional Record* indicates that the House of Representatives did not receive the rule until April 14, 2016 – only 53 days before it was scheduled to take effect on June 6, 2016.[95] Therefore, GAO's conclusion in this case was incorrect. Had GAO provided the two missing pieces of information in the report– the date of congressional receipt and the effective date – GAO either would not have made this error, or the error would have been apparent to a reader of the report.

Even when GAO's conclusions regarding CRA compliance were correct, inclusion of all of the relevant information would have made the reasoning behind GAO's conclusions more transparent and understandable. For example:

- In its report for an FDA major rule, GAO said "We received the rule on May 10, 2016. It was published in the *Federal Register* as a final rule on May 10, 2016."[96] The report did not mention when the rule took effect, or when Congress received the rule. Nevertheless, GAO concluded that the agency had "complied with the applicable requirements." Had GAO provided the rule's effective date (August 8, 2016) and the date that Congress received the rule (May 16, 2016), a reader of the report would have understood why GAO reached its conclusion.
- The Grain Inspection, Packers and Stockyards Administration with USDA published a major final rule

90 GAO, B-327048, June 23, 2015, available at https://www.gao.gov/assets/680/671071.pdf.
91 GAO, B328137, June 15, 2016, available at https://www.gao.gov/assets/680/678018.pdf. Even the date GAO received the rule was less than 60 days prior to the effective date, but this did not seem to trigger an inquiry as to when Congress received the rule (which was January 12, 2016 – also less than 60 days prior to the effective date).
92 GAO, B-328556, November 21, 2016, available at https://www.gao.gov/assets/690/681503.pdf. Although the House of Representatives and the Senate received this rule on October 20, 2016 – more than 60 days prior to its effective date, the rule was not published in the *Federal Register* until November 4, 2016. The CRA requires that the 60-day period be measured from the date the rule is received by Congress or published in the *Federal Register*, whichever is later.
93 GAO, B-328635, December 12, 2016, available at https://www.gao.gov/assets/690/682022.pdf. The House of Representatives and the Senate received this rule on November 28, 2016 – also less than 60 days prior to its effective date.
94 GAO, B-327982, April 22, 2016, available at https://www.gao.gov/assets/680/676890.pdf.
95 *Congressional Record*, April 18, 2016, p. H1799.
96 GAO, B-328083, May 25, 2016, available at https://www.gao.gov/assets/680/677687.pdf.

in the *Federal Register* on December 20, 2016, with an effective date of February 21, 2017 – i.e., 63 days later. In its major rule report, GAO said it did not receive the rule until December 29, 2016 – i.e., only 54 days before its effective date.[97] GAO did not mention in its report the date that Congress received the rule, but concluded that the agency did not provide the required delay. The *Congressional Record* indicated that the Senate did not receive this rule until October 25, 2017 – more than eight months after it was initially scheduled to take effect.[98] Therefore, although GAO was ultimately correct in its conclusion in this case, the major rule report did not provide Congress or the public the information needed to understand how GAO reached its determination.

In the past, GAO has criticized OMB and other agencies for a lack of transparency in the rulemaking process with respect to other types of procedural requirements or determinations. For example, in a 2014 report, GAO recommended that OMB "work with agencies to clearly communicate the reasons for designating a regulation as a significant regulatory action," and "explain its reason for any changes to an agency's initial assessment of a regulation as nonsignificant."[99] It appears that GAO could profit from following its own advice, and more clearly communicate in its major rule reports the reasons why it was concluding federal agencies did and did not comply with CRA requirements.

97 GAO, B-328704, January 12, 2017, available at https://www.gao.gov/assets/690/682429.pdf.

98 *Congressional Record*, October 31, 2017, p. S6921. A search of the *Congressional Record* did not reveal when the House of Representatives received this rule.

99 GAO, Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent, GAO-14-714, September 11, 2014, p. 32.

Summary and Conclusions

In its March 2018 report and testimony, GAO concluded that federal agencies (HHS and DOT in particular) had frequently violated the Congressional Review Act by failing to delay the effective dates of their major rules for the required 60 days. However, GAO appears to have used a flawed methodology to reach this conclusion. Specifically, GAO seems to have used the wrong interpretation of the "good cause" exception to the 60-day delay requirement, and appears to have measured the length of the required delay period incorrectly. These errors may have caused GAO to either understate or overstate the overall level of CRA compliance during the periods examined. In addition, GAO interpreted its results incorrectly, wrongly claiming that when agencies failed to delay the effective dates of their major rules for the full 60 days, the agencies had somehow reduced Congress' ability to use the CRA to disapprove agency rules.

Furthermore, examination of GAO's major rule reports for a three-year period revealed that GAO has been inconsistent in its interpretation and application of the CRA's "good cause" exception, and has frequently made mistakes in determining whether federal agencies had complied with the 60-day delay requirement. Also, GAO's major rule reports frequently did not disclose all of the information that Congress and the public would need in order to determine how GAO made its compliance determinations, and whether those determinations were correct (e.g., when Congress received the rules, and their effective dates).

So What?

At this point, a reader of this report might ask "So what?" Why is it important for Congress and the public to know that GAO's March 2018 report and testimony regarding the CRA were based on a flawed legal interpretation, and used a flawed methodology? Why should anyone care that GAO misstated the effect of the 60-day delay on Congress' ability to disapprove rules? And what does it matter that many of GAO's reports on major rules are inconsistent or contain mistakes?

There are at least two reasons why it is important to identify and correct these errors and inconsistencies in GAO's reports on the CRA. The first reason focuses on the CRA, and the second focuses on GAO.

The CRA Has Become an Important Policy Tool

The CRA was enacted in March 1996, and during its first 20 years of implementation it was used to disapprove only one rule. As a result of this lack of activity, some considered the act a failure.[100] However, since February 2017, Congress and the President have used the CRA to disapprove 16 agency rules covering a wide range of policy issues. The disapproved rules include:

- A Securities and Exchange Commission rule that would have required oil, gas and mining companies to disclose payments made to foreign governments in exchange for access to drilling or mining rights (P.L. 115-4);
- A Department of the Interior rule that would have limited the way mines dump debris when clearing earth in order to prevent the destruction of area streams (P.L. 115-5);
- A rule issued by the Social Security Administration that would have made it more difficult for the mentally ill to purchase firearms (P.L. 115-8);
- A Department of Labor rule that would have clarified that employers are required to maintain accurate records of serious workplace injuries and illnesses for up to five years (P.L. 115-21);
- A Federal Communications Commission rule that would have required broadband providers to get permission from customers to collect and use their online information (P.L. 115-22);
- An HHS rule that would have barred states from withholding federal family-planning funds from Planned Parenthood affiliates and other health clinics that provide abortions (P.L. 115-23); and
- A rule issued by the Bureau of Consumer Financial Protection (CFPB) that would have banned companies from using mandatory arbitration clauses to deny groups of people their day in court (P.L. 115-74).

100 See, for example, Cindy Skrzycki, "Reform's Knockout Act, Kept Out of the Ring, Washington Post, April 18, 2006.

Resolutions of disapproval regarding even more agency rules have been introduced in the 115th Congress, but have not yet been acted upon.

Also, the recognized scope of the CRA has recently been expanded to include covered rules and guidance documents that were issued at any time since the CRA was enacted in 1996, but were not submitted to Congress at the time they were issued. Although the total number of such unsubmitted covered rules and guidance documents is unclear, the number could be in the thousands, or even tens of thousands. If the agency that issued any of those rules and guidance documents now submits them to Congress, Members will then have 60 "days of continuous session" to introduce CRA resolutions of disapproval.[101]

Because of this increased level of activity and its expanded applicability, the CRA has taken on more importance within the past 18 months, and is now viewed as a "secret weapon" that Congress and the President can use to change the direction of public policy.[102] As one article put it, the CRA "has moved from a long period of obscurity to a central role in the balance of power between Congress and the agencies."[103] Therefore, whenever anyone speaks or writes about the CRA, and particularly when those statements are making judgments about whether or not federal agencies are complying with the act's requirements, it is important that those characterizations be accurate.

Congress and the Public Depend on GAO to "Get It Right"

It is particularly important that GAO's reports, testimonies, and legal opinions regarding the CRA be accurate. Congress and the public have long relied on GAO as an unimpeachable source of valid, unbiased, and reliable information. On its website, GAO notes that it is often called the "congressional watchdog," and describes its mission in part as providing Congress with "timely information that is objective, fact-based, nonpartisan, nonideological, fair, and balanced."[104]

GAO's core values are accountability, integrity, and reliability.[105] Regarding integrity, GAO said it "sets high standards for itself and its work, and describes integrity as "the foundation of reputation." Regarding "reliability," GAO said it "produces high quality reports, testimony, briefings, legal opinions, and other products and services that are timely, accurate, useful, clear, and candid."

When GAO does not meet these standards, particularly with regard to an increasingly important issue such as the CRA, it is important for GAO (and Congress) to understand why those standards were not met, to correct any mistakes, and to prevent a recurrence of those mistakes in the future. It does not appear that GAO met these standards in its March 2018 report and testimony on the CRA, or in a significant number of its major rule reports that have been issued in recent years (and possibly longer).

GAO's Role in Broadening the Scope of the CRA

The importance of GAO "getting it right" regarding the CRA has been underscored of late by its increasing role in broadening the scope of the act. From 1996 until 2014, Members of Congress asked GAO 11 times (i.e., an average of only about once every two years) whether certain agency actions constituted a "rule" under the CRA.[106] However, between October 2017 and May 2018, GAO issued six such opinions (i.e., and average of nearly one per month), and is reportedly working on others.[107] In four of those six recent opinions, GAO concluded that the agency actions at issue were covered "rules" that should have been submitted to Congress.[108] When rules are not submitted to Congress, the Senate considers the publication of these GAO opinions in the

101 For more on this issue, see https://www.redtaperollback.com/cra-2/. In addition, Members can introduce resolutions of disapproval if GAO determines that the unsubmitted rule or guidance meets the definition of a "rule" in the CRA.

102 Fred Barnes, "Congressional Republicans' Secret Weapon," The Weekly Standard, May 25, 2018, available at https://www.weeklystandard.com/fred-barnes/congressional-republicans-secret-weapon; and Michael Grunwald, "Trump's Secret Weapon Against Obama's Legacy," Politico Magazine, April 10, 2017, available at https://www.politico.com/magazine/story/2017/04/donald-trump-obama-legacy-215009.

103 Dechert LLP, "Congress Applies the Congressional Review Act in a New Way – Voiding CFPB Bulletin on Indirect Auto Lending," June 7, 2018, available at https://www.jdsupra.com/legalnews/congress-applies-the-congressional-41466/.

104 See https://www.gao.gov/about/index.html.

105 See https://www.gao.gov/values/ .

106 For a list of these 11 GAO decisions, see CRS, R43992, op. cit., pp. 23-24. GAO concluded in 7 of those 11 decisions that the agency actions at issue were "rules" under the CRA.

107 For a discussion regarding two of those six opinions that were issued in October 2017, see CRS, GAO Issues Opinions on Applicability of Congressional Review Act to Two Guidance Documents," IN10808, October 25, 2017, available at https://fas.org/sgp/crs/misc/IN10808.pdf.

108 GAO, B-329272: Oct 19, 2017 (https://www.gao.gov/assets/690/687879.pdf); B-238859: Oct 23, 2017 (https://www.gao.gov/as-

Congressional Record as the date when Members may introduce resolutions of disapproval.

One of those four recent GAO opinions has resulted in the use of the CRA to disapprove the "rule" – even though agency action was issued years earlier. In December 2017, GAO concluded that an unsubmitted March 2013 CFPB bulletin on "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act" was a CRA-covered "rule."[109] In March 2018, Senator Jerry Moran introduced a CRA resolution to disapprove the CFPB bulletin (S.J. Res. 57), citing the GAO opinion in the text of the resolution. Within two months the resolution of disapproval was enacted and signed into law.[110] Some have called for increased use of the CRA regarding such unsubmitted guidance documents.[111]

In summary, the CRA has recently become a significant tool that Congress and the President can use to make public policy, and the scope of the CRA now clearly includes unsubmitted guidance documents, even if they were issued years earlier. Because GAO now plays a more important role than ever in the CRA process, it is more important than ever that its opinions, testimonies, and reports regarding the CRA be considered credible and reliable.

sets/690/687922.pdf); B-329065: Nov 15, 2017 (https://www.gao.gov/assets/690/688420.pdf); and B-329129: Dec 5, 2017 (https://www.gao.gov/assets/690/688763.pdf).

109 GAO, B-329129, December 5, 2017, available at https://www.gao.gov/assets/690/688763.pdf.

110 Public Law 115-172, May 21, 2018.

111 Paul J. Larkin, Jr., "Reawakening the Congressional Review Act, Harvard Journal of Law & Public Policy, 41 (2017), pp. 187-252, available at http://www.harvard-jlpp.com/wp-content/uploads/2018/01/Larkin_FINAL.pdf.

GAO's Responses to These Issues

The author of this report first raised many of these issues with GAO on March 14, 2018 – the day after the report was issued, and the day that GAO testified on the report before the House Committee on Government Reform and Oversight. On March 26, GAO responded by simply saying that its judgments in the report "were appropriate and conformed to GAO policies and procedures."[112]

Later that day, the author provided GAO with a more detailed description of concerns about the March 2018 report, and about a number of GAO's major rule reports. GAO responded nearly six weeks later (on May 4) by agreeing that some errors existed, but generally defending the methodology used in the March report and in the major rule reports.[113] For example, GAO noted that its March 2018 interpretation of the "good cause" provision in the CRA was "different" than in its previous reports and testimonies, but said this interpretation was "fully disclosed in the report." (As noted previously, although the interpretation was disclosed, the fact that it was a new interpretation was not disclosed.) GAO also explained that it uses the date that rules are submitted to it as a starting point for determining compliance with the 60-day delay requirement (which, as discussed above, can be a problem). Finally, GAO said that the March 2018 report's "description of the effect of agency failure to comply with the 60 day delay requirement is fair and accurate."

On May 28, 2018, GAO was provided with an early draft of this report. The next day, GAO indicated that, consistent with its procedures, its Chief Quality Officer would "review the report in question," along with a staff member from the Office of the General Counsel who is "independent of that area of work."[114] When that review is completed, GAO said it would "notify you of our findings and, if necessary, any actions that GAO intends to take." As of the date of this report, six weeks after this message, and nearly four months after first being notified of these concerns, GAO's review was reportedly continuing.

112 Email from Charles, Managing Director, GAO's Office of Public Affairs, March 26, 2018.
113 Email from Charles Young, Managing Director, GAO's Office of Public Affairs, May 4, 2018.
114 Email from Katherine Siggerud, Chief Operating Officer, GAO, May 29, 2018.

Recommendations

GAO should amend its March 2018 report and testimony, and should reexamine all of its major rule reports and, where necessary, amend them. Those amendments should consistently:

- Interpret the "good cause" exception in Section 808(2) of the CRA in the same way that GAO did during the first 10 years of the act's implementation – i.e., that the exception is available if a notice of proposed rulemaking was not published pursuant to a similar "good cause" exception in the APA; and
- Measure the length of the required 60-day delay periods from the starting point that was stipulated in the CRA – i.e., when a rule was published in the *Federal Register*, or when a rule was received by Congress (whichever is later).

In addition, GAO should revise its March 2018 report and testimony to clearly indicate that any failure to delay the effective dates of major rules for the full 60-day period has no effect on Congress' overall ability to use the CRA to disapprove agency rules.

Also, GAO's major rule reports should be more transparent to Congress and the public, clearly laying out all of the information readers need to understand how and why GAO made its CRA compliance determinations. Specifically, GAO should indicate in each of its major rule reports (1) when Congress as a whole (i.e., the last chamber) received the rule at issue, (2) when the rule was published in the *Federal Register* (if it was published), and (3) when the rule is scheduled to take effect. One way in which this could be accomplished would be for GAO to establish a standard electronic template into which all three pieces of information would have to be provided before the report could be issued.