

United States Senate

WASHINGTON, DC 20510

February 27, 2013

Mr. Boris Bershteyn
Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Dear Mr. Bershteyn:

The Government Accountability Office (GAO) recently completed a report, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*.¹ This report studies how often agencies cite the “good cause” and other statutory exceptions to avoid publishing notices of proposed rulemakings (NPRMs) before they issue new rules. GAO found that agencies are using these exceptions more than ever before to issue major rules. This means that the public has a diminishing opportunity to both provide feedback, and have that feedback considered by the agency. This trend is particularly troubling since public input often helps agencies improve the rules and lower their costs.

As a result of its findings, GAO recommended that the Office of Management and Budget (OMB), in consultation with the Administrative Conference of the United States (ACUS), issue guidance to encourage agencies to respond to comments on major rules issued without NPRMs. We are disappointed to learn that you disagreed with GAO’s recommendation. Every year federal agencies write thousands of new regulations. In order to better serve the American people, agencies must have a consistent, transparent process for the public to respond. We therefore ask you to implement GAO’s recommendation.

Agencies are required to publish NPRMs in the ordinary course of rulemaking. This is a critical part of the rulemaking process. The publication of NPRMs ensures that the public is allowed to comment on proposed rules. Agencies are required to respond to those comments. In certain instances agencies may invoke the “good cause” or other statutory exceptions to issue rules without NPRMs. In limited circumstances, it can be appropriate for agencies to do so. However, rulemakings without NPRMs should not be common. This is particularly important in major rulemaking.

¹ U.S. Government Accountability Office, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-21 (Dec. 2012).

GAO found that approximately 18 percent of final major rules were published without NPRMs in 1998. This number nearly doubled by 2012. From 2003 through 2010, agencies invoked exceptions and did not publish NPRMs for approximately 35 percent of major rules and 44 percent of non-major rules. The largest number of major rules finalized without NPRMs occurred during the Obama Administration.

While GAO found that agencies sometimes sought comments after the fact on regulations previously issued without NPRMs, GAO also found agencies frequently failed to respond to these comments. This is an important concern because “courts have recognized that the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”²

GAO found that when agencies did respond to comments after rules were issued, they often made changes to the rules. In some instances, the changes resulted in less costly rules. When agencies fail to respond to comments they waste public resources expended in seeking and receiving comments. They also forgo potentially beneficial modifications to rules.

GAO determined that the public would benefit and the “quality and transparency” of rulemakings would improve if OMB directed agencies to respond to comments on major rules issued without NPRMs. GAO cautioned that agencies may otherwise “create the perception that they are making final decisions about the substance of major rules without considering data, views, or arguments submitted in public comments.”³ ACUS has previously recognized the importance of agency requests for and responses to public comments even after rules are finalized. According to GAO, “ACUS recommended that agencies request comments whenever they invoke ‘impracticable’ or ‘contrary to the public interest’ reasons under the good cause exemption and publish a responsive statement”⁴ Agencies have yet to implement this recommendation.

In response to GAO’s recommendation, you stated that agencies currently respond to such comments on a case-by-case, “discretionary” basis, and that you do not believe “a more general, undiscriminating policy . . . would offer *substantial* benefits”⁵ (emphasis added). GAO’s recommendation, however, is based on extensive research, and GAO has found that the benefits of implementing the recommendation would be substantial. Furthermore, GAO is not suggesting that OMB implement an undiscriminating policy. Rather, GAO recognized that OMB could develop guidance that maintains needed flexibility for agencies. We therefore respectfully request that you work with ACUS to implement GAO’s recommendation. This will help ensure the

² *Id.* at 26 (citing *Alabama Power Co. v. Costle*, 636 F.2d 323, 385 (D.C. Cir. 1979) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir.1977)).

³ *Id.* at 28.

⁴ *Id.* at 27.

⁵ Letter from Boris Bershteyn, Acting Administrator, Office of Information and Regulatory Affairs to Melissa Emrey-Arras, Acting Director, Strategic Issues, GAO, Dec. 13, 2012.

February 27, 2013

Page 3

public has a fair chance to comment on new rules and agencies better and more promptly identify when regulatory quality can be improved and regulatory costs lowered.

Sincerely,



Ron Johnson
Ranking Member
Subcommittee on Financial
and Contracting Oversight



Darrell Issa
Chairman
Committee on Oversight and
Government Reform



Bob Goodlatte
Chairman
Committee on the Judiciary

cc: The Hon. Elijah Cummings, Ranking Minority Member, Committee on Oversight
and Government Reform
The Hon. John Conyers, Jr., Ranking Minority Member, Committee on the
Judiciary
The Hon. Claire McCaskill, Chairman, Subcommittee on Financial and
Contracting Oversight