



January 2023

# FEDERAL RULEMAKING

Trends at the End of  
Presidents' Terms  
Remained Generally  
Consistent across  
Administrations

## Why GAO Did This Study

Federal agencies typically issue a larger number of rules during the transition from one presidential administration to the next, according to GAO's 2018 report on late-term rulemaking. Congress and individuals outside of the government have expressed concerns that these rules may be rushed through analytical and procedural rulemaking requirements. The CRA requires agencies to submit rules to Congress so it can review and possibly disapprove of rules before they become effective.

GAO was asked to compare final economically significant rules issued during the transition and nontransition periods of the Trump, Obama, Bush, and Clinton administrations. Among its objectives, this report assesses (1) the number of economically significant rules, their scope, and other indicators; and (2) agencies' reported compliance with procedural requirements for promulgating the rules.

GAO compared the results to data from prior administrations. To address these objectives, GAO reviewed the text of economically significant rules published in the *Federal Register* for the universe of all 131 economically significant final rules (generally those with a likely annual effect of \$100 million or more) published during transition and nontransition periods. It also compared Trump administration rules to the prior three administrations.

View [GAO-23-105510](#). For more information, contact Yvonne D. Jones, (202) 512-6806, [jonesy@gao.gov](mailto:jonesy@gao.gov)

## FEDERAL RULEMAKING

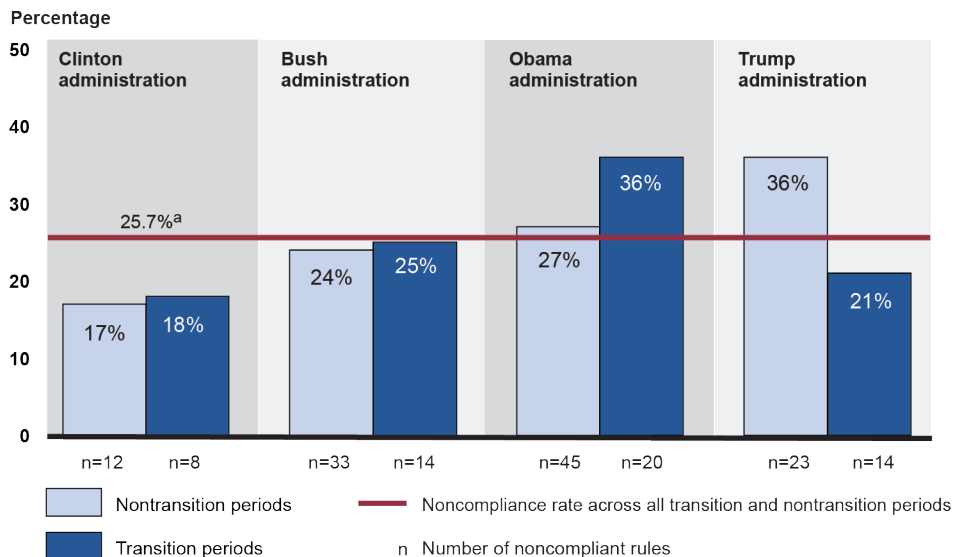
### Trends at the End of Presidents' Terms Remained Generally Consistent across Administrations

## What GAO Found

During the transition period at the end of the Trump administration, agencies published an average of roughly 3 times more economically significant rules than during its nontransition periods. After removing the 11 rules specifically related to the federal government's COVID-19 response, agencies published on average 2.6 times more economically significant rules during the Trump administration transition period. This is similar to the Clinton, Bush, and Obama administrations, when agencies published on average roughly 2.5 times more such rules in transition periods.

The Congressional Review Act (CRA) requires agencies to submit rules to Congress and to GAO, as well as to delay the effective date of certain rules to provide Congress an opportunity to review and possibly disapprove of rules before they become effective. Twenty-eight percent of the final economically significant rules issued during the Trump Administration (37 of 131) did not meet at least one timing requirement of the CRA or were not submitted to GAO or to Congress.

**Economically Significant Rules Determined to Be Noncompliant with the Congressional Review Act during the Past Four Administrations' Transition Periods**



Source: GAO analysis of published rules, GAO major rule reports, and the *Congressional Record*. | GAO-23-105510

While there was a decrease in noncompliance over the 4 years of the Trump administration, the average percent of noncompliance was almost 30 percent across those 4 years of the Trump administration. This number is comparable with the Clinton, Bush, and Obama administrations. To address noncompliance with the CRA, GAO previously recommended that the Office of Management and Budget (OMB) identify rules that appear at potential risk of not complying with the CRA's delay requirements, and then work with the agencies to ensure compliance with these requirements. In 2019, OMB issued a memorandum that emphasizes the 60-day delay requirement for such rules. While GAO observed a decrease in noncompliance over the Trump administration, opportunities remain for agencies to improve levels of CRA compliance.

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## Abbreviations

APA	Administrative Procedure Act
CFPB	Consumer Financial Protection Bureau
COVID-19	Coronavirus Disease 2019
CRA	Congressional Review Act
CRS	Congressional Research Service
E.O.	Executive Order
EPA	Environmental Protection Agency
FEMA	Federal Emergency Management Agency
HHS	Department of Health and Human Services
Interior	Department of the Interior
IRS	Internal Revenue Service
MOA	Memorandum of Agreement
NPRM	Notice of Proposed Rulemaking
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
PRA	Paperwork Reduction Act
RFA	Regulatory Flexibility Act
RISC	Regulatory Information Service Center
SBREFA	Small Business Regulatory Enforcement Fairness Act
Transportation	Department of Transportation
UMRA	Unfunded Mandates Reform Act of 1995
USDA	United States Department of Agriculture

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January 31, 2023

The Honorable Jamie Raskin  
Ranking Member  
Committee on Oversight and Accountability  
House of Representatives

The Honorable Gerald E. Connolly  
House of Representatives

Federal agencies typically issue a larger number of rules during the transition from the end of one presidential administration to the beginning of the next administration, according to prior studies and our previous work.<sup>1</sup> This phenomenon is sometimes referred to as “midnight rulemaking” by academic researchers, government organizations, and others.

Officials from outgoing administrations generally attribute this increased regulatory activity to agencies completing long-planned regulatory initiatives. However, some members of Congress and individuals outside of the government have expressed concerns that midnight rules may be rushed through the analytical and procedural processes agencies are expected to use. They are concerned that, as a result, agencies may potentially provide fewer opportunities for public input and rules may be less transparent and less thoroughly reviewed.

Party control of the White House changed during the presidential transitions in 2001, 2009, 2017, and 2021. During such transitions, the outgoing President and agencies may engage in midnight rulemaking because it may be difficult for the subsequent administration to change or eliminate rules after they have taken effect. Rulemaking is the means by which federal agencies establish legally binding requirements to implement laws passed by Congress. Agencies also use rulemaking to

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<sup>1</sup>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](#) (Washington, D.C.: Mar. 13, 2018); the Congressional Research Service, *Presidential Transitions: Midnight Rulemaking* (Washington, D.C.: Nov. 24, 2020); and Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285 (2013).

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achieve national goals, such as improving the economy and protecting the health and safety of the public and environment.<sup>2</sup>

You asked us to compare final economically significant rules issued during the transition and nontransition periods of the Trump, Obama, Bush, and Clinton administrations.<sup>3</sup> We previously assessed this for the Clinton, Bush, and Obama administrations. To assess midnight rulemaking during the Trump administration, we considered the 120-day period from September 23 through January 20 for each year of the Trump administration. Specifically, our objectives were to assess (1) the number, scope, and type of rulemaking procedures used for economically significant rules; (2) agency-reported compliance with analytical and procedural requirements, including the Congressional Review Act (CRA); and (3) the agency-reported projected economic impacts of the economically significant rules. For each of these objectives, we compared our results for the economically significant rules issued during the Trump administration to those issued under the Obama, Bush, and Clinton administrations.<sup>4</sup>

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<sup>2</sup>GAO, *Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent*, [GAO-14-714](#) (Washington, D.C.: Sept. 11, 2014).

<sup>3</sup>For the purposes of this report, we use the term “final rules” to refer to those rules issued by federal agencies and published in the *Federal Register* as final regulatory actions. We limited our review to final economically significant regulatory actions under Executive Order (E.O.) 12866. A subset of “significant regulatory actions,” economically significant regulatory actions are those that are likely to result in a rule that may have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. Other significant regulatory actions are those that are expected to have less than \$100 million in economic effects, but are likely to result in a regulation that may: (1) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (2) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (3) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the executive order. Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735, 51737 (Oct. 4, 1993).

<sup>4</sup>We assessed economically significant rules published in the *Federal Register* by executive agencies. For purposes of this review, executive agencies are those cabinet departments and other agencies that answer directly to the President and exclude the independent regulatory agencies. “Independent regulatory agencies” are the boards and commissions identified as such in the Paperwork Reduction Act, such as the Securities and Exchange Commission. 44 U.S.C. § 3502(5).

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To address our objectives, we identified final economically significant rules published by executive agencies during the relevant periods. We then reviewed them to collect information such as whether the final rule had published a prior notice of proposed rulemaking and the expected economic impacts as reported by the issuing agencies. To assess variations in agencies' compliance with procedural requirements and the anticipated economic effects of rules, we reviewed the published text of the rules and the reports on major rules that we prepared for Congress under the CRA. We reviewed agencies' reported compliance with procedural requirements for promulgating rules under five statutes—the CRA, the Regulatory Flexibility Act (RFA), the Paperwork Reduction Act (PRA), the Unfunded Mandates Reform Act of 1995 (UMRA), and the Small Business Regulatory Enforcement Fairness Act (SBREFA).<sup>5</sup> We compared our results for Trump administration rulemakings to our prior findings on Clinton, Bush, and Obama administration rulemakings. More information on our objectives, scope, and methodology is provided in appendix I.

We conducted this performance audit from October 2021 to January 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

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### Laws Governing Rulemaking

Congress and presidential administrations have developed multiple procedural and analytical requirements that agencies are required to comply with prior to issuing rules:

- **Administrative Procedure Act (APA).**<sup>6</sup> The APA established the basic framework of administrative law governing federal agency

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<sup>5</sup>Congressional Review Act, Pub. L. No. 104-121, tit. II, subtit. E, § 251, 110 Stat. 847, 868-875 (1996); Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980); Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980); Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995); Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, 110 Stat. 847, 857-874.

<sup>6</sup>Pub. L. No. 79-404, 60 Stat. 237, ch. 324, §§ 1-12 (1946), *codified as amended at* 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521.



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action, including rulemaking. Before promulgating a rule, agencies are generally required to publish a notice of proposed rulemaking (NPRM) in the *Federal Register* and take comments concerning the proposed rule. However, agencies may issue final rules without the use of an NPRM in certain cases. This includes when the agency determines for “good cause” that notice and comment procedures are “impracticable, unnecessary, or contrary to the public interest.”<sup>7</sup> Further, Congress sometimes enacts laws that direct an agency to issue rules without notice and comment.<sup>8</sup>

- **Regulatory Flexibility Act (RFA).**<sup>9</sup> The RFA was enacted in response to concerns about the effect that federal rules can have on small entities. The act requires agencies to consider the impact of their rules on small entities and to prepare regulatory flexibility analyses, unless the head of the agency certifies that the rule will not have a “significant economic impact upon a substantial number of small entities.”<sup>10</sup>
- **Paperwork Reduction Act (PRA).**<sup>11</sup> The PRA was enacted to help minimize the burden that federal information collections (e.g., forms, surveys, or questionnaires) impose on the public, while maximizing their public benefit. This act requires agencies to provide public notice, solicit comments, and request Office of Management and Budget (OMB) approval before imposing new information collection requirements.
- **Unfunded Mandates Reform Act of 1995 (UMRA).**<sup>12</sup> The UMRA was enacted to address concerns about federal statutes and rules that require nonfederal parties to expend resources to achieve legislative goals without being provided funding to cover the costs.

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<sup>7</sup>5 U.S.C. § 553(b)(3)(B).

<sup>8</sup>See, GAO, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, [GAO-13-21](#) (Washington, D.C.: Dec. 20, 2012).

<sup>9</sup>Pub. L. No. 96-354, 94 Stat. at 1164, *codified as amended at* 5 U.S.C. §§ 601-612.

<sup>10</sup>5 U.S.C. §§ 603-05.

<sup>11</sup>The PRA was originally enacted into law in 1980. Pub. L. No. 96-511, 94 Stat. at 2812, *codified as amended at* 44 U.S.C. §§ 3501-3520. It was reauthorized with minor amendments in 1986, and was reauthorized a second time with more significant changes in 1995, Pub. L. No. 99-591, tit. VIII, 100 Stat. 3341, 3341-335 (1986); Pub. L. No. 104-13, 109 Stat. 163 (1995).

<sup>12</sup>Pub. L. No. 104-4, 109 Stat. at 48, *codified in* scattered sections of Title 2 of the United States Code.

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This act generally requires federal agencies to prepare a written statement containing a “qualitative and quantitative assessment of the anticipated costs and benefits” for any rule that includes a federal mandate that may result in the expenditure of \$100 million or more in any one year by state, local, and tribal governments in the aggregate, or by the private sector.<sup>13</sup>

- **Small Business Regulatory Enforcement Fairness Act (SBREFA).**<sup>14</sup> Under SBREFA, the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau are required to convene Small Business Review Panels for rulemaking efforts that are expected to have a significant economic impact on a substantial number of small entities.<sup>15</sup> SBREFA intended to encourage the effective participation of small businesses in the federal regulatory process, among other things.
- **Congressional Review Act (CRA).**<sup>16</sup> The CRA was enacted to better ensure that Congress has an opportunity to review and possibly disapprove rules, in certain cases, before they become effective. It established expedited procedures by which Congress may disapprove agencies’ rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency’s action.<sup>17</sup> The CRA’s definition of a major rule is similar to Executive Order (E.O.) 12866’s criteria for economically significant rules. Generally, economically significant rules are

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<sup>13</sup>44 U.S.C. § 1532(a). The dollar thresholds in UMRA are in 1996 dollars and are adjusted annually for inflation.

<sup>14</sup>Pub. L. No. 104-121, tit. II, 110 Stat. at 867–868.

<sup>15</sup>The Dodd-Frank Wall Street Reform and Consumer Protection Act imposed the requirement for convening SBREFA panels on the Consumer Financial Protection Bureau, an independent regulatory agency not covered by this report. Pub. L. No. 111-203, tit. X, § 1100G, 124 Stat. 1376, 2112 (2010),

<sup>16</sup>Pub. L. No. 104-121, § 251, 110 Stat. at 868–874, *codified at* 5 U.S.C. §§ 801–808.

<sup>17</sup>The President may veto the joint resolution of disapproval and Congress could vote to override the veto. 5 U.S.C. § 801(a)(3)(B)-(C).

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classified for purposes of the CRA as major rules.<sup>18</sup> The CRA requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later, allowing Congress time to review these rules before they take effect.<sup>19</sup> This delay can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued (see fig. 1).<sup>20</sup>

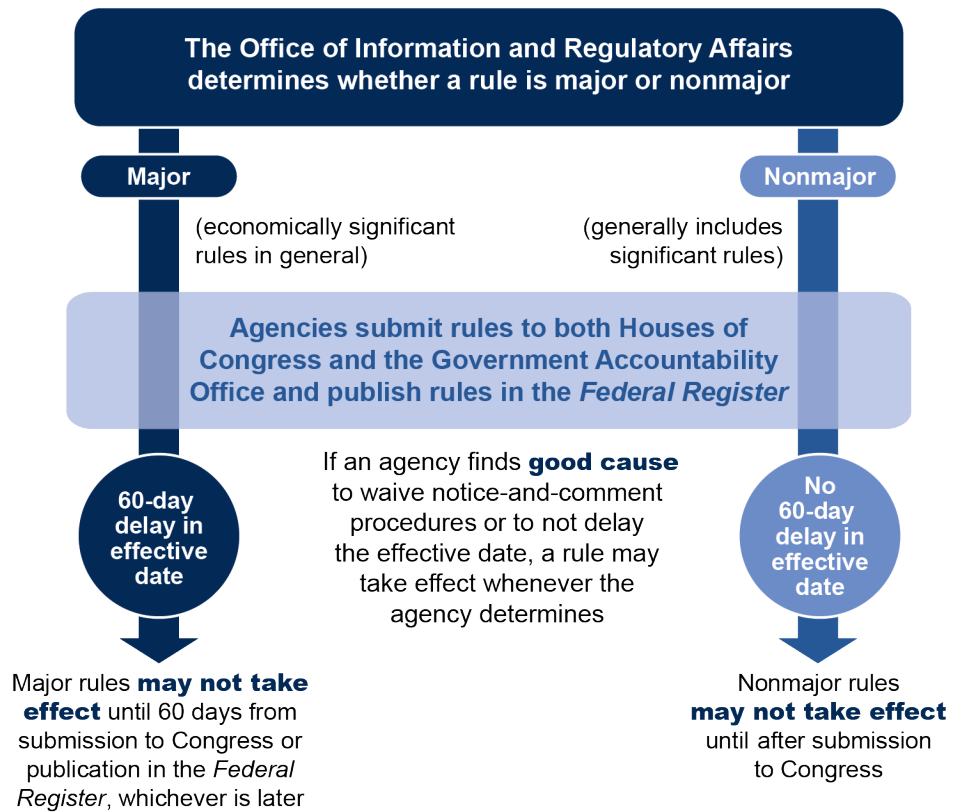
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<sup>18</sup>Major and economically significant rules are subject to the same \$100 million economic effect threshold, but vary in that the definition of major is broader than that of economically significant. Rules that may be designated as major under CRA but not economically significant under E.O. 12866 include those that would have a significant adverse effect on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Rules that may be designated as economically significant under E.O. 12866 but nonmajor under CRA include those that adversely affect in a material way the environment, and public health or safety. 5 U.S.C. § 804(2); Exec. Order No. 12866, § 3(f)(1).

<sup>19</sup>5 U.S.C. § 801(a)(3)(A).

<sup>20</sup>5 U.S.C. § 808(2).

**Figure 1: Delay in Effective Date Requirements under the CRA**



Source: GAO analysis of the Congressional Review Act and Administrative Procedure Act. | GAO-23-105510

Note: Generally, major rules are those with an annual effect on the economy of \$100 million or more. This is similar to the criteria for economically significant rules under Executive Order 12866. 5 U.S.C. § 804(2).

Agencies may claim “good cause” to waive requirements to publish proposed rules under the Administrative Procedures Act (APA) and “good cause” to waive the delay in effective date requirements for major rules

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under the Congressional Review Act (CRA). 5 U.S.C. §§ 553(b)(3)(B), (d)(3); 808(2).<sup>21</sup>

The CRA also requires us to provide Congress with reports on rules OMB's Office of Information and Regulatory Affairs (OIRA) determined to be major. These reports include our assessment of the issuing agency's compliance with the procedural steps required by various acts and executive orders governing the rulemaking process.<sup>22</sup> Figure 1 provides an overview of requirements under the CRA.

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## Executive Orders and Relevant Policies and Practices

Executive agencies must also follow requirements set in executive orders and related policies and practices:

- **Role of OIRA.** E.O. 12866, issued in 1993, authorized OIRA to review rules deemed significant. The Administrator of OIRA is responsible for providing meaningful guidance and oversight with respect to regulatory planning and review to the extent permitted by law. Further, the order states that OIRA is to be the repository of expertise concerning regulatory issues. It is also responsible for determining if a rule is major as defined by the CRA.<sup>23</sup>
- **Role of agencies and assessment of costs and benefits.** Under E.O. 12866, agencies are responsible for developing rules and assuring that the rules are consistent with applicable law. The order also requires agencies to prepare an agenda of all rules under development or review. For economically significant rules, E.O. 12866 requires agencies to provide to OIRA (unless prohibited by law) an assessment, including the underlying analysis, of the costs and benefits anticipated from the regulatory action and feasible

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<sup>21</sup>For purposes of this report, if an agency claimed "good cause" under the APA, we recognized the agency as claiming "good cause" to waive the delay in effective date requirements under the CRA as well. We recognize that agencies use varying terminology for claiming "good cause" for not delaying the effective date. If there was language that could potentially be interpreted as doing this, we removed these rules from further consideration as noncompliant, unless the agency failed to submit the rule to us. This is consistent with the current methodology we use in complying with reporting requirements under 5 U.S.C. § 801. Our 2018 review of compliance with the CRA only considered claims of "good cause" to waive the delay in effective date requirement that are relevant to CRA noncompliance.

<sup>22</sup>5 U.S.C. § 801(a)(2)(A).

<sup>23</sup>5 U.S.C. § 804(2). The CRA's definition of a major rule is similar to E.O. 12866's criteria for economically significant rules, and generally, economically significant rules are classified for purposes of the CRA as major rules.

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alternatives. Circular A-4, published in 2003, provides guidance to agencies on how to conduct the required analysis and directs agencies to estimate the costs and benefits of a rule as well as transfer payments that may result from the rule.<sup>24</sup> Rules primarily involving transfer payments redistribute income between parties, but generally do not result in direct economic benefits or costs. Often these transfers are payments from the government (taxpayers) to program beneficiaries, such as Medicare recipients.

- **Deregulatory actions.** E.O. 13771, issued in 2017, required that for every one new rule issued by agencies, at least two prior rules be identified for elimination.<sup>25</sup> E.O. 13771 stated that agencies should prudently manage and control the cost of planned rules through a budgeting process. This order was relevant to rulemaking activity throughout the Trump administration. It was revoked through E.O. 13992, issued on January 20, 2021.<sup>26</sup>
- **2018 Memorandum of Agreement between OIRA and the Department of the Treasury.** While OIRA review of significant rules produced by most executive agencies has been standard since 1981, we found in our prior work that certain tax rules were largely exempt from OIRA review as the result of a 1983 Memorandum of Agreement (MOA) between Treasury and OMB.<sup>27</sup> In 2016, we recommended that OMB and Treasury examine the relevance of this exemption and, if relevant, make publicly available any reaffirmation of the agreement and the reasons for it. In April 2018, Treasury and OIRA signed a new

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<sup>24</sup>With Circular A-4, OMB replaced both its guidance (2000) and best practices (1996) on how to conduct economic analysis. OMB Circular A-4, *Regulatory Analysis*, (September 2003).

<sup>25</sup>Exec. Order No. 13771, *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9339 (Feb. 3, 2017).

<sup>26</sup>Exec. Order No. 13992, *Revocation of Certain Executive Orders Concerning Federal Regulation*, 86 Fed. Reg. 7049 (Jan. 25, 2021).

<sup>27</sup>GAO, *Regulatory Guidance Processes: Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance*, [GAO-16-720](#) (Washington, D.C.: Sept. 6, 2016).

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MOA that, along with E.O. 12866, outlines the processes and requirements for OIRA review and analysis of tax regulatory actions.<sup>28</sup>

- **Regulatory flexibilities available to agencies.** Agencies can take a variety of actions to temporarily reduce regulatory burdens or constraints imposed on those affected by rules. These can include actions that modify regulatory standards themselves, as well as activities that modify their applicability. Regulatory flexibilities may be based on a range of legal authorities. Under these authorities, agencies may use several methods to implement flexibilities available to them. For example:
  - Notice-and-comment rulemaking. Agencies may use notice-and-comment rulemaking procedures to create new regulatory requirements and to modify or repeal existing rules.
  - Interim final rules. Agencies may issue different types of rules that vary from the notice-and-comment rulemaking process. This includes interim final rules, which go into effect without a prior notice if the agency finds that it has good cause to do so.
  - Guidance. Agencies may issue guidance documents to explain how they plan to interpret rules, address circumstances they could not have anticipated when issuing rules, or, when necessary, make additional clarifications. Guidance documents differ from rules in that they are not legally binding.<sup>29</sup>

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## Unique Circumstances of the Trump Transition Period

The circumstances of the Trump transition period differed from those of other recent administrations in several ways relevant to our analysis. First, the transition came at the end of one term, whereas Presidents Clinton, Bush, and Obama each had two terms. Agency officials under these administrations knew that these presidents would leave office after two terms, which may have created an incentive to finish rules before a new president, possibly from the other party, took office. While President Trump sought a second term, agency officials did not know if there would be a different president on January 20, 2021. This difference may have

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<sup>28</sup>Department of the Treasury and the Office of Management and Budget, *Memorandum of Agreement: Review of Tax Regulations under Executive Order 12866* (Washington, D.C.: Apr. 11, 2018). The MOA took effect immediately with a 12-month transition period for the additional analysis for economically significant rules. Under this agreement, some regulatory actions issued by Treasury remain exempt from review by OIRA under E.O. 12866. This includes rules concerning the review of transactions by the Committee on Foreign Investment in the United States.

<sup>29</sup>GAO, *COVID-19: Agencies Increased Use of Some Regulatory Flexibilities and Are Taking Steps to Assess Them*, [GAO-22-105047](#) (Washington, D.C.: June 23, 2022).

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affected rulemaking behavior during the transition year of the Trump administration by increasing the incentive for officials to issue rules after the election results became known.

Second, the Trump administration had to respond to the global COVID-19 pandemic during the transition period. Other presidential administrations experienced events that involved immediate regulatory responses, such as the financial crisis, which intensified in the Bush administration's transition period. However, the pandemic was an unprecedented event. The pandemic began during the Trump administration's final year in office and may have affected regulatory activity during the transition period while agencies' focused on responding to the pandemic.

Congress passed, and the president signed into law, six COVID-19 relief laws to address the public health and economic threats posed by COVID-19. As of March 2022, the six relief laws had provided a total of about \$4.6 trillion toward such efforts.<sup>30</sup> The Trump administration also issued an executive order directing agencies to aid the economic emergency by rescinding, modifying, waiving, or providing exemptions from rules and other requirements that may have inhibited economic recovery.<sup>31</sup>

Third, the January 6, 2021, attack on the U.S. Capitol may have affected the rulemaking process at the end of the Trump administration. Before a rule can take effect, the CRA requires agencies to submit a report to each House of Congress and to the Comptroller General containing (1) a copy of the rule, (2) a concise general statement relating to the rule (including whether it is a major rule), and (3) the proposed effective date of the rule.<sup>32</sup> While the CRA does not specify the manner by which agencies must deliver these 801(a) reports to Congress or the Comptroller General, the Administrative Conference of the United States has reported that congressional rules require that 801(a) reports be hand delivered to both chambers of Congress.<sup>33</sup> The attack disrupted typical Capitol operations on the day it occurred. This disruption, close to the end of the

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<sup>30</sup>[GAO-22-105047](#).

<sup>31</sup>Exec. Order No. 13924, *Regulatory Relief to Support the Economic Recovery*, 85 Fed. Reg. 31353 (May 22, 2020). President Biden subsequently revoked this executive order on February 24, 2021. Exec. Order No. 14018, *Revocation of Certain Presidential Actions*, 86 Fed. Reg. 11855 (Mar. 1, 2021).

<sup>32</sup>5 U.S.C. § 801(a)(1)(A).

<sup>33</sup>Administrative Conference of the United States, *Technical Reform of the Congressional Review Act* (Washington, D.C.: Oct. 21, 2021).



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transition period, may have made it more difficult for agencies to submit rules subject to the CRA to either chamber of Congress as required. This could have resulted in some agency rules being noncompliant with the CRA.

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## Agencies Published More Economically Significant Rules during the Transition Period with Less Opportunity for Public Participation

### Increased Rulemaking Trends Are Generally Consistent across Administrations

#### **Economically Significant and Other Significant Regulatory Actions**

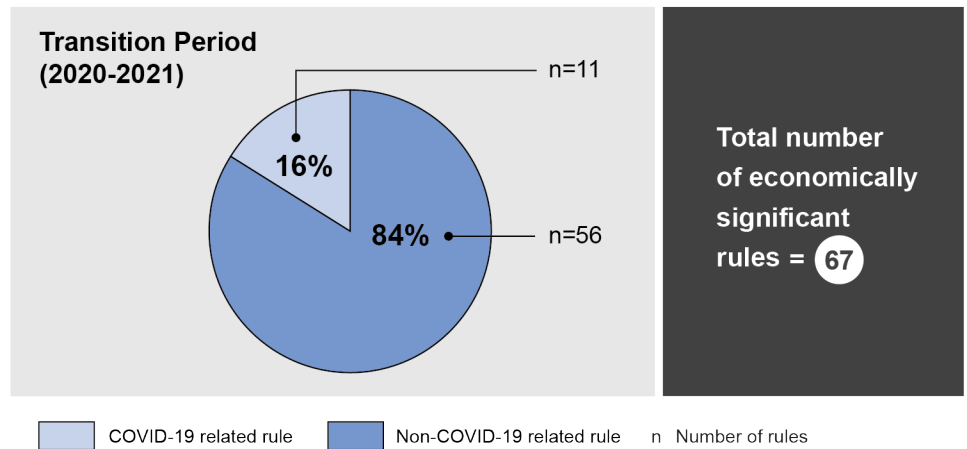
A subset of “significant regulatory actions,” economically significant regulatory actions are those that are likely to result in a rule that may have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.

Other significant regulatory actions are those that are likely to result in a rule that may: (1) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (2) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (3) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866.

Source: Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735, 51737 (Oct. 4, 1993). | GAO-23-105510

The Trump administration published a larger number of economically significant rules during its transition period (2020-2021) than during its nontransition periods. Of the 67 economically significant rules published during the last 120 days of the Trump administration, we identified 11 that were specifically related to pandemic response (see fig. 2).

**Figure 2: Portion of Economically Significant Rules Specifically Related to Pandemic Response**

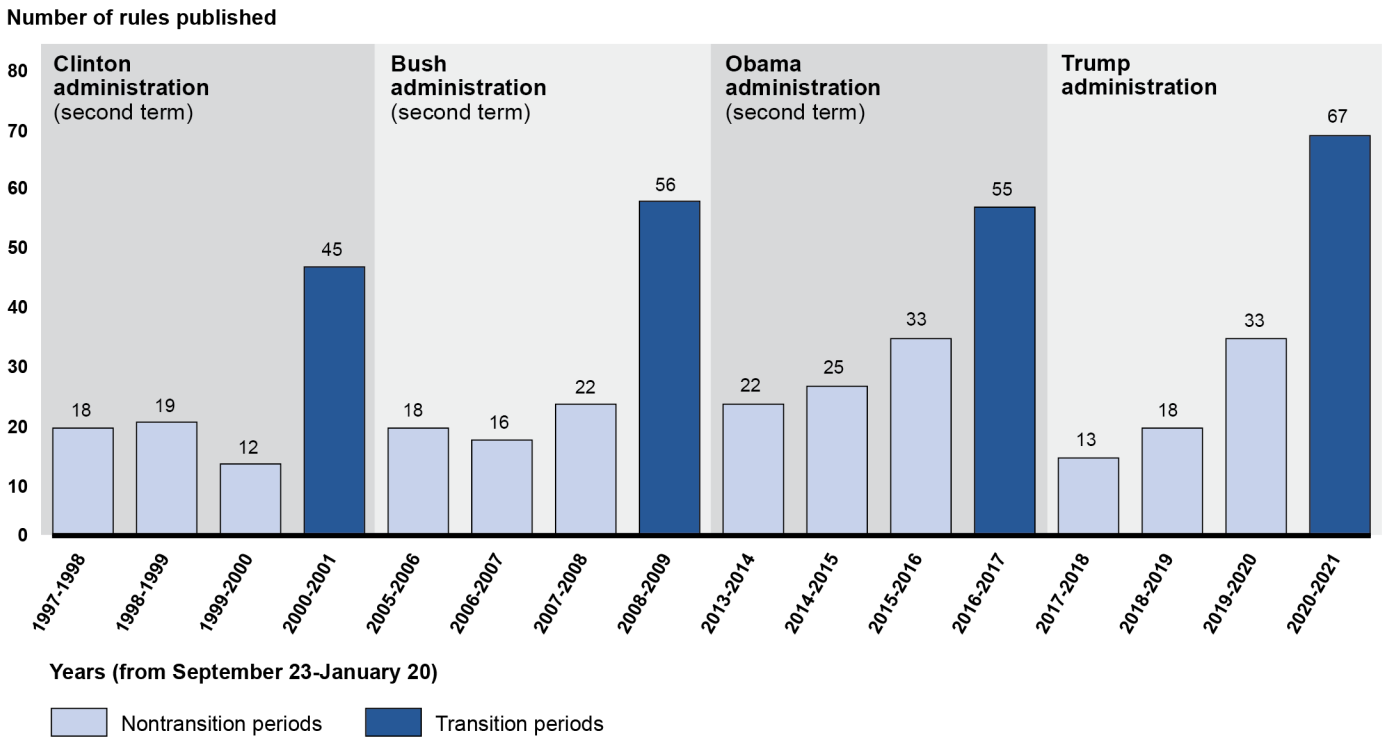


Source: GAO analysis of published rules and data from Reginfo.gov. | GAO-23-105510

Note: See Exec. Order No. 12866, § 3(f)(1) for the criteria for economically significant rules.

The administration published on average 3 times more economically significant rules during its final 120 days in office than it did during the same 120 days in the 3 years prior to the administration’s transition (see fig. 3). When we removed 11 rules specifically related to the COVID-19 response, we found that the Trump administration still published on average 2.6 times more economically significant rules during its final 120 days in office than it did during the same 120-day periods in nontransition years.

**Figure 3: Number of Economically Significant Rules Published in 3 Years Prior to and during Presidential Transitions, 1997-2021**



Source: GAO analysis of published rules. | GAO-23-105510

Note: The number of economically significant rules published during the 2020-2021 period includes 11 rules we identified as COVID-19-related rules. See Exec. Order No. 12866, § 3(f)(1) for the criteria for economically significant rules.

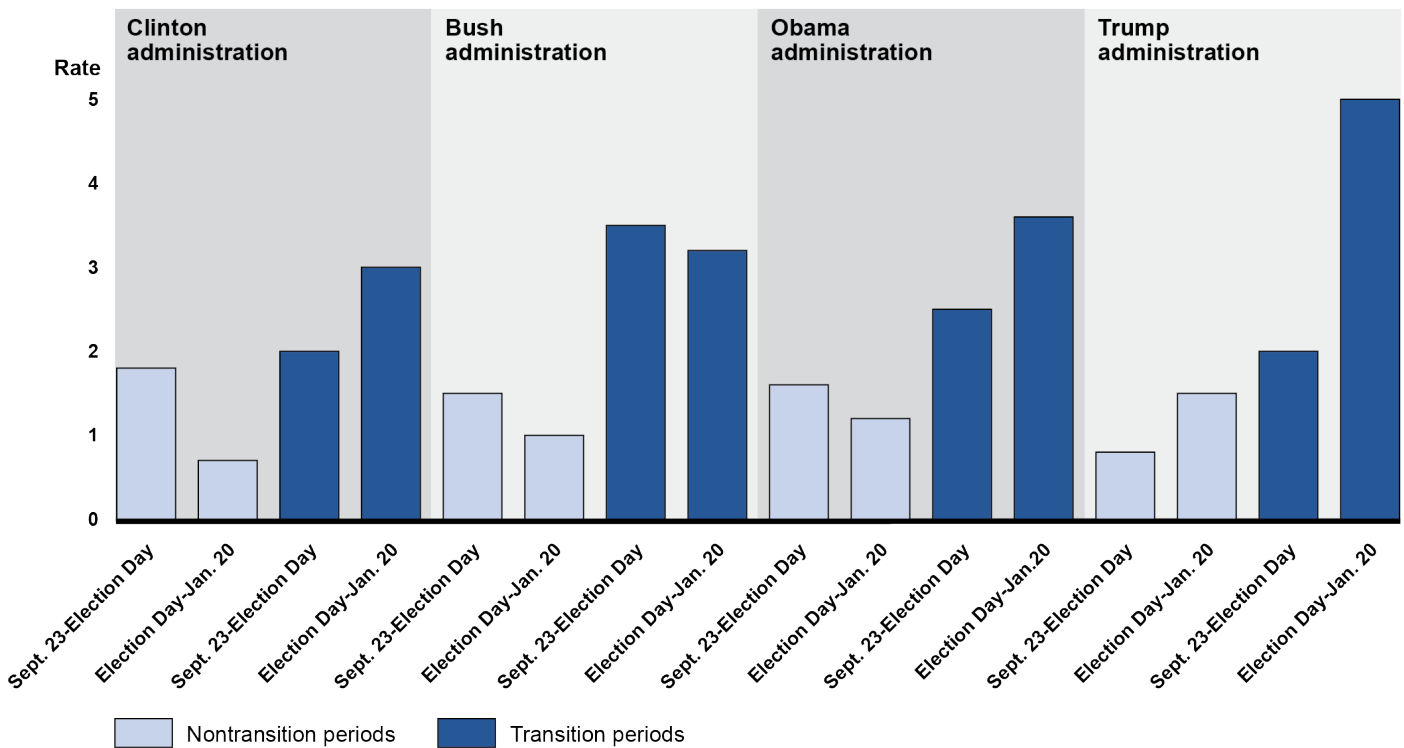
This is consistent with the prior three presidential administrations analyzed in our 2018 report on midnight rulemaking that showed increases in rulemakings during the transition years. In 2018, we reported that the Clinton, Bush, and Obama administrations published roughly 2.5 times more economically significant rules during their transition periods than they did during nontransition periods.<sup>34</sup>

We also examined the rates of rulemaking before and after Election Day in transition periods and compared them to rate changes before and after Election Day in nontransition years. Our analysis showed that within its transition period, the Trump administration increased its rate of economically significant rulemaking following the 2020 election, which

<sup>34</sup>GAO-18-183.

occurred on November 3, 2020 (see fig. 4). Of the 67 rules published during the transition period, 12 were published between September 23 and Election Day 2020. The remaining 55 were published following the 2020 election. If we removed the 11 COVID-19 rules from the transition year population, 10 of the remaining non-COVID-19 rules were published prior to the 2020 Election Day and 46 of the remaining non-COVID-19 rules were published after that Election Day.

**Figure 4: Weekly Rates of Economically Significant Rules Published before and after Election Day during Transition and Nontransition Periods**



Source: GAO analysis of published rules. | GAO-23-105510

Notes: We reviewed the date on which economically significant rules were published. We divided rules into two smaller categories: those published between September 23 and when the election occurred or would have occurred (federal elections only take place in even-numbered years) and those published between the election and January 20. We then took the total number of economically significant rules published during each of these smaller periods and divided it by the number of days to calculate the rate at which agencies were publishing rules. See Exec. Order No. 12866, § 3(f)(1) for the criteria for economically significant rules.

Our 2018 report on late-term rulemaking began its assessment period in 1996 in accord with the mandate that required that work. This figure represents all nontransition and transition years since 1996, including the first and second terms of the Bush and Obama administrations.

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In 2018, we reported that both the Clinton and Obama administrations also increased the rate of economically significant rulemakings following the 2000 and 2016 elections, respectively. By contrast, the Bush administration decreased the rate of economically rulemakings following the 2008 election.

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### Agencies Generally Provided Less Opportunity for Public Participation during the Transition Period

A concern regarding midnight rulemaking is that agencies may attempt to hastily promulgate rules during transition periods and provide less advance notice of forthcoming rules and fewer opportunities for the public to comment on proposed rules. In light of this concern regarding midnight rulemaking, we examined two indicators that provide perspective concerning the transparency of rulemakings and the related rulemaking procedures:

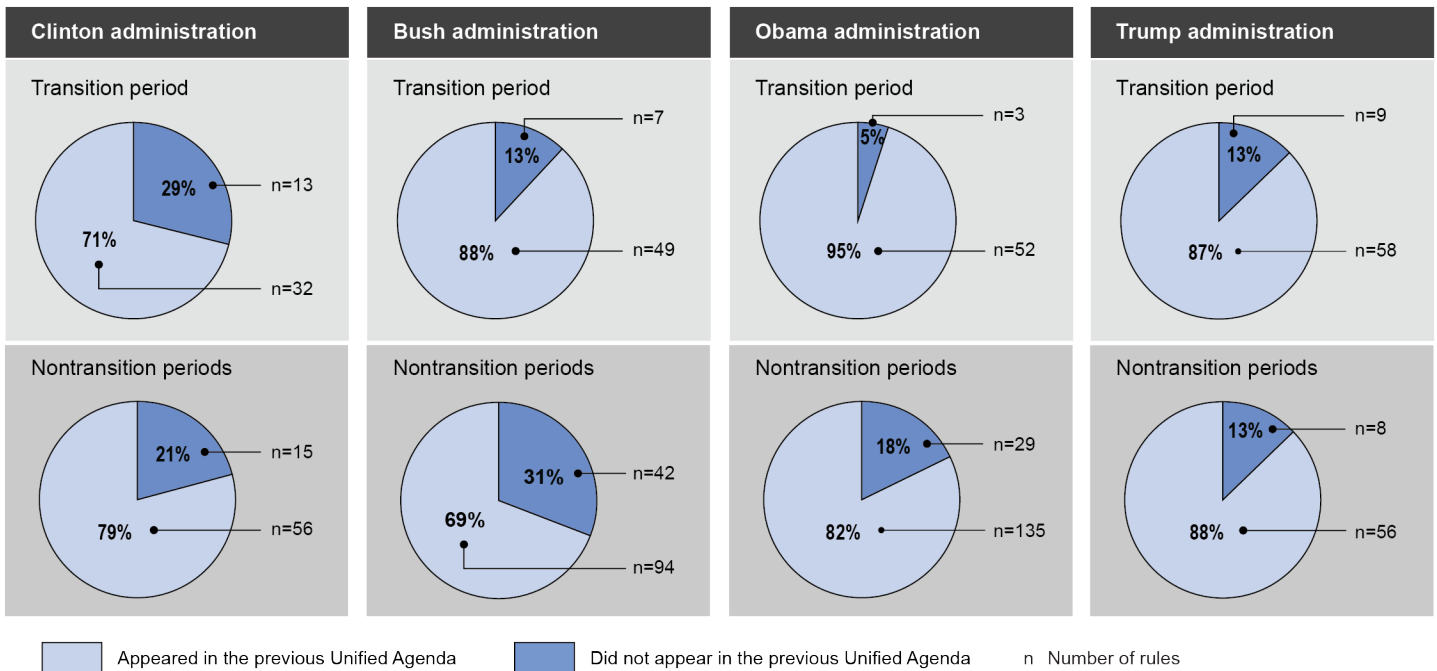
- We examined whether agencies advertised forthcoming rules in the previous spring's Unified Agenda. The semiannual Unified Agenda provides uniform reporting of data on those regulatory and deregulatory activities under development or review throughout the federal government. Inclusion in the previous spring's Unified Agenda would have provided the public with several months' notice before a final rule was published.<sup>35</sup>
- We also examined whether or not each final rule in our scope had been preceded by a notice of proposed rulemaking. A notice of proposed rulemaking may also be referred to as a proposed rule or proposed regulation. The notice and comment process gives the public the opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. Agencies need to respond to comments that, if true, would require a change to the agency's proposed rule. However, agencies do not need to respond to every comment or analyze every issue raised by comments.

The percentage of economically significant rules included in the spring Unified Agenda before the rules were issued remained approximately the same during the Trump transition period as opposed to the nontransition periods (see fig. 5). When we removed the 11 COVID-19 rules from our population, we found that the percentage of economically significant rules included in the previous spring's Unified Agenda increased to 93 percent during the Trump transition period.

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<sup>35</sup>The *Spring 2020 Unified Agenda of Federal Regulatory and Deregulatory Actions* was released on June 30, 2020.

**Figure 5: Percentage of Economically Significant Rules That Appeared in the Previous Spring’s Unified Agenda in Transition and Nontransition Periods of Recent Administrations**



Source: GAO analysis of published rules and data from Reginfo.gov. | GAO-23-105510

Notes: Because no Unified Agenda was published in spring 2012, we used the Unified Agenda published in the fall of 2011 as an indicator of advanced notice of the rules published during the 2012-2013 nontransition period. See Exec. Order No. 12866, § 3(f)(1) for the criteria for economically significant rules.

The number of rules published during the 2020-2021 period includes 11 rules we identified as COVID-19-related rules.

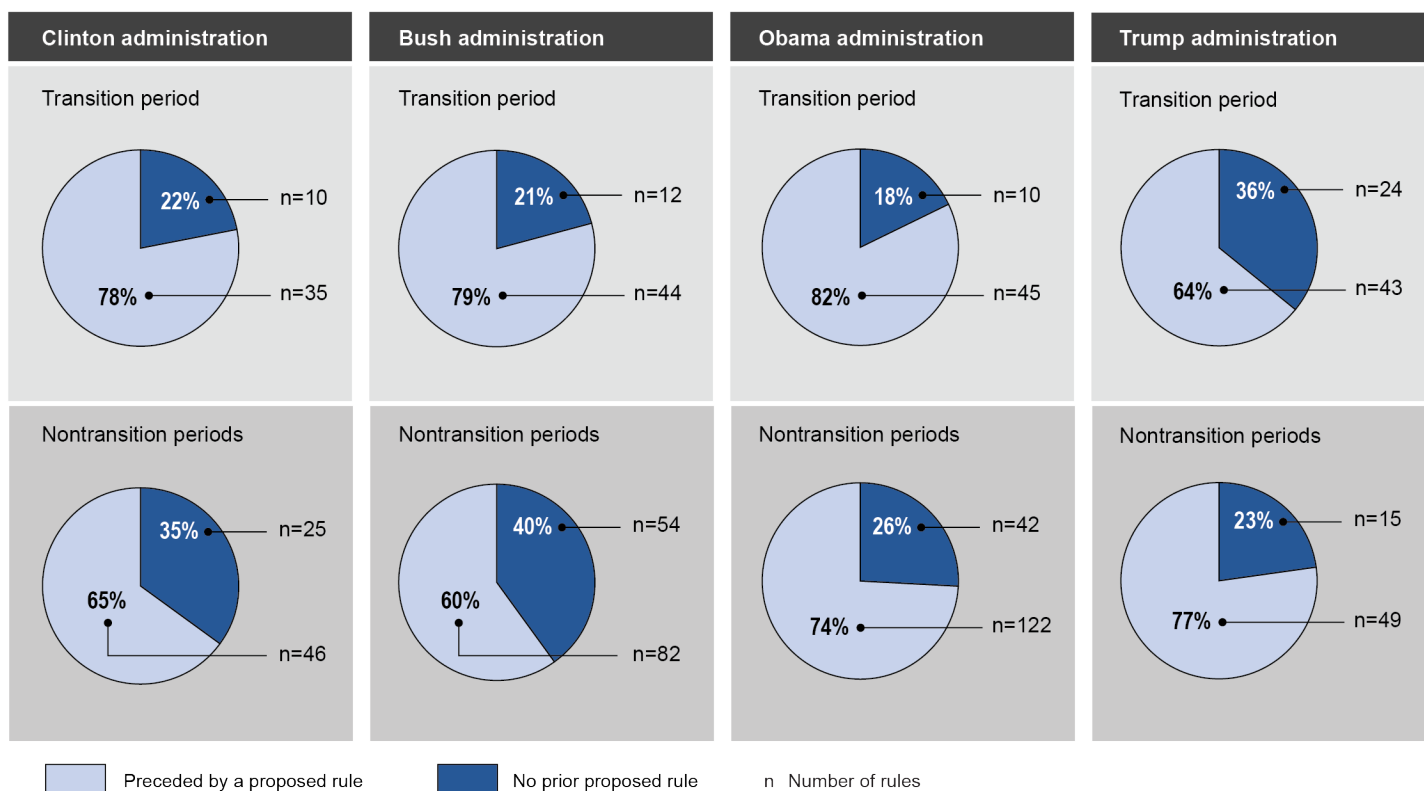
Some percentages do not add up to 100 percent due to rounding.

In 2018, we reported that a higher percentage of economically significant rules appeared in the previous spring’s Unified Agenda during the Bush and Obama transition periods compared to nontransition periods. The Clinton administration published a smaller percentage of rules in the Unified Agenda during its transition period compared to its nontransition periods. This percentage decreased because the Departments of Health and Human Services and the Interior did not enter four rules they typically update each year into the spring 2000 Unified Agenda pertaining to migratory bird hunting and Medicare.

We also found that economically significant final rules promulgated during the Trump administration’s transition period were less frequently

preceded by proposed rules. Sixty-four percent of rules published in this transition period were preceded by notices of proposed rulemaking. In nontransition periods, 77 percent of rules were preceded by notices of proposed rulemaking (see fig. 6). When we removed the 11 COVID-19 rules from the population, we found that 71 percent of transition period rules were preceded by notices of proposed rulemaking.

**Figure 6: Percentage of Economically Significant Rules Preceded by a Notice of Proposed Rulemaking in Transition and Nontransition Periods of Recent Administrations**



Source: GAO analysis of published rules. | GAO-23-105510

Notes: The number of rules published during the 2020-2021 period includes 11 rules we identified as COVID-19-related rules.

See Exec. Order No. 12866, § 3(f)(1) for the criteria for economically significant rules.

In 2018, we reported that economically significant rules promulgated during the transition periods of the Clinton, Bush, and Obama administrations were more often preceded by proposed rules than economically significant rules published during comparable periods earlier in these administrations. Since smaller percentages of rules published

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during the Trump administration’s transition period were preceded by notices of proposed rulemaking relative to nontransition years, the public may have had less opportunity to provide input during the development and review of these rules.

In June 2022, we reported that in light of the COVID-19 emergency, agencies have implemented methods with fewer procedural requirements than the typical notice-and-comment process, such as issuing interim final rules or guidance to address emerging needs.<sup>36</sup> Seven of the 11 rules related to the COVID-19 pandemic were interim final rules. This means that the agencies published the rules without a prior notice-and-comment period or publication of a proposed rule. However, interim final rules may contain requests for public comments, providing the public with an opportunity to offer input that could influence the final rule. Of the four remaining rules related to COVID-19, one was a temporary rule and three were final rules.<sup>37</sup>

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### The Department of Health and Human Services Promulgated the Largest Number of Economically Significant Rulemakings

During the Trump administration transition period of 2020-2021, the Department of Health and Human Services (HHS) published more economically significant rules than any other department. HHS published approximately one-third of the economically significant rules we reviewed across the 4 years of the Trump administration. It was also the most active agency during both the transition and nontransition periods (see table 1).

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<sup>36</sup>[GAO-22-105047](#).

<sup>37</sup>The APA permits agencies to issue final rules without publishing a notice of proposed rulemaking in certain cases, including when the agency determines for “good cause” that notice-and-comment procedures are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B). Legislation may also permit an agency to issue rules without first going through notice-and-comment procedures. One type of rule issued without a notice of proposed rulemaking is the interim final rule. These rules generally take effect immediately but can provide an opportunity for public comment after the rule’s issuance.



**Table 1: Agencies' Rulemakings during the Trump Administration (2017-2021)**

Department/Agency	Number of rules in nontransition periods	Percent of rules in nontransition periods	Number of rules in the transition period	Percent of rules in the transition period
All	64	100	67	100
Health and Human Services	27	42.2	18	26.9
Treasury	7	10.9	10	14.9
Labor	3	4.7	7	10.4
Agriculture	7	10.9	6	9
Joint <sup>a</sup>	2	3.1	5	7.5
Environmental Protection Agency	2	3.1	4	6
Homeland Security	0	0	4	6
Interior	1	1.6	3	4.5
Transportation	2	3.1	3	4.5
Commerce	1	1.6	2	3
Defense	1	1.6	2	3
Justice	1	1.6	1	1.5
Small Business Administration	0	0	1	1.5
Veterans Affairs	3	4.7	1	1.5
Energy	3	4.7	0	0
Education	3	4.7	0	0
Office of Personnel Management	1	1.6	0	0

Source: GAO analysis of published rules. | GAO-23-105510

<sup>a</sup>A joint rule is published by more than one agency.

In 2018, we reported that HHS had published the largest number of economically significant rules during the Clinton, Bush, and Obama administrations. For example, the Centers for Medicare & Medicaid Services typically publishes various rules describing reimbursement rates for medical providers serving Medicaid and Medicare patients.

Following HHS, the next three agencies publishing the most rules during the Trump transition period were the Departments of Agriculture, Labor, and the Treasury.

While the 2018 analysis did not include Treasury as one of the most active agencies across the Clinton, Bush, and Obama administrations, we found Treasury to be the second-most active agency across all periods of the Trump administration. Many of the Treasury rules included in our review were published by the Internal Revenue Service (IRS). Some of

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these rules were related to the implementation of the Tax Cuts and Jobs Act, which modified, added, or repealed sections of the U.S. tax code. The act was passed by Congress and signed into law during the Trump administration's first year in office.<sup>38</sup> IRS was also involved in pandemic-response initiatives.

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## Compliance with the Congressional Review Act Remains a Challenge for Federal Rulemaking Agencies

### More than a Quarter of Economically Significant Rules Did Not Comply with the Requirements of the Congressional Review Act

#### **Congressional Review Act Requirements**

The Congressional Review Act (CRA) requires agencies to submit rules to Congress and to us as well as to delay the effective date of certain rules to provide Congress an opportunity to review and possibly disapprove of rules before they become effective. Rules determined to be major under the CRA may not take effect until 60 days from submission to Congress or publication in the *Federal Register*, whichever is later. Nonmajor rules do not require this delay, but may not take effect until after submission to Congress.

Agencies may waive delay requirements if they find for good cause that the delay is impracticable, unnecessary, or contrary to the public interest, and incorporate a statement of the findings and reasons in the rule issued.

Source: GAO summary of the CRA. 5 U.S.C. §§ 801-808. | GAO-23-105510

We reviewed agencies' compliance with the Congressional Review Act (CRA) requirements to (1) provide the required delay between submission of the rule to Congress and to us and its effective date; (2) provide the required delay between publication of the rule and its effective date; and (3) submit the rule to Congress and to us. Our analysis determined that 37 of the 131 economically significant rules promulgated during relevant periods during the Trump administration, or 28 percent, did not meet at least one of these three requirements. This is generally consistent with

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<sup>38</sup>Pub. L. No. 115-97, 131 Stat. 2054 (2017).

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our 2018 review, when we found that a quarter of economically significant rules were noncompliant with at least one of these CRA requirements.

Consistent with the results of our 2018 analysis, we found that noncompliance for economically significant rules was primarily associated with agencies' failure to delay the effective date of their rules. We did not include in our count of noncompliant rules those for which the agency claimed "good cause" for not providing the required delays.<sup>39</sup> Agencies not submitting rules to Congress and to us accounted for a smaller proportion of the deficiencies. The 37 noncompliant economically significant rules in our study were noncompliant for the following reasons (a rule can have more than one deficiency):

- **Lack of delay between submission and effective date.** We identified 29 rules across all periods that did not provide the required delay between submission to Congress and to us and the effective date and did not claim good cause for not providing the delay. Seventeen of these noncompliant rules, or 59 percent, missed the deadline by more than 5 days. This differs from our 2018 report, in which we stated that 70 of 92, or 76 percent, of major rules that did not provide the required delay between submission of the rule to Congress and to us and the effective date missed the deadline by more than 5 days.
- **Lack of delay between publication and effective date.** We identified 18 rules that did not provide the required 60-day delay between publication in the *Federal Register* and the effective date nor claim good cause for not providing the delay.<sup>40</sup> Sixteen of these noncompliant rules, or 89 percent, missed the deadline by more than 5 days. This is more consistent with our findings in 2018 when we

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<sup>39</sup>Agencies may claim "good cause" to waive requirements to publish proposed rules under the APA and "good cause" to waive the delay in effective date requirements for major rules under the CRA. 5 U.S.C. §§ 553(b)(3)(B), (d)(3); 808(2). Agencies may waive notice and comment procedures or the delay in effective date for reasons such as a statutory or judicial deadline or an emergency situation requiring a rapid response. For purposes of this report, if an agency claimed "good cause" under the APA, we recognized the agency claiming "good cause" to waive the delay in effective date requirements under the CRA as well. This is consistent with the current methodology we use in complying with reporting requirements under 5 U.S.C. § 801. Our 2018 review of compliance with the CRA only considered claims of "good cause" to waive the delay in effective date requirement that are relevant to CRA noncompliance.

<sup>40</sup>The subtotals for these two deficiencies are larger than the total number of noncompliant rules because some noncompliant rules had both deficiencies.

reported that 62 of 74 rules, or 84 percent, missed the deadline by more than 5 days.

- **Not submitted.** Finally, we also identified six economically significant rules that were not submitted to us. Four of these were economically significant, but nonmajor.

In those instances where the agency made a good cause claim for a rule, we did not consider that rule to be noncompliant with the CRA, as long as it was submitted to Congress and to us. Of the 131 rules we reviewed, 47 made good cause claims.<sup>41</sup> Some agencies reported they had to make a rule effective immediately because of an emergency. We found that of the 11 rules related to pandemic response, good cause was claimed for 10 rules. For the 11th rule, the required delay between submission to us and publication and effective date was provided.

**Table 2: CRA Noncompliance of Economically Significant Rules Published by All Agencies in Transition and Nontransition Periods during the Trump Administration**

Period	17-18		18-19		19-20		20-21	
	N	Percent	N	Percent	N	Percent	N	Percent
Not identified as noncompliant	6	46	11	61	24	73	53	79
Noncompliant	7	54	7	39	9	27	14	21
<b>Total</b>	<b>13</b>	<b>100</b>	<b>18</b>	<b>100</b>	<b>33</b>	<b>100</b>	<b>67</b>	<b>100</b>

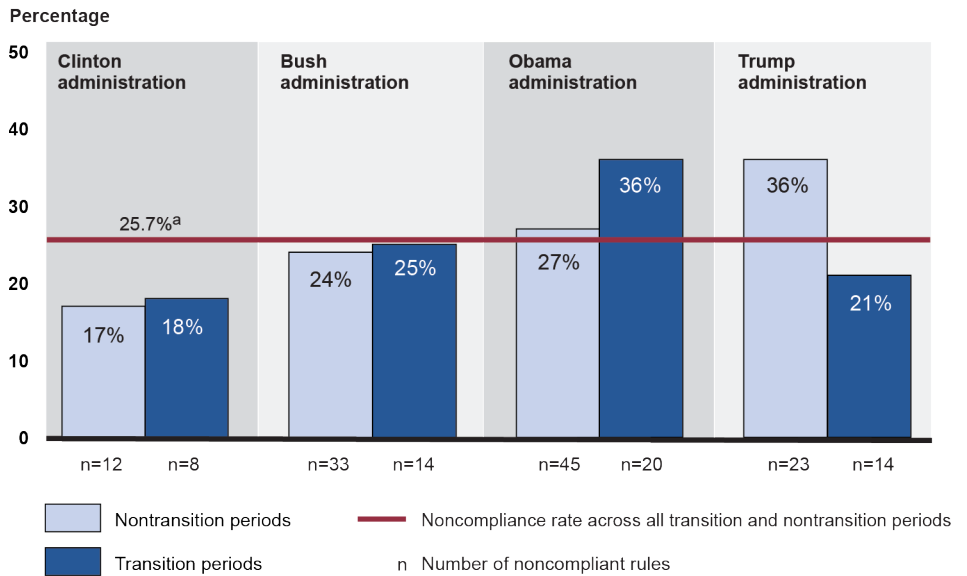
Source: GAO analysis of published final rules. | GAO-23-105510

Note: See Exec. Order No. 12866, § 3(f)(1) for the criteria for economically significant rules.

We found that the percentage of rules that were noncompliant with at least one of the three CRA requirements described above declined during the Trump transition period relative to the nontransition periods (see fig. 7). As table 2 indicates, throughout the Trump administration, the percentage of noncompliant rules decreased during each 120-day period relative to the immediately previous 120-day period.

<sup>41</sup>Two of these were noncompliant because they were not submitted to us or to Congress.

**Figure 7: Economically Significant Rules Determined to Be Noncompliant with the Congressional Review Act during the Past Four Administrations' Transition Periods**



Source: GAO analysis of published rules, GAO major rule reports, and the *Congressional Record*. | GAO-23-105510

Notes: Our 2018 report on late-term rulemaking began its assessment period in 1996 in accord with the mandate that required that work. This figure represents all nontransition and transition years since 1996, including the first and second terms of the Bush and Obama administrations.

See Exec. Order No. 12866, § 3(f)(1) for the criteria for economically significant rules.

<sup>a</sup>The noncompliance rate across all transition periods combined was 25.1 percent, compared to 26 percent during all nontransition periods combined.

This differs from 2018, when we observed higher rates of noncompliance during the transition periods of the Clinton, Bush, and Obama administrations.<sup>42</sup>

Although we observed a decrease in noncompliance over the 4 years of the Trump administration, the average percent of noncompliance in comparison to the previous presidential administrations has not

<sup>42</sup>We did not include in our count of noncompliant rules those for which the agency claimed “good cause.” Our 2018 review of compliance with the CRA only considered claims of “good cause” to waive the delay in effective date requirement that are relevant to CRA noncompliance. For the purposes of this report, we also considered “good cause” claims under the APA to waive the CRA delay in effective date requirement. We recognize that agencies use varying terminology for claiming “good cause” for not delaying the effective date. If there was language that could potentially be interpreted as doing this, we removed these rules from further consideration as noncompliant, unless the agency failed to submit the rule to us. This is consistent with our current methodology reporting under 5 U.S.C. § 801.

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significantly changed. We found that the percentage of noncompliance remained at an average of almost 30 percent across those 4 years of the Trump administration, which is consistent with our findings in 2018.

To address noncompliance with the CRA, we previously recommended that the Director of OMB ensure that Office of Information and Regulatory Affairs (OIRA) staff examine the planned time frames for implementing economically significant rules or major rules and identify rules that appear at potential risk of not complying with the Congressional Review Act's delay requirements, as part of the regulatory review process and then work with the agencies to ensure compliance with these requirements.<sup>43</sup> In 2019, OMB issued a guidance memorandum on compliance with the CRA to agencies that explains the process OIRA uses to determine if a rule is major and emphasizes the 60-day delay requirement for such rules.<sup>44</sup> While we observed a decrease in noncompliance during the Trump administration, opportunities remain for agencies to take actions to improve levels of CRA compliance.

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### Agencies Generally Indicated Compliance with Other Procedural Requirements

We also reviewed information agencies reported to the public about their compliance with four other procedural requirements for promulgating rules: the Regulatory Flexibility Act (RFA), the Paperwork Reduction Act (PRA), the Unfunded Mandates Reform Act (UMRA), and the Small Business Regulatory Enforcement Fairness Act (SBREFA). For these requirements, agencies reported high rates of compliance in published rules.

**Regulatory Flexibility Act, Paperwork Reduction Act, and the Unfunded Mandates Reform Act of 1995:** We found that 94 percent of economically significant rules across all periods of the Trump administration explained to the public the determinations the agencies made regarding these three procedural requirements. For the nontransition periods combined, 91 percent explained their determinations for all three of these requirements. For the transition year, 97 percent explained their determinations for all three requirements. This is consistent with our findings from 2018, when we reported that 91 percent of the economically significant rules across all periods provided

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<sup>43</sup>[GAO-18-183](#).

<sup>44</sup>Office of Management and Budget, *Guidance on Compliance with the Congressional Review Act*, M-19-14 (Apr. 11, 2019).

explanations of their determinations regarding these requirements to the public.

For the rules that did contain explanations of these requirements, agencies indicated that larger percentages of economically significant rules published during the transition period were not subject to the RFA, the PRA, and the UMRA relative to those published during the nontransition periods.<sup>45</sup> For example, agencies stated that 21 percent of transition period rules were not subject to the RFA, 19 percent of transition period rules were not subject to the UMRA, and 12 percent of transition period rules were not subject to the PRA. The percentages of rules for which the agency stated the rule was not subject to each of these requirements was less than 10 for nontransition periods.

**Table 3: Percent of Economically Significant Rules that Agencies Stated Were Not Subject to These Procedural Requirements during the Trump Transition and Nontransition Periods**

	<b>Percent of rules that stated they were not subject to the Regulatory Flexibility Act</b>	<b>Percent of rules that stated they were not subject to the Unfunded Mandates Reform Act</b>	<b>Percent of rules that stated they were not subject to the Paperwork Reduction Act</b>
Transition period (2020-2021)	21	19	12
Average across Trump nontransition periods (2017-2018, 2018-2019, 2019-2020)	8	3	8

Source: GAO analysis of published rules. | GAO-23-105510

Note: See Exec. Order No. 12866, § 3(f)(1) for the criteria for economically significant rules.

This may reflect the effects of the COVID-19 pandemic. In 2022, we reported that agencies told us they used methods to implement regulatory flexibilities, such as waiving notice of proposed rule requirements, to publish rules quickly in response to the emergency.<sup>46</sup> For example, several of the COVID-19 rules published in the 2020-2021 period stated they were not subject to the RFA because they were exempt from notice and comment procedures.

<sup>45</sup>Stating that a rule is not subject to one of the procedural requirements is not an instance of noncompliance with the requirement. Agencies are permitted to conclude that their rules are not subject to requirements in certain cases. We considered cases in which the agency did not address a requirement in the rule to be noncompliant.

<sup>46</sup>[GAO-22-105047](#).

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Aside from the increase in the percentage of rules for which the agency stated the rule was not subject to one of the RFA, the PRA, or the UMRA during the transition period, we did not observe any notable patterns in agency responses concerning these procedural requirements. In 2018, the percentage of rules that the agencies determined were not subject to various requirements did not vary largely or uniformly between nontransition and transition periods.

**Small Business Regulatory Enforcement Fairness Act.** Only two economically significant rules we reviewed were subject to SBREFA requirements. The Environmental Protection Agency (EPA) reported holding small business review panels for these two rules. We confirmed that the proceedings of both of these panels had been documented. The Occupational Safety and Health Administration (OSHA) and the Consumer Financial Protection Bureau (CFPB) are also required to convene SBREFA panels for rulemaking efforts expected to have a significant economic impact on a substantial number of small entities. However, we did not identify any OSHA rules in our review and CFPB was outside the scope of our review.

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## Office of Management and Budget Review Times Decreased during the Trump Transition Period

### The Office of Information and Regulatory Affairs Reviews Significant Regulatory Actions

Under Executive Order 12866, agencies are expected to submit regulatory actions deemed significant to OIRA for review.

Source: Exec. Order No. 12866. | GAO-23-105510

Nearly all rules we reviewed had been reviewed by OIRA. For a small number of economically significant rules (12 across all periods), we could not find evidence that OIRA reviewed the rule. However, the absence of evidence on Reginfo.gov does not necessarily mean that OIRA did not review those rules. It may instead indicate that the review dates were not entered into Reginfo.gov.<sup>47</sup> Our analysis of Trump administration rules indicate the median length of time it took OIRA to complete its review during the transition and nontransition periods for all four periods was less

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<sup>47</sup>Two of these are Treasury rules that stated they were not subject to OIRA review due to the foreign affairs exemption under E.O. 12866. Nine of the remaining 10 are rules related to the application of Medicare formulas. The tenth is related to the application of Medicaid formulas.



than 45 days.<sup>48</sup> The transition year also included the highest percentage of economically significant rules that were reviewed in less than 45 days (see table 3).

**Table 4: Number and Percentage of Rules by OMB Review Days**

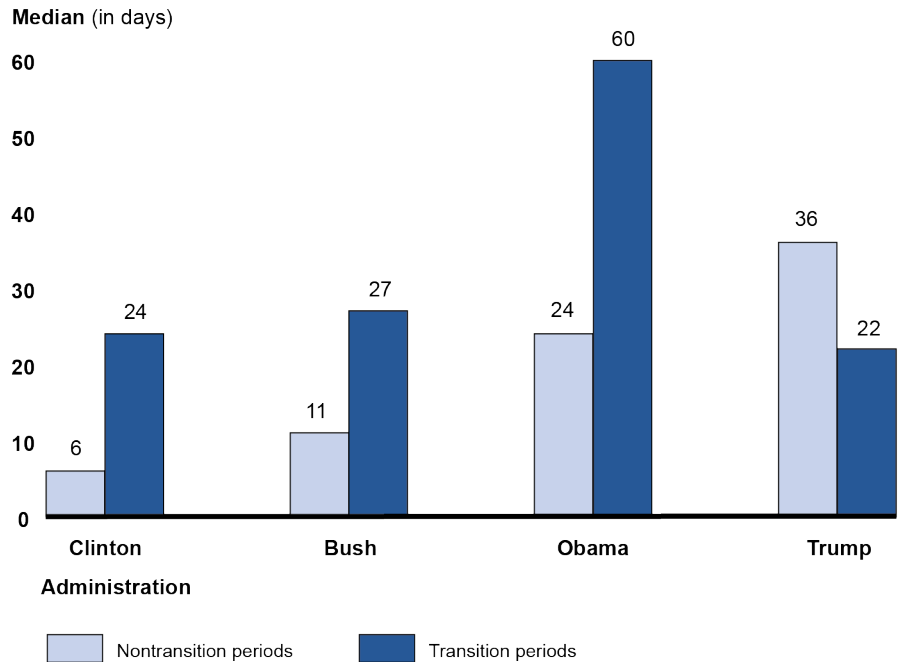
Period	0-45 days (Number)	0-45 days (Percent)	46-90 days (Number)	46-90 days (Percent)	More than 90 days (Number)	More than 90 days (Percent)	Missing record of review (Number)	Missing record of review (Percent)
17-18	8	62	1	8	1	8	3	23
18-19	10	56	4	22	2	11	2	11
19-20	16	48	9	27	4	12	4	12
20-21	46	69	7	10	10	15	4	6

Source: GAO review of rules. | GAO-23-105510

This is in contrast to what we reported in 2018. Our 2018 review found that the median length of OIRA’s review increased for economically significant rules during each transition (see fig. 8).

<sup>48</sup>Under E.O. 12866, OIRA is required to complete its review of significant rules within 90 days. If OIRA has already reviewed the rule and there have been no material changes to the rule, it is required to review the rule within 45 days. Further, the review process may be extended once by no more than 30 calendar days.

**Figure 8: Median Length of OIRA Review (in Days) of Draft Final Economically Significant Rules Published during Specified Transition and Nontransition Periods, 1996-2021**



Source: GAO analysis of data from Reginfo.gov. | GAO-23-105510

Note: See Exec. Order No. 12866, § 3(f)(1) for the criteria for economically significant rules.

Some have expressed the concern that a shorter review period could indicate lower-quality or less-thorough reviews. However, longer review times do not necessarily imply higher-quality reviews. OIRA told us that review times are affected by a number of factors. These factors include the complexity of the regulatory action, the economic significance and scope of public impacts, the need for interagency coordination, urgency, and the agency’s timeline for completion of the regulatory action. OIRA also noted that it is not unusual for agencies to prioritize the completion of pending rules during transition periods. For example, as noted, we also observed a larger number of rules from Treasury than the 2018 review did. To ensure timely implementation of the Tax Cuts and Jobs Act, Treasury and OIRA agreed to an expedited review timeline of less than 10 days for certain tax regulatory actions. This may have affected timelines.

In addition, we identified four rules published during the transition period that stated OIRA had waived review of the rule. OIRA staff told us they

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were unable to discuss the decision to waive the four rules we identified. However, in general, after receiving a waiver request, OIRA weighs the implications of not requiring compliance with the analytical requirements contained in the relevant sections of E.O. 12866. These sections include a number of requirements for significant regulatory actions, including that agencies provide a description of the need for a regulatory action and a description of how the regulatory action will meet that need and an analysis of costs and benefits for economically significant regulatory actions. We also reviewed a small number of rules that agencies claimed were not subject to E.O. 12866 review. Two of these, promulgated by Treasury, cited the foreign affairs exclusion included in E.O. 12866 as well as a provision in the memorandum of agreement between Treasury and OMB.

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## Agencies Generally Anticipated More Transition Period Rules Would Have Economic and Social Benefits and Costs Relative to Nontransition Period Rules

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### Agencies Promulgated a Larger Percentage of Economically Significant Rules Intended to Address Social Issues during the Transition Period

#### **Executive Order 12866 Economic Impact Assessments**

E.O. 12866 states that for economically significant regulatory actions, agencies should assess both the costs and the benefits of the regulatory action to the extent possible.

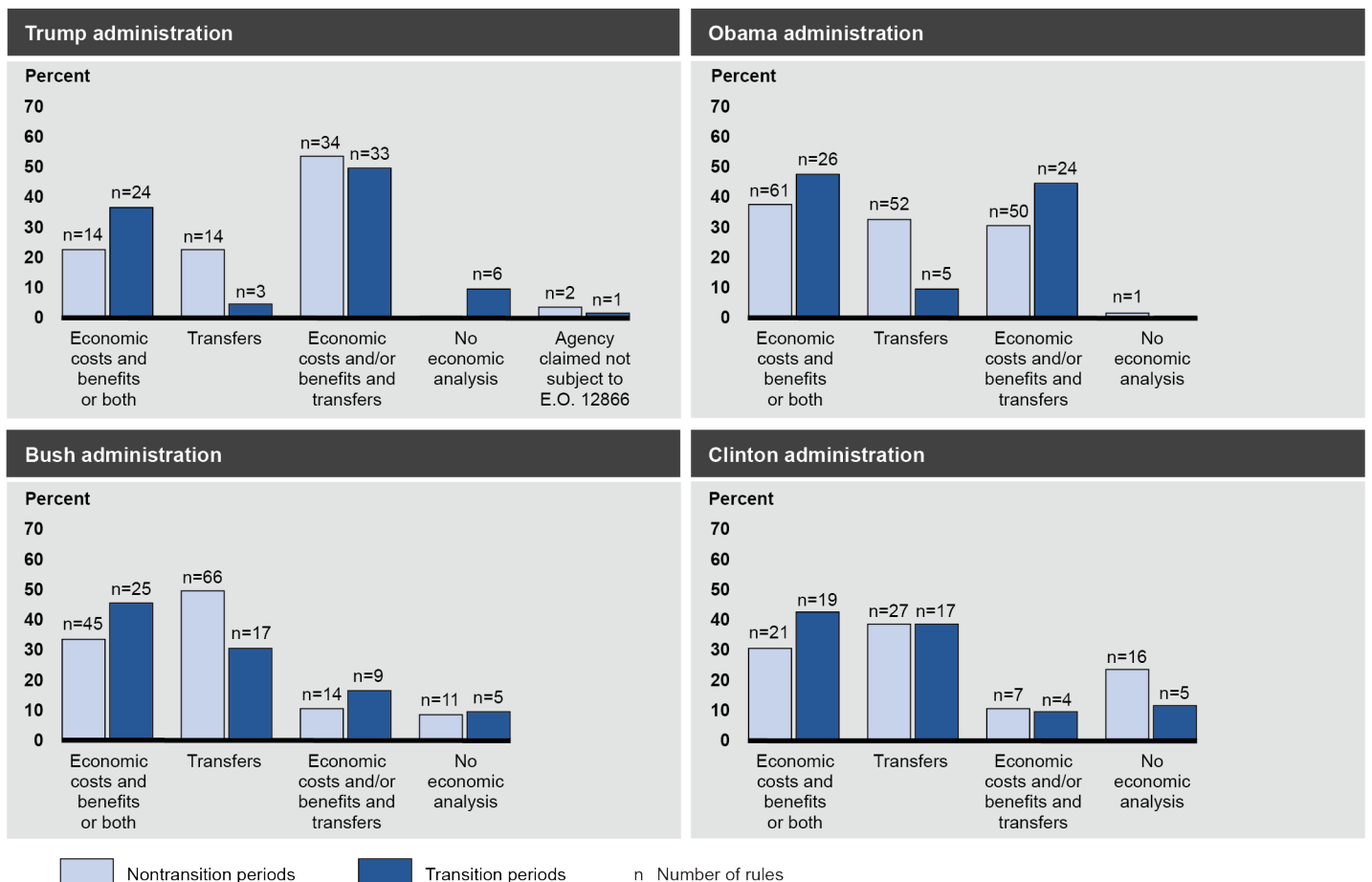
Source: GAO summary of Exec. Order No. 12866 requirements. | GAO-23-105510

We found that economically significant rules published during the most recent transition period were more likely to include qualitative and quantitative estimates of economic and social costs and benefits than those published during the nontransition periods of the administration. We also found that agencies were generally less likely to report that

economically significant rules published during this transition period would result only in transfers of income between entities, relative to the nontransition periods of the administration.

We used information provided in the published rules or impact analyses about the anticipated costs, benefits, or transfers associated with each rule to divide the 131 economically significant rules in our study into one of five categories (see fig. 9). We considered qualitative and quantitative descriptions of expected costs, benefits, and transfers when categorizing rules.

**Figure 9: Anticipated Economic Impacts Reported for Economically Significant Rules Published during the Past Four Administrations**



Source: GAO analysis of published rules. | GAO-23-105510

Note: See Exec. Order No. 12866, § 3(f)(1) for the criteria for economically significant rules.

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**Expected costs, benefits, or both.** For 38 of the 131 economically significant rules (29 percent), agencies expected costs or benefits or both to result from the rule and did not mention transfer payments. We have previously reported that rules typically require a desired action or prohibit certain actions by regulated parties.<sup>49</sup> Such requirements may impose costs on private-sector parties, such as businesses and individuals, and may also benefit society as a whole. For example, during the Trump transition period, EPA promulgated a rule requiring community water systems to conduct lead-in-drinking-water tests and public education in schools and childcare facilities.<sup>50</sup> EPA anticipated that the rules would impose costs related to sampling and lead service line replacements and generate benefits in terms of children’s neurological health. Department of Energy rules setting standards under the Energy Conservation Program also fell into this category.

**Transfers.** For 17 of the 131 economically significant rules (or 13 percent), agencies expected transfers to result from the rule and made no mention of either costs or benefits. Most of the rules involving only transfer payments that we reviewed were Department of Health and Human Services (HHS) rules related to the Medicare and Medicaid programs. For example, annual rules establishing deductible and coinsurance amounts for particular years fell into this category. While these payments change the medical costs for participants in these programs, they do not change aggregate social welfare. OMB Circular A-4 directs agencies not to misclassify transfers as costs or benefits.

**Combination of economic costs, benefits, or transfers.** For 67 of the 131 economically significant rules (or 51 percent), agencies expected both transfers and either costs, benefits, or both to occur. Examples we reviewed included Treasury rules associated with implementing provisions of the Tax Cuts and Jobs Act, such as a rules related to investing in qualified opportunity funds. Rules associated with a number of U.S. Department of Agriculture programs, such as the Conservation Stewardship Program and the Environmental Quality Incentives Program, also fell into this category. We assigned some rules to this category that described significant qualitative costs or benefits associated with the

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<sup>49</sup>GAO, *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, [GAO-14-268](#) (Washington, D.C.: Apr. 11, 2014).

<sup>50</sup>*National Primary Drinking Water Regulations: Lead and Copper Rule Revisions*, 86 Fed. Reg. 4198 (Jan. 15, 2021).

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rules, although OIRA identified them as involving only transfer payments. For example, a Department of Commerce rule setting and adjusting patent fees during fiscal year 2017 stated that in addition to transfer payments, the department's analysis found that the final rule has significant qualitative benefits with no identified costs.<sup>51</sup> In addition, we also assigned a number of rules that primarily involved transfer payments, but identified anticipated costs associated with reviewing the rule or other administrative items to this category, even if those costs were not substantial. For example, an HHS rule revising payment policies shows that the primarily economic impacts associated with the rule will be transfers, but also identifies some costs, including those associated with regulatory familiarization.<sup>52</sup>

**No economic analysis.** For six of the 131 economically significant rules (or 5 percent), agencies provided no economic analysis. Five of these were related to the federal COVID-19 response. E.O. 12866 contains a provision allowing flexibilities related to cost and benefit assessments when emergencies require the agency to act more quickly than normal procedures allow. For example, the Federal Emergency Management Agency (FEMA) issued a temporary final rule extending and modifying an earlier rule preventing the export of certain health and medical resources, such as personal protective equipment from the U.S., without explicit FEMA approval. Citing the emergency provision of E.O. 12866, FEMA did not assess costs and benefits of the temporary final rule.<sup>53</sup>

**Not subject to E.O. 12866.** For three of the 131 economically significant rules (or 2 percent), agencies stated they were not subject to the requirements of E.O. 12866. For two of these rules, Treasury cited a provision of the executive order exempting rules relating to a foreign

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<sup>51</sup>*Setting and Adjusting Patent Fees During Fiscal Year 2017*, 82 Fed. Reg. 52780 (Nov. 14, 2017).

<sup>52</sup>*Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2018; Medicare Shared Savings Program Requirements; and Medicare Diabetes Prevention Program* 82, Fed. Reg. 52976 (Nov. 15, 2017).

<sup>53</sup>*Prioritization and Allocation of Certain Scarce and Critical Health and Medical Resources for Domestic Use*, 85 Fed. Reg. 86835 (Dec. 31, 2020).

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affairs function of the U.S.<sup>54</sup> The rules did not contain statements concerning economic significance or economic analyses. The third rule was from the Department of Interior (Interior), removing the gray wolf from the endangered and threatened species list.<sup>55</sup> The rule does not mention E.O. 12866. Also, when Interior submitted the rule to us, it said it considered an economic analysis under the order to be nonapplicable.<sup>56</sup>

When we compared the reported effects between the Trump transition period and nontransition periods earlier in the administration, we found that agencies reported that economically significant rules published during the transition period were more likely to result in costs and benefits to society than those published during nontransition periods. This is consistent with the results of our 2018 analysis of Clinton, Bush, and Obama administration rulemaking during transition and nontransition periods.

Rules that involved various combinations of costs, benefits, and transfers became a smaller proportion of rules published during the Trump transition period, as opposed to nontransition periods during the Trump administration. This differs from our findings for the Bush and Obama administrations.

Rules involving only transfers became a smaller proportion of the economically significant rules published during the Trump transition period, also consistent with the Bush and Obama administrations. Many transfer payments we reviewed were regulatory actions HHS publishes annually stating how much the government will pay for Medicare and Medicaid services.

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## Agency Comments

We provided a draft of this report to the Office of Management and Budget for review and comment. OMB provided technical comments, which we incorporated as appropriate.

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<sup>54</sup>*Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States*, 85 Fed. Reg. 3158 (Jan. 17, 2020); and *Provisions Pertaining to Certain Investments in the United States by Foreign Persons*, 85 Fed. Reg. 3112 (Jan. 17, 2020).

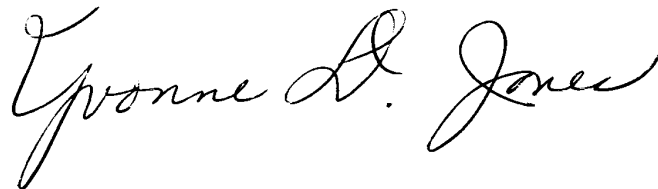
<sup>55</sup>*Endangered and Threatened Wildlife and Plants; Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife*, 85 Fed. Reg. 69778 (Nov. 3, 2020).

<sup>56</sup>GAO, *Department of the Interior, Fish and Wildlife Service: Endangered and Threatened Wildlife and Plants; Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife*, B-333005 (Washington, D.C.: Mar. 3, 2021).

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As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees and the Director of OMB. In addition, the report is available at no charge on the GAO website at <https://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-6806 or [jonesy@gao.gov](mailto:jonesy@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix II.

A handwritten signature in black ink that reads "Yvonne D. Jones". The signature is written in a cursive style with a large initial 'Y' and a distinct 'D'.

Yvonne D. Jones,  
Director, Strategic Issues



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# Appendix I: Objectives, Scope, and Methodology

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This report is an update on the findings of our 2018 report on late-term rulemaking under the Clinton, Bush, and Obama administrations. The updated findings include late-term rulemaking under the Trump administration.<sup>1</sup>

Specifically, our objectives were to assess (1) the number, scope, and type of rulemaking procedures used for economically significant rules; (2) agency-reported compliance with analytical and procedural requirements, including the Congressional Review Act; and (3) the agency-reported projected economic impacts of the economically significant rules. For each of these objectives, we compared our results for the economically significant rules issued during the Trump administration to those issued under the Obama, Bush, and Clinton administrations. To assess midnight rulemaking during the Trump administration, we considered the 120-day period from September 23 through January 20 for each year of the Trump administration.

For the purposes of this report, we reviewed all economically significant final rules published by executive agencies in the *Federal Register* during the same 120-day period in each year of the Trump administration.<sup>2</sup> Executive Order (E.O.) 12866 defines significant regulatory actions as those that are likely to result in a regulation that may:

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (generally referred to as “economically significant” regulations);
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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<sup>1</sup>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](#) (Washington, D.C.: Mar. 13, 2018).

<sup>2</sup>For purposes of this review, executive agencies are those cabinet departments and other agencies that answer directly to the President and exclude the independent regulatory agencies. “Independent regulatory agencies” are the boards and commissions identified as such in the Paperwork Reduction Act, such as the Securities and Exchange Commission. 44 U.S.C. § 3502(5).

3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order.<sup>3</sup>

We focused our review on those rules in criterion one above; we did not review significant regulatory actions meeting criteria two, three, and four. Our review encompassed the universe of all 131 economically significant rules published by executive agencies during the Trump administration.

To identify the rules in our scope, we primarily relied on the Office of Management and Budget's Reginfo.gov database on rules reviewed under E.O. 12866 to compile a list of final economically significant rules published during the specified periods. For the purposes of this review, we counted and analyzed economically significant interim final rules and their corresponding final rules as two separate regulatory actions. If the interim final rule and corresponding final rule fell within one of the 120-day periods, we counted and analyzed both as separate regulatory actions. We refined and supplemented the lists from the Reginfo.gov database with information from our database of rules submitted to us under the Congressional Review Act (CRA) and the Government Printing Office's Govinfo database on the *Federal Register*.<sup>4</sup> To test the reliability of data from these databases, we reviewed relevant documentation, interviewed knowledgeable agency officials, and traced a sample of entries to source documents. We concluded that the data were sufficiently reliable for our purposes.<sup>5</sup>

For all objectives, our primary source was the text of the published economically significant rule. However, as described below, we did

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<sup>3</sup>Exec. Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (Oct. 4, 1993). The Office of Management and Budget reviews significant proposed and final rules from all federal agencies (other than independent regulatory agencies) before they are published in the *Federal Register*.

<sup>4</sup>The CRA generally requires agencies to submit rules to both Houses of Congress and the U.S. Comptroller General before the rules can become effective. 5 U.S.C. § 801(a)(1)(A). The *Federal Register* is a legal journal published every business day by the National Archives and Records Administration containing legal documents and notices pertaining to federal agencies, including rules.

<sup>5</sup>There is a small possibility that we may not have included economically significant rules that were miscategorized as significant in Reginfo.gov and that were also not submitted to us.

sometimes supplement that information with information from other publicly available sources. We downloaded copies of published rules from the *Federal Register* website. The PDF copies of rules on the *Federal Register* website are maintained by the Government Printing Office, which securely controls content to ensure the integrity and authenticity of the *Federal Register*. We developed and used an Excel data collection instrument to collect standardized information about individual rules as described below. We did not evaluate the agencies' decisions regarding procedural requirements or their determinations regarding the effects of their rules. Instead, consistent with our practice in preparing major rule reports to Congress under CRA and prior reports on federal rulemaking, we are providing information about what the agencies published in the *Federal Register*.

To assess the number of rules and other variations related to the scope and transparency of these rules, we first reviewed and refined our lists of economically significant rules published during each of the transition and nontransition periods. We compared the initial lists compiled from [Reginfo.gov](https://www.reginfo.gov) against lists of major rules agencies had submitted to us under CRA to look for potential omissions.<sup>6</sup> We then reviewed each of the published rules to identify explanations agencies may have provided of a selected rule's classification as economically significant under E.O. 12866 to tally total numbers of economically significant rules published during each of the time periods and the agencies publishing them.<sup>7</sup> To provide insights on the type of rulemaking procedures that agencies used and the transparency of those rulemakings, we compiled information on the rulemaking procedures used by agencies. We reviewed indicators such as whether the final rule had published a prior notice of proposed rulemaking (NPRM). We did this by looking for discussion of a proposed

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<sup>6</sup>The criteria for economically significant under E.O. 12866 is similar to the definition of major rules under the Congressional Review Act. Our database is accessible at <https://www.gao.gov/legal/other-legal-work/congressional-review-act>.

<sup>7</sup>Our analysis recognized that agencies used varying terminology to indicate if a regulation was economically significant. If the rule was silent or unclear on whether it was economically significant, an economist reviewed the rule to determine if it was economically significant or not. We eliminated those the economist thought were not economically significant based on this review. We also identified a number of rules that [Reginfo.gov](https://www.reginfo.gov) identified as economically significant and that were submitted to us as major rules, but in which the agency claimed the rule was not subject to E.O. 12866 and provided no statement about economic significance and no additional economic analysis that could be used to make a determination. In these cases, we accepted the classifications used by the Unified Agenda.

rule in the published final rule. As necessary, we supplemented that review with information from our major rule reports, if available, and data from Reginfo.gov concerning the rulemaking history. To describe the extent to which rules had been advertised in the previous spring's Unified Agenda, we searched for the rule's identification number(s) in the online database for the Unified Agenda.<sup>8</sup> Additionally, we collected information on whether or not rules were published in response to the COVID-19 pandemic, which may have affected regulatory activities throughout the final year of the Trump administration.

We also reviewed the published rules to see whether they contained a section clearly identified as economic analysis or discussion of the analytical requirements concerning E.O. 12866.<sup>9</sup> We did not evaluate the agencies' decisions regarding procedural requirements or their determinations regarding the potential effects of their rules. In addition, we did not assess whether the agencies analyzed regulatory alternatives and uncertainty. Instead, we are providing information about what the agencies included in the rule texts published in the *Federal Register*. We also looked for indication in the published rule's economic analysis that the agency reported that the rule involved such topics as transfers, or federal payments to certain groups in society. If available, we used accounting statements agencies may have prepared summarizing the anticipated economic effects to help collect all of this information. We did not assess whether the agencies' classification of economic impacts into these categories or determinations regarding the benefits and costs were reasonable.

To assess variations in agencies' compliance with procedural requirements and the anticipated economic effects of rules, we also reviewed the published text of the rules. For major rules, we reviewed the reports that we prepared for Congress under the CRA. We reviewed agencies' reported compliance with procedural requirements for

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<sup>8</sup>For joint rules involving multiple agencies or rules with multiple identification numbers, we documented if any of the identification numbers had appeared in the relevant agenda.

<sup>9</sup>If the rule contained no section clearly identified as economic analysis, we looked to see if the sections addressing other analytical requirements contained any explanation of anticipated costs and benefits. Further, if an agency clearly directed the public to a specific document—for example, a regulatory impact analysis available on <https://www.regulations.gov/> or the economic analysis the agency had presented in an NPRM—we reviewed those. However, we did not review economic analyses that had been purportedly done, but were not readily accessible to the public at the time of our review.

promulgating rules under five statutes—CRA, the Regulatory Flexibility Act, the Paperwork Reduction Act (PRA), the Unfunded Mandates Reform Act of 1995 (UMRA), and the Small Business Regulatory Enforcement Fairness Act (SBREFA)—including whether and, if so, how the agency addressed the requirement in the published rule. To determine whether the Environmental Protection Agency and the Occupational Safety and Health Administration held the panels they were required to hold under SBREFA, we also reviewed the information on the Small Business Administration’s website summarizing these panels.<sup>10</sup>

We took multiple steps to identify noncompliance with the CRA. The CRA requires agencies to: (1) submit the rule to Congress and to us; (2) provide the required delay between submission of the rule to Congress and its effective date; and (3) provide the required delay between publication of the rule and its effective date. We first determined whether every rule had been submitted to us. For rules that had been submitted, we recorded the date we received it. We used the date a rule had been submitted to us when assessing whether a rule’s stated effective date was consistent with the CRA requirements. We also reviewed whether agencies had claimed “good cause” for not delaying the effective date.<sup>11</sup> For rules not submitted to us or those rules 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 rule to either of the Houses of Congress in time for the rule’s stated effective date to be consistent with the CRA requirements.<sup>12</sup> If we could find evidence that any of these requirements had been met, we removed the rule from further consideration as potentially noncompliant. Our methodology does not allow us to conclude that the remaining rules were fully compliant. In addition, it was beyond

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<sup>10</sup>Available from <https://advocacy.sba.gov/resources/reference-library/sbrefa/>. The Consumer Financial Protection Bureau (CFPB) is also subject to the requirement to convene panels under SBREFA. However, CFPB was outside the scope of our review. 5 U.S.C. § 609(b)-(c).

<sup>11</sup>Agencies can claim “good cause” to waive requirements to publish proposed rules under the APA and “good cause” to waive the delay in effective date requirements for major rules under the CRA. 5 U.S.C. §§ 553(b)(3)(B), (d)(3); 808(2). For purposes of this report, if an agency claimed “good cause” under the Administrative Procedure Act, we recognized the agency claiming “good cause” to waive the delay in effective date requirements under the CRA as well. This is consistent with the current methodology we use in complying with reporting requirements under the CRA. 5 U.S.C. § 801(a)(2)(A).

<sup>12</sup>*The Congressional Record* summarizes the proceedings of Congress and includes, among other things, communications from executive agencies.

the scope of our review to evaluate the appropriateness of agencies claiming “good cause” for not providing the required delay.

Lastly, we compared the number of economically significant rules issued during the Trump administration and their characteristics to those issued during the Obama, Bush, and Clinton administrations as reported in 2018. We compared information such as the number of economically significant rules, their projected impacts, and regulatory compliance with various regulatory requirements across each administration in transition and nontransition periods. While we followed a similar methodology to the 2018 report for purposes of comparison, there are some differences in our objectives, scope, and methodology. For example, we excluded rules that were not economically significant from our review. We also conducted a less-detailed assessment of reported economic impacts (e.g., we did not review the monetization of the economic impacts). As a result, we only compared our findings to those concerning economically significant rules in the 2018 report and for the economic information we did collect.

Two analysts independently reviewed each rule and associated documents, such as major rule reports written by our Office of General Counsel, and recorded responses to questions related to our objectives in an Excel data collection instrument. For example, we used our data collection instrument to determine if a rule addressed other rulemaking statutes such as the PRA and the UMRA in addition to the CRA. Any disagreements between the analysts were identified. A third analyst then reviewed the disagreements and the rule documentation to determine the appropriate response. We occasionally deviated from this methodology when resolving different responses required further discussion among the team or when we needed expert judgment from an economist or legal counsel. In such cases, the team discussed, but generally deferred to the expert advice. We also determined the need to add additional data elements as we proceeded with our analysis. In these cases, first, a single analyst responded to the questions. Then a second analyst checked those responses and indicated agreement or disagreement. If there was a disagreement, the first analyst reviewed and either corrected their responses or provided additional support to the second analyst.

We conducted this performance audit from October 2021 to January 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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# Appendix II: GAO Contact and Staff Acknowledgments

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## GAO Contact

Yvonne D. Jones, (202) 512-6806

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## Staff Acknowledgments

In addition to the individual named above, Barbara Lancaster (Assistant Director), Arpita Chattopadhyay, Pin-En Annie Chou, Robert Gebhart, Samantha Lalisan, Danielle Novak, Michael O'Neill, Catherine Parylo, Joseph Santiago, Michael Silver, Ardith Spence, Alicia White, and Sarah Wilson made key contributions to this report.

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Chuck Young, Managing Director, [youngc1@gao.gov](mailto:youngc1@gao.gov), (202) 512-4800  
U.S. Government Accountability Office, 441 G Street NW, Room 7149  
Washington, DC 20548

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## Strategic Planning and External Liaison

Stephen J. Sanford, Managing Director, [spel@gao.gov](mailto:spel@gao.gov), (202) 512-4707  
U.S. Government Accountability Office, 441 G Street NW, Room 7814,  
Washington, DC 20548

