



# Institute for Policy Integrity

*new york university school of law*

To: ACUS Committee on Regulation  
From: Institute for Policy Integrity at NYU School of Law<sup>1</sup>  
Date: April 12, 2015  
Subject: Suggested Revisions to Draft Recommendation on the Unified Agenda (dated April 13, 2015)

The Institute for Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity is a frequent user of the Unified Agenda and supports ACUS's reforms to ensure that the Agenda continues to "serve a useful function in notifying stakeholders . . . of upcoming regulatory actions." To that end, Policy Integrity makes the following additional recommendations:

- ACUS should call for the sharing among agencies of best practices for more regular updates on rulemaking developments, to harmonize agencies' digital tools to the extent possible, and to facilitate seamless compatibility with ROCIS and access by third parties.
- ACUS should call for additional guidance on the classification of agenda items' "significance."
- ACUS should call for additional guidance on agencies' Preambles to the Agenda, to enhance public participation in the regulatory process by providing more consistent and helpful information, particularly on opportunities for public comment.

## (A) Best Practices for Agency Rule Tracking and Information Systems

### Proposed Changes

Add, following draft recommendation #1:

**OIRA and RISC should facilitate sharing among agencies of best practices for providing periodic, digital updates on rulemaking developments. To the extent possible, agencies should move toward common, flexible open-source information standards for such digital tools, which could allow OIRA and RISC to seamlessly upload periodic updates from agency websites to ROCIS, as well as allow third parties to easily access and aggregate agency rulemaking information.**

### Rationale

A critical challenge implicit in the Committee's aspiration for a more "real-time" public agenda of regulatory developments is the marked heterogeneity of contributing agencies. The Committee should expand its first draft recommendation to facilitate the sharing among agencies of best practices for their digital rule-tracking and information systems.<sup>2</sup> Several agencies already have valuable experience with developing rule-tracking and information systems, like the Department of Transport, EPA, FDA, or the

---

<sup>1</sup> These recommendations do not represent the views of New York University, if any.

<sup>2</sup> ACUS often recommends best practices for agency communication with the public. *See, e.g.,* Admin. Conf. of the United States, *Ex Parte Communications in Informal Rulemaking* (June 10, 2014), <https://www.acus.gov/recommendation/ex-parte-communications-informal-rulemaking>.

Center for Medicare and Medicaid Services.<sup>3</sup> Best practice standards would allow agencies to learn from each other and adapt standards to their unique rulemaking environment and stakeholder communities.<sup>4</sup>

Additionally, ACUS should recommend moving toward a common technical standard by which agency rule tracking should be conducted, to lay the foundations for simplified submissions to the Unified Agenda: relying on a common technical standard, RISC could seamlessly “stream” or upload each agency’s work to a central database like ROCIS, allowing each agency to maintain its individual rule tracking system as it saw fit while helping the public to easily grasp rulemaking at a government-wide level.<sup>5</sup> A common technical standard will also facilitate compatibility with social media and the aggregation of data by third parties.<sup>6</sup> The Consumer Financial Protection Board’s eRegulations tool, for example, uses an open source standard that could easily be adapted by other agencies.<sup>7</sup>

## (B) Clarifying the Definitions of “Significance” and “Major”

### Proposed Changes

Amend draft recommendation #9 to read:

9. OIRA should change the wording of the Regulatory Flexibility Act element in the Unified Agenda and associated materials to more clearly reflect its intent **and provide helpful guidance to agencies.** [...]

Add a new recommendation #10:

**10. OIRA should provide additional guidance to agencies on the EO 12866 “Priority” element and the Congressional Review Act “Major” element of their Unified Agenda submissions, to facilitate more consistent interpretation and application of classifications. In particular, OIRA should clarify and emphasize that “economically significant” under EO 12866 encompasses more than negative financial impacts on regulated entities or the economy of greater than \$100 million, but also includes materially adverse effects upon the economy, environment, public health and safety, or local governments. Moreover, estimating a rule’s “significance” requires accounting for any loss of social benefits from a proposed repeal or modification of existing rule, as well as accounting for the costs and benefits of any newly proposed regulatory action.**

### Rationale

The eighth and ninth draft recommendations touch on the critical issue of consistent interpretation and application of the “significant,” “economically significant,” and “major” categorizations to agency

---

<sup>3</sup> See Curtis Copland, *The Unified Agenda: Proposals for Reform Draft Report 94-97* (March 10, 2015).

<sup>4</sup> Admin. Conf. of the United States, *Best Practices for Using Video Teleconferencing for Hearings* (Dec. 9, 2014), <https://www.acus.gov/recommendation/best-practices-using-video-teleconferencing-hearings>. The teleconferencing recommendations are especially apropos, since ACUS identified that, just as is the case with rulemaking development updates, some agencies have forged ahead while others have remained more cautious.

<sup>5</sup> Open-source standards are already employed by the Federal Register, which was promoted as a model for other agencies. See Model Agency Rule Initiative, *Success Stories: federalregister.gov*, <https://www.acus.gov/best-practices/success-story/federalregister-gov-the-daily-newspaper-for-the-government/> (Federal Register was able to improve their website dramatically and cheaply because they employed an open XML standard for their old website which allowed them to collaborate with volunteers).

<sup>6</sup> See Recommendation 2013-5, *Social Media in Rulemaking*, <https://www.acus.gov/recommendation/social-media-rulemaking>.

<sup>7</sup> Stefanie Tatham, *Administrative Fix Blog: CFPB’s eRegulations tool promises to help users navigate federal regulations*, ADMIN. CONF. OF THE UNITED STATES (Oct. 22, 2013), <https://www.acus.gov/newsroom/administrative-fix-blog/cfpb%E2%80%99s-eregulations-tool-promises-help-users-navigate-federal>.

actions. ACUS's recommendations regarding jointly issued rules and RFA analysis are each salient, but could further help clarify the categorical requirements.

Too often when proposing rules, Executive Order 12,866's "economically significant" brightline of \$100 million is the sole definitional term which agencies and OIRA seize upon, discounting the other factors of "significance." The lack of clear guidance has resulted in inconsistent application of the other conditions, namely: materially adverse effects upon the economy, environment, public health and safety, or local governments; serious inconsistencies or interference with other agencies; material alterations to entitlement programs; and the creation of novel legal or policy issues.<sup>8</sup>

Additionally, the common application of "annual effect on the economy of \$100 million or more" suffers from a serious flaw. Absent guidance from ACUS or OIRA, the threshold could be easily misinterpreted to apply only to financial harms and not all social costs and benefits. The result can be to heavily favor deregulatory activity, allowing deregulation to escape review as a "significant" rule if it entails financial savings from reduced compliance costs despite other major, adverse effects on social welfare.<sup>9</sup> Indeed, in the past, major deregulatory proposals have not always been classified as significant and, thus, have sometimes escaped OIRA review and public scrutiny.<sup>10</sup>

## (C) Agency Preambles to the Agenda

### Proposed Change

Insert a new recommendation #11:

**11. Agencies' Preambles to the Unified Agenda should follow a consistent format and should provide the public with an appropriate level of background and other detail. In particular, to facilitate public participation, all Preambles should invite comments on the agenda entries and direct the public to the appropriate website or address to submit those comments. Agencies should also consider providing information in their Preambles on how to submit public petitions for rulemakings, or should otherwise explain more generally how the public can engage in agenda-setting decisions. OIRA should offer guidance to agencies on Preamble format and basic content recommendations.**

### Rationale

Agency Preambles to the Unified Agenda are widely inconsistent in their content and calls for public comments.<sup>11</sup> For example, in the Fall 2014 Agenda Preambles, some agencies provide helpful background details and definitions, such as explaining what withdrawal of an agenda item might signify;<sup>12</sup> other agencies provide next to no details or content in their preambles;<sup>13</sup> for other agencies, like FHFA, it is not even clear if their preambles are published in the *Federal Register*. Similarly, a few agencies, like CFPB, list their highest priority rules in the Preamble; a few others, like NRC, DOT, and EPA, give some details on how rules are prioritized; and several at least make a reference in their Preambles

---

<sup>8</sup> See Richard L. Revesz & Michael A. Livermore, *Fixing Regulatory Review* 16-17, 24-25 (Policy Integrity Report, Dec. 2008), <http://policyintegrity.org/files/publications/FixingRegulatoryReview.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> See Richard L. Revesz & Michael A. Livermore, *Retaking Rationality* 154 (2008) (discussing deregulation under the Clean Air Act's New Source Review program in 2002); Comments from Policy Integrity, to Dept. of Labor & OIRA, Sept. 29, 2008 (criticizing the failure to classify proposed changes as significant).

<sup>11</sup> Note that Preambles are distinct from Regulatory Plans and are properly within the scope of this ACUS project.

<sup>12</sup> See HUD preamble; see also EPA and DOT preambles as examples of offering more background detail.

<sup>13</sup> See, e.g., Interior, State, and FERC preambles.

to their Regulatory Plans, which contain a list of priority rulemakings. But several others, such as State and Energy, include no details on priority rulemakings.

Most importantly, there is wide inconsistency in whether and how agencies call for public comments on agenda items. Some agencies make either no reference to public inquiries or indicate that the public can contact only for “further information.”<sup>14</sup> A few agencies call only for comments “of a general nature” about the agenda itself,<sup>15</sup> or indicate only that comments on rulemakings should be made during the designated comment period following the proposed rulemaking.<sup>16</sup> By contrast, many other agencies either allow or explicitly invite comment on the individual agenda items.<sup>17</sup> A few agencies provide additional details on the opportunities for comment: DOT includes an entire appendix of contact people; EPA provides a separate section on how to be involved in rulemaking; NRC includes a detailed section on how to comment, as well as a docket number for submitting comments to regulations.gov; and SEC references several electronic forums for submission. A few agencies place some limitations on comments: some set deadlines of as little as 30 days after the publication of the agenda,<sup>18</sup> and the CPSC seemingly welcomes all comments, but provides contact information only for comments on regulatory flexibility agenda items or for informational inquiries.

In the spirit of public participation in rulemaking, Preambles should follow a more consistent format and should provide the public with useful information, especially on how to comment.<sup>19</sup> Agencies should also explain how the public can engage generally with agenda-setting decisions, such as through petitions for rulemaking.<sup>20</sup>

Sincerely,

Kevin Bell  
Alec Webley  
Jason A. Schwartz

Institute for Policy Integrity at NYU School of Law

---

<sup>14</sup> See, e.g., Energy, Justice, Labor, State, Treasury, CFPB, FCC, and FERC preambles.

<sup>15</sup> See, e.g., Agriculture, Commerce, and FTC preambles.

<sup>16</sup> See Defense preamble; see also HHS preamble, which directs the public to websites to comment on open proposed rules and retrospective review.

<sup>17</sup> See, e.g., Education, Homeland Security, HUD, Interior, and VA preambles; CFTC preamble “welcomes comments from small entities and others.”

<sup>18</sup> See, e.g., SEC, CPSC, and Federal Reserve preambles.

<sup>19</sup> ACUS has previously called for making comment policies easier to locate, <https://www.acus.gov/recommendation/agency-innovations-e-rulemaking>.

<sup>20</sup> See Admin. Conf. of the United States, *Recommendations: Petitions for Rulemaking* (Dec. 4, 1986), <https://www.acus.gov/recommendation/petitions-rulemaking>.