

Preliminary Comments from the Institute for Policy Integrity at NYU Law School

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The Institute for Policy Integrity at NYU School of Law would like to offer these preliminary comments on ACUS's consideration of the Unified Agenda. 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. (These comments do not reflect the views of NYU, if any.)

As we continue to study the consultant's report and the Committee's revisions to its draft recommendations, we plan to offer more detailed comments in advance of your next meeting. For now, we hope to draw the Committee's attention to three particular areas of opportunity as it continues its deliberations.

(1) Best Practices for Agency Rule Tracking and Information Systems

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 consider expanding its first draft recommendation to include a set of best practice recommendations on agency rule tracking and information systems. Such best practices should draw on existing efforts by agencies like the Department of Transport, the EPA, the FDA, or the Center for Medicare and Medicaid Services. Best practice standards would allow agencies to learn from each other and adapt the standards to their unique rulemaking environment and stakeholder communities. Additionally, ACUS could recommend 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 would merely need to "stream" each agency's work to a central website, allowing each agency to maintain its individual rule tracking system as it saw fit while allowing the public to easily grasp rulemaking at a government-wide level.

(2) Clarifying the Definitions of "Significance" and "Major"

The seventh and eighth draft recommendations touch on the critical issue of consistent interpretation and application of the "significant," "economically significant," and "major" categorizations to agency 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 conditions. 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.

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 for compliance costs despite other major, adverse effects on social welfare.

ACUS should consider either offering additional clarifications of the definitions along these lines, or encouraging OIRA to do so.

(3) Agency Preambles to the Agenda

Agency preambles to the Unified Agenda (as distinct from their Regulatory Plans) are widely inconsistent in their content and call for comments. For example, some call for comments only on the agenda itself, some provide instructions for commenting on specific items in the agenda, and some preambles make no reference to public comments at all. ACUS should provide recommendations encouraging some consistency around best practices for drafting preambles to the Agenda.