



Administrative Conference Draft Recommendation

Promoting Accuracy and Transparency in the Unified Agenda

Draft for April 13, 2015 Committee on Regulation Meeting

The Unified Agenda of Federal Regulatory and Deregulatory Actions (typically known simply as the “Unified Regulatory Agenda” or “Unified Agenda”) is an important mechanism by which federal agencies inform the public of upcoming rules. Required to be published on a semiannual basis, the Unified Agenda represents a joint enterprise of the Office of Information and Regulatory Affairs (OIRA), the Regulatory Information Service Center (RISC) within the General Services Administration, and the individual agencies working on rules. The database used to produce the Unified Agenda is the RISC-OIRA Consolidated Information System (ROCIS). Publishing upcoming rules in the Unified Agenda satisfies requirements of both the Regulatory Flexibility Act¹ and Executive Order 12,866.²

The Unified Agenda serves a useful function in notifying stakeholders and the general public of upcoming regulatory actions.³ In an increasingly globalized world, this notice-serving function is valuable not only for domestic stakeholders but also for foreign businesses and regulators, who must remain apprised of developments in U.S. policymaking in order to coordinate effectively in promoting international regulatory cooperation.⁴ Thus, it is critical to

¹ 5 U.S.C. § 602(a).

² Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993).

³ See Curtis W. Copeland, The Unified Agenda: Proposals for Reform 7–9 (Mar. 10, 2015), *available at* <https://www.acus.gov/report/unified-agenda-report> (cataloguing various stakeholders’ expressions of support for the Unified Agenda and recent uses thereof).

⁴ See Administrative Conference of the United States, Recommendation 2011-6, *International Regulatory Cooperation*, ¶ 3, 77 Fed. Reg. 2257, 2260 (Jan. 17, 2012) (advocating the establishment of common regulatory agendas among trading partners).



ensure that the information in the Unified Agenda is as accurate as possible in order to allow regulators and stakeholders to plan accordingly.

At the same time, it is unrealistic to expect that agencies can provide perfectly accurate predictions of upcoming actions. There will always be some uncertainty, given the dynamic environment in which agencies operate, and the information contained in the Unified Agenda will never achieve total predictive accuracy. The Agenda itself states that agencies are permitted to issue rules that were not predicted by the Agenda and are not required to issue rules that were so predicted. In addition, agencies may have limited time or resources to prepare Agenda entries.

The Unified Agenda functions reasonably well as a predictor of some agency actions, but is less accurate in other areas.⁵ For example, estimated action dates may prove incorrect, the significance of a regulation may be misclassified, and jointly issued rules may inappropriately be characterized differently by different agencies. Additionally, some rules are classified as long-term actions when regulatory activity is imminent, while others remain listed as long-term actions after work on them has ceased. Occasionally, actions are removed from the Unified Agenda without explanation. Finally, a number of regulatory actions have recently been placed in a “pending” category that is not included in the published Unified Agenda.

As technology has evolved, some agencies have begun to provide periodic updates on the progress of their rulemaking efforts on their websites and other media between the semiannual Agenda publication dates. Though this may not prove feasible in all instances, there are steps that agencies, OIRA, and RISC might take to ensure that the public has consolidated access to this information to the extent this updating takes place.

The touchstone of the process should be transparency: although complete predictive accuracy is infeasible, all agencies that contribute to the Unified Agenda should strive to ensure that it offers the most up-to-date, valuable information possible. The following

⁵ See generally Copeland, *supra* note 3.



recommendations are designed to identify straightforward, simple steps that OIRA, RISC, and rulemaking agencies can take to enhance the predictive accuracy of the Unified Agenda and ensure that it remains a valuable resource for regulators, stakeholders, and the general public.

RECOMMENDATION

1. Federal agencies should consider providing on their websites and/or, where appropriate, other media, periodic updates concerning rulemaking developments outside of the semiannual reporting periods connected with the Unified Agenda. These periodic updates would likely focus primarily on concrete actions undertaken in connection with particular rules (e.g., noting if a rule has been issued since the last Agenda), but could also include changes regarding rules still under development (e.g., revisions to predicted issuance dates or significance classification). OIRA and RISC should provide electronic links in the online Unified Agenda directing users to locations on agency websites where periodic updates are provided.

2. OIRA and RISC should provide electronic links in the Unified Agenda to other regulatory data systems (e.g., the *Federal Register* and other parts of ROCIS) that would, as appropriate, permit the agenda information to be updated automatically. For example, if the Unified Agenda indicates that a proposed rule is forthcoming, and that rule is published in the *Federal Register* months before the next edition of the Agenda is issued, an electronic link between the *Federal Register* and the Agenda could permit the Agenda information to be updated automatically to reflect the issued rule.

3. Federal agencies, with the support of OIRA and RISC, should not keep regulations that are still under development in a “pending” category that is not included in the published Unified Agenda. Regulations that are currently in the “pending category” should be reclassified and included in the Unified Agenda if the agency is actively working on such matters, or should be removed entirely if they are not still under development. One consequence of any such reclassification may be an increase in the total number of regulations in the Unified Agenda, even though the number of rules under development has not actually increased.



4. In instances in which a Unified Agenda entry has been in the “proposed rule” or “final rule” stage for three or more Agendas in a row, the agency should reexamine the entry to determine whether it is likely to take action on it in the ensuing twelve months. If not, the agency should reclassify the entry as a “long-term” action or, if the regulatory action is no longer in development, remove it from the Unified Agenda entirely. If the agency is uncertain as to whether the proposed or final rule might be issued within twelve months, it should consider providing, where appropriate, an explanation in the associated Agenda entry.

5. In instances in which a Unified Agenda entry has been in the “long-term” category for an extended period of time, the agency should reexamine the entry to ensure that it is still under development. If not, the agency should remove the entry from the Unified Agenda.

6. To the extent feasible, agencies should ensure that any regulatory actions that are likely to occur in the ensuing twelve months (e.g., hearings or proposed or final rules) are included in the appropriate active “Stage of Rulemaking” category (i.e., the “prerule,” “proposed rule,” or “final rule” stage), rather than in the “long-term” action category. Long-term actions are intended to reflect items that are under development but for which the agency does not expect to undertake a regulatory action in the next twelve months.

7. Unified Agenda entries appearing in one or more editions of the Agenda should not simply disappear in the next edition. When an agency determines that it no longer intends to pursue any additional rulemaking activity with respect to an entry that has appeared in one or more previous editions of the Unified Agenda, the agency should reclassify the entry as completed and indicate how the action was completed.

8. For rules expected to be jointly issued by more than one agency, the agencies should strive to ensure that the descriptive information provided in the Unified Agenda, including the timing of the rule’s issuance and its classification as a “significant” or “major” regulatory action, is accurate across all of the agencies’ entries. To the extent possible, OIRA and RISC should permit agencies to publish a single Agenda entry for the joint rule, or should link the individual agencies’ entries electronically.



9. OIRA should change the wording of the Regulatory Flexibility Act (RFA) element in the Unified Agenda and associated materials to more clearly reflect its intent. For example, if the intent is to determine whether a forthcoming rule is expected to have a significant economic impact on a substantial number of small entities, then the RFA element should be worded “Is this rule expected to have a significant economic impact on a substantial number of small entities?” On the other hand, if the intent is to determine whether an RFA analysis is expected, then the wording should be “Is this rule expected to require an initial or final regulatory flexibility analysis?”