



Administrative Conference Draft Recommendation

The Unified Agenda: Promoting Regulatory Transparency, Planning, and Public Participation

Draft for March 31, 2015 Committee on Regulation Meeting

The Unified Agenda of Federal Regulatory and Deregulatory Actions (typically known simply as the “Unified Agenda”) is the primary mechanism by which federal agencies inform the public of upcoming rules. Required to be published on a biannual 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 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 an important function in notifying stakeholders of upcoming regulatory actions upon which they might file public comments or otherwise furnish information for consideration by the agency.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).

Comment [RTB1]: Strauss’ Comment: You’ll not be surprised to learn that I find the recommendation inadequate for its failure even to mention OIRA’s role (regulatory plan) and its single-minded focus on informing the public of the agenda (which, to be sure, should be accurately done, with old business weeded out and time lines as accurate as possible). The proposed title of the recommendation is “The Unified Agenda: Promoting Regulatory Transparency, Planning, and Public Participation.” I would accept (but still think unfortunately limited) “The Unified Agenda: Promoting Accurate Public Knowledge of Regulatory Work Plans.” That seems to be all the recommendation is about. “Regulatory Transparency” is missing when OIRA’s role under EO 12866 is hidden from view. “Planning” refers to the public’s planning, I suppose, but the real “planning” is agency planning and that occurs under OIRA’s watchful eye, EO 12,866 Sec. 4 and -- particularly for an agency (ACUS) that is primarily focused on agency life, not the public as such -- saying “planning” in relation to this study strikes me as quite misleading. The recommendation does not address agency planning in what, for me, is its most significant dimension.

If I were able to participate I would move this change in the title, accepting that ACUS has no taste for assisting agencies in their work with OIRA about regulatory planning.



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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, one cannot realistically demand that agencies provide perfectly accurate predictions of upcoming actions. As with any predictive exercise, there will necessarily be a degree of uncertainty, and the information contained in the Unified Agenda will never achieve one-hundred percent predictive accuracy. The agenda itself states that agencies may issue rules that were not predicted by the agenda, and predicted rules are not required to be issued. In addition, agencies may have limited time or resources to prepare agenda entries.

The Unified Agenda functions reasonably well as a predictor of many agency actions, but is less accurate in some other areas.⁵ For example, there are cases of agencies' inaccurately characterizing rules as forthcoming within the next twelve months for years on end, rules' lingering in the "long term" action or other categories after the agency has effectively ceased working on those rules, failure to provide any notification of rules' being withdrawn from further consideration, **mischaracterization of whether a rule will be classified as "significant" or "major,"** and inconsistent characterizations of rules being jointly issued by multiple agencies.

Comment [RTB2]: Lubbers' suggested edit.

As technology has evolved, some agencies have begun to provide periodic updates to some of their **agenda entries** between the biannual publication dates. Though this may not prove feasible in all instances, there are steps that agencies as well as OIRA and RISC might take to ensure that the public has optimal access to this information to the extent ~~it is made available~~ **this updating takes place.**

Comment [RTB3]: Lubbers comment: Should "ROCIS entries" be substituted for "agenda entries" here?

Comment [RTB4]: Lubbers' suggested edit.

The touchstone of the entire process should be transparency, striving to ensure that the Unified Agenda offers the most up-to-date, valuable information possible while recognizing that complete predictive accuracy is infeasible. The following recommendations are designed to identify straightforward, simple steps that OIRA, RISC, and rulemaking agencies might

⁵ See generally Copeland, *supra* note 3.



undertake to enhance the predictive accuracy of the Unified Agenda and ensure that it remains a valuable resource for regulators and stakeholders alike to plan for future agency actions.

RECOMMENDATION

1. Federal agencies should consider providing on their websites ~~or elsewhere~~ periodic updates concerning rulemaking developments outside of the biannual 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 whether the forthcoming rule will be a major rule). OIRA and RISC should provide electronic links in the online agenda directing users to ~~whatever periodic updates agencies provide on their websites~~ locations on agency websites where periodic updates are provided.

Comment [RTB5]: Lubbers' suggested edit: I would delete "or elsewhere" as I'm not sure what an alternative to the website would be.

2. OIRA and RISC should establish electronic links ~~between~~ the Unified Agenda and other regulatory data systems (e.g., the Federal Register and ROCIS) to permit agency rulemaking information in the agenda to be updated automatically.

Comment [RTB6]: Lubbers' suggested edit.

3. Federal agencies 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 included in the "pending category" should be reclassified as "long term" actions if the agency is actively working on such matters, or should be removed from the Unified Agenda entirely if they are not still under development.

Comment [RTB7]: Lubbers' comment: The word "between" seems to imply that the Fed. Reg. and ROCIS should also have links to the Agenda. I guess that's fine, but if you only want to address what the Agenda should do (since it's addressed to OIRA and RISC) then it should probably say "links on the Unified Agenda to..."

On the other hand, if you think it should stay "between" then don't you need to address the recommendation to the Office of the Federal Register too?

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 move the action to the "long term" category or, if the regulatory action is no longer in development, remove it from the Unified Agenda entirely. If the agency is uncertain



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as to whether the proposed or final rule might be issued within twelve months, it should consider providing an appropriate explanation in the associated agenda entry.

5. [Discussion of whether we can make recommendations for ensuring that “old and cold” entries do not languish in the “long term” category of the Agenda indefinitely.]

6. 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 a “completed action” and indicate that it has been “withdrawn” in the next edition of the agenda.

7. For rules expected to be jointly issued by more than one agency, the agencies should 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 consistent 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.

8. OIRA should change the wording of the Regulatory Flexibility Act (RFA) element in the agenda 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?”

9. [Discussion of whether we should recommend that the FCC and other agencies reclassify “long term” actions as forthcoming “proposed” or “final rules,” to the extent they can feasibly do so.]