



## Promoting Accuracy and Transparency in the Unified Agenda

### Committee on Regulation

#### Proposed Recommendation | June 4, 2015

1           The Unified Agenda of Federal Regulatory and Deregulatory Actions (typically known  
2 simply as the “Unified Regulatory Agenda” or “Unified Agenda”) is an important mechanism by  
3 which federal agencies inform the public of upcoming rules. Required to be published on a  
4 semiannual basis, the Unified Agenda represents a joint enterprise of the Office of Information  
5 and Regulatory Affairs (OIRA), the Regulatory Information Service Center (RISC) within the  
6 General Services Administration, and the individual rulemaking agencies working on rules. The  
7 database used to produce the Unified Agenda is the RISC-OIRA Consolidated Information  
8 System (ROCIS). Publishing upcoming rules in the Unified Agenda satisfies requirements of  
9 both the Regulatory Flexibility Act<sup>1</sup> and Executive Order 12,866.<sup>2</sup>

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

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<sup>1</sup> 5 U.S.C. § 602(a).

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

<sup>3</sup> 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).

<sup>4</sup> 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).



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

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

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

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

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

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<sup>5</sup> See generally Copeland, *supra* note 3.



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

## RECOMMENDATION

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

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

60 3. Federal agencies, with the support of OIRA and RISC, should not keep regulations that  
61 are still under development in a “pending” category that is not included in the published  
62 Unified Agenda. Regulations that are currently in the “pending” category should be reclassified  
63 and included in the Unified Agenda if the agency is actively working on such matters, or should  
64 be removed entirely if they are not still under development. One consequence of any such



65 reclassification may be an increase in the total number of regulations in the Unified Agenda,  
66 even though the number of rules under development has not actually increased.

67 4. In instances in which a Unified Agenda entry has been in the “proposed rule” or “final  
68 rule” stage for three or more Agendas in a row, the agency should reexamine the entry to  
69 determine whether it is likely to take action on it in the ensuing twelve months. If not, the  
70 agency should reclassify the entry as a “long-term” action or, if the regulatory action is no  
71 longer in development, remove it from the Unified Agenda entirely, with the notation described  
72 in recommendation 7. If the agency is uncertain as to whether the proposed or final rule might  
73 be issued within twelve months, it should consider providing, where appropriate, an  
74 explanation in the associated Agenda entry.

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

81 6. In instances in which a Unified Agenda entry has been in the “long-term” category for  
82 an extended period of time, the agency should reexamine the entry to ensure that it is still  
83 under development. If not, the agency should remove the entry from the Unified Agenda, with  
84 the notation described in recommendation 7.

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



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

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