



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 Act¹ and Executive Order 12,866.²

10 The Unified Agenda serves the useful function of notifying stakeholders and the general
11 public of upcoming regulatory actions.³ 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.⁴ Thus, it is critical to
15 ensure that the information in the Unified Agenda is as accurate as possible to allow regulators
16 and stakeholders to plan accordingly.

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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.⁵ 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.

Comment [MA1]: Manager's Amendment

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

⁵ See generally Copeland, *supra* note 3.

⁶ One consequence of eliminating the “pending” category and moving all active entries to the public-facing Unified Agenda, as recommended below, may be an increase in the total number of regulations in the Agenda, even though the number of rules under development has not actually increased.



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~~take steps to provide on their websites
44 ~~and/or, where appropriate, through~~ other media, periodic updates concerning rulemaking
45 developments outside of the semiannual reporting periods connected with the Unified Agenda.
46 These periodic updates would likely focus primarily on concrete actions undertaken in
47 connection with particular rules (e.g., noting if a rule has been issued since the last Agenda),
48 but could also include changes regarding rules still under development (e.g., revisions to
49 predicted issuance dates or significance classification). ~~OIRA and RISC should provide electronic~~
50 ~~links in the online Unified Agenda directing users to locations on agency websites where~~
51 ~~periodic updates are provided.~~Each agency's Unified Agenda entry should include a notice of
52 ~~where information about updates can be found; if updates are published on the agency's~~
53 ~~website, a link to the appropriate webpages should be included in the Unified Agenda.~~ OIRA
54 and RISC should also facilitate sharing among agencies of best practices for providing periodic,
55 digital updates on rulemaking developments.

Comment [CMA2]: Farina Amendment

Comment [CMA3]: Farina Amendment

56 2. OIRA and RISC should provide ~~electronic links in the Unified Agenda to a mechanism~~
57 ~~for linking the information contained in the Unified Agenda and~~ other regulatory data systems
58 (e.g., the *Federal Register* and other parts of ROCIS) that would, ~~as appropriate, permit enable~~
59 ~~the agenda information to be updated automatically~~ as appropriate. For example, if the Unified
60 Agenda indicates that a proposed rule is forthcoming, and that rule is published in the *Federal*
61 *Register* months before the next edition of the Agenda is issued, ~~an electronic link between the~~
62 ~~Federal Register and the Agenda could permit the Agenda information to be updated~~
63 ~~automatically to reflect the issued rule~~ the Federal Register entry should result in an automatic
64 update to the Agenda.

Comment [MA4]: Manager's Amendment

Comment [MA5]: Manager's Amendment



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

Comment [CA6]: Council Amendment: During its meeting, the Council noted that the document is unclear on whether we are recommending that OIRA eliminate the pending category. Though the Council takes no position on whether OIRA should do so, it suggests that the language be made clearer if the recommendation ultimately proposes that outcome. The sentence might be re-worded to state “OIRA should eliminate the “pending” category, so that all regulations under development are included in the Unified Agenda.”

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

Comment [MA7]: Manager’s Amendment

Comment [MA8]: Manager’s Amendment

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

Comment [MA9]: Manager’s Amendment

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

90 7. Unified Agenda entries appearing in one or more editions of the Agenda should not
91 simply disappear in the next edition. When an agency determines that it no longer intends to



92 pursue any additional rulemaking activity with respect to ~~such an entry that has appeared in~~
93 ~~one or more previous editions of the Unified Agenda~~, the agency should reclassify the entry as
94 completed and indicate how the action was completed.

Comment [MA10]: Manager's Amendment

95 8. For rules expected to be jointly issued by more than one agency, the agencies should
96 strive to ensure that the descriptive information provided in the Unified Agenda, including the
97 timing of the rule's issuance and its classification as a "significant" or "major" regulatory action,
98 is accurate across all of the agencies' entries. To the extent possible, OIRA and RISC should
99 permit agencies to publish a single Agenda entry for the joint rule, ~~or should link the individual~~
100 ~~agencies' entries electronically. Where this is not possible, each agency's Unified Agenda entry~~
101 ~~should include a link to the other associated entry or entries.~~

Comment [MA11]: Manager's Amendment

102 9. ~~At present, the Regulatory Flexibility Act (RFA) elements of the Unified Agenda and~~
103 ~~associated materials are ambiguous, making it difficult for agencies to know how to respond.~~
104 ~~For example, it is currently unclear if agencies should indicate whether an upcoming regulatory~~
105 ~~action is expected to have a significant economic impact on a substantial number of small~~
106 ~~entities or whether some type of RFA analysis will be conducted.~~ OIRA should change the
107 wording of the ~~Regulatory Flexibility Act (RFA) elements~~ in the Unified Agenda and associated
108 materials to ~~more clearly reflect its~~ ~~the intent~~ ~~more clearly~~ and ~~should~~ provide helpful guidance
109 to agencies ~~to ensure that the meaning is clear. For example, if the intent is to determine~~
110 ~~whether a forthcoming rule is expected to have a significant economic impact on a substantial~~
111 ~~number of small entities, then the RFA element should be worded "Is this rule expected to have~~
112 ~~a significant economic impact on a substantial number of small entities?" On the other hand, if~~
113 ~~the intent is to determine whether an RFA analysis is expected, then the wording should be "Is~~
114 ~~this rule expected to require an initial or final regulatory flexibility analysis?"~~

Comment [MA12]: Manager's Amendment

Comment [MA13]: Manager's Amendment

Comment [MA14]: Manager's Amendment