



# The Unified Agenda: Implications for Rulemaking Transparency and Participation

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## Summary

The Obama Administration has launched an initiative to make the policymaking process more open and transparent, and has asked for comments from the public on how the rulemaking process in particular can be improved in these respects. Some observers have concluded that the most critical part of that process occurs before a proposed rule is published in the *Federal Register*, and (for significant rules) possibly even earlier—before the rule is approved by the issuing agency and submitted to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget for review pursuant to Executive Order 12866. A representative of the Obama Administration has said that the public will be allowed to participate in the development of proposed rules. However, in order for the public to do so, or to allow more time to prepare comments during sometimes brief comment periods, the public must first know that the proposed rule is being developed.

The Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda), which has been published twice each year since 1983, arguably provides federal agencies with the most systematic, government-wide method to alert the public about their upcoming proposed rules. To determine how frequently agencies are using the Unified Agenda to perform this task, CRS examined all 231 significant proposed rules that were issued after having been reviewed by OIRA in 2008. About three-quarters of those rules were preceded by a “proposed rule” Unified Agenda entry (indicating that the agency was developing a proposed rule), and two-thirds of the rules had such entries even earlier, before the rules were submitted to OIRA for review. Viewed another way, however, there were no “proposed rule” Unified Agenda entries for about one-quarter of the proposed rules before they were published in the *Federal Register*, and there were no such entries before one-third of the rules were submitted to OIRA for review. Some agencies almost always used the Unified Agenda to notify the public about their upcoming proposed rules, while others did so less frequently.

If Congress or the Obama Administration conclude that improvements are needed in the transparency of the rulemaking process, or in the ability of the public to participate in that process prior to the publication of proposed rules, various policy options are available. Some of the options do not involve the Unified Agenda (e.g., greater use of public meetings, blogs, or making agencies’ internal rulemaking tracking systems available to the public). Also, or alternatively, either Congress or the Obama Administration could take one or more of the following actions: (1) improve the visibility of the Unified Agenda to the public; (2) require agencies to publish “proposed rule” entries in the Unified Agenda before submitting their significant draft rules to OIRA, or to explain why such entries were not possible; (3) increase the frequency with which the Unified Agenda is published; and (4) require agencies to establish a rulemaking docket where comments could be placed when the public is notified of an upcoming proposed rule.

This report will be updated to reflect changes in factual information or policy developments.

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## Introduction

The Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda) is compiled and published twice each year by the Regulatory Information Service Center (RISC) within the General Services Administration (GSA), and provides the public with information about regulations that federal agencies are considering or reviewing. The Obama Administration has launched an initiative to make the policymaking process more transparent, participatory, and collaborative, and has specifically requested suggestions from the public regarding the rulemaking process. With entries designed to alert the public about upcoming proposed rules and commenting opportunities, the Unified Agenda appears uniquely suited to the Administration's effort. However, it is unclear how well the Unified Agenda currently performs this task—i.e., how often agencies' proposed rules are preceded by "proposed rule" entries in the Agenda (indicating that agencies are preparing a proposed rule). This report examines that issue and discusses options that Congress or the President can use to improve transparency and participation via the Unified Agenda or other means. First, however, the report discusses the Obama Administration's open government initiative, the rulemaking process, and the potential value of comments prior to the publication of a proposed rule.

## Open Government and Rulemaking

On January 21, 2009, his first full day in office, President Barack Obama issued a memorandum to the heads of executive departments and agencies in which he directed the Chief Technology Officer, in coordination with the Director of the Office of Management and Budget (OMB) and the Administrator of GSA, to coordinate recommendations for an "Open Government Directive."<sup>1</sup> The memorandum said that the directive (which is to be issued by the Director of OMB) would require agencies to take specific actions to make the federal government more transparent, participatory, and collaborative. For example, with regard to transparency, the memorandum said that the agencies should "harness new technologies to put information about their operations and decisions online and readily available to the public." It also said that agencies should "offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information," and "should solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation."

On May 21, 2009, the Director of the Office of Science and Technology Policy within the Executive Office of the President published a notice in the *Federal Register* inviting the public to offer comments and suggestions about how to increase openness and transparency in government.<sup>2</sup> The notice said that, with "twenty-first century tools," the federal government can take advantage of information that is currently dispersed among the nation's citizens to improve the policy process, and said "Our goal is to use the principles of open government to obtain fresh

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<sup>1</sup> The President, "Transparency and Open Government," 74 *Federal Register* 4685, January 26, 2009. See [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government/](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/) for a copy of this memorandum.

<sup>2</sup> Office of Science and Technology Policy, "Transparency and Open Government," 74 *Federal Register* 23901, May 21, 2009. Comments were requested from the public by June 21, 2009.

ideas about open government itself.”<sup>3</sup> One area in which comments were specifically requested was rulemaking—the process by which federal agencies develop and promulgate regulations.

## The Rulemaking Process

Federal regulations implement statutes and establish specific requirements. One observer described rulemaking as “the single most important function performed by agencies of government,” noting that it is “to rules, not statutes or other containers of the law, that we turn most often for an understanding of what is expected of us and what we can expect from government.”<sup>4</sup> Federal agencies issue 3,000 to 4,000 final rules each year on topics ranging from the timing of bridge openings to the permissible levels of arsenic and other contaminants in drinking water.

The rulemaking process is governed by the Administrative Procedure Act (APA, 5 U.S.C. §551 *et seq.*) and numerous other statutes and executive orders.<sup>5</sup> **Figure 1** below shows the process that most federal agencies are generally required to follow in developing or revising significant regulations. In brief, an agency develops a draft proposed rule based on congressional requirements or authority and, after review and approval within the agency, sends the draft rule to the Office of Information and Regulatory Affairs (OIRA) within OMB for review under Executive Order 12866.<sup>6</sup> After OIRA review, the agency publishes a notice of proposed rulemaking (NPRM) in the *Federal Register*, obtains comments on the proposed rule, and responds to those comments in developing a draft final rule.<sup>7</sup> The draft final rule is then reviewed in sequence by the agency and OIRA, and the final rule is published in the *Federal Register*.<sup>8</sup> The APA generally requires that final rules take effect no less than 30 days after publication. The rulemaking process varies somewhat depending on the agency issuing the rule, its significance, and whether the rule must be issued quickly. For example, agencies sometimes issue final rules without a prior NPRM,<sup>9</sup> and OIRA only reviews regulatory actions that are “significant”<sup>10</sup> and from agencies other than independent regulatory agencies.<sup>11</sup>

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<sup>3</sup> Ibid.

<sup>4</sup> Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Public Policy*, 3<sup>rd</sup> ed., (Washington: CQ Press, 2003), p. xi.

<sup>5</sup> For a description of many of these statutes and executive orders, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Curtis W. Copeland.

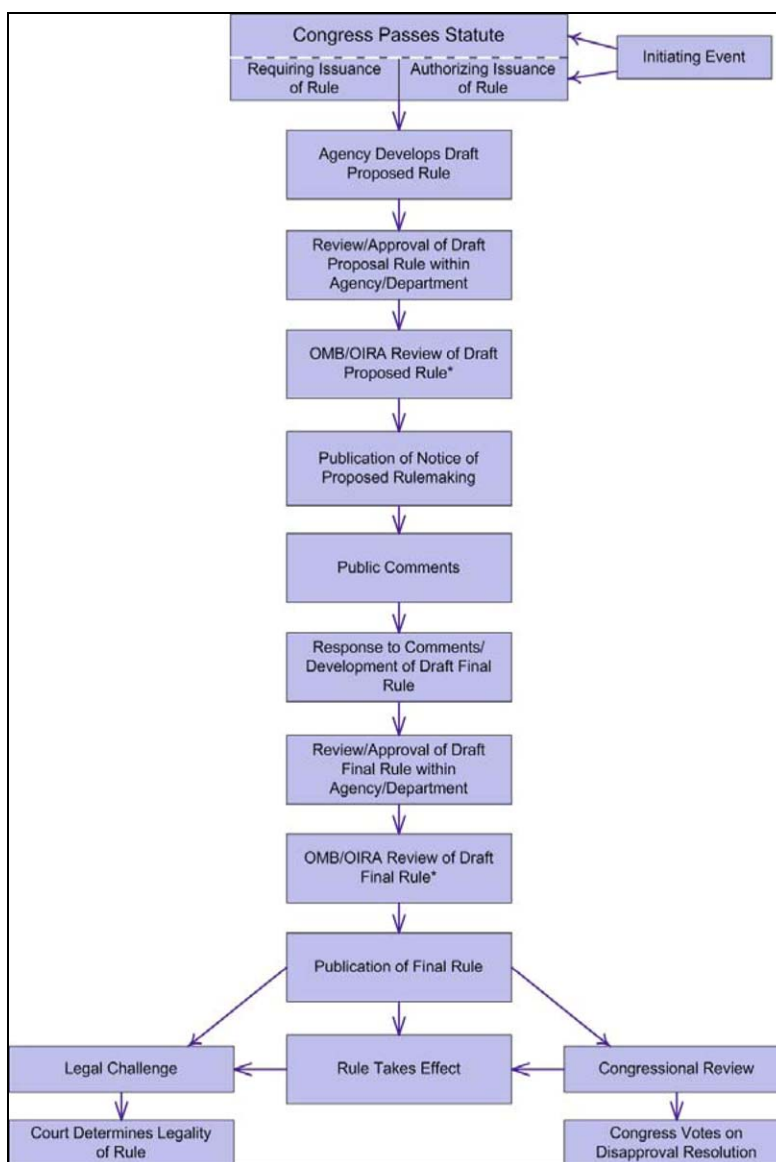
<sup>6</sup> Executive Order 12866, “Regulatory Planning and Review,” 58 *Federal Register* 51735, October 4, 1993. For more information on the OIRA review process, see CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Curtis W. Copeland.

<sup>7</sup> The APA does not specify a minimum comment period for proposed rules. However, Section 6(a) of Executive Order 12866 states that most covered rules “should include a comment period of not less than 60 days.”

<sup>8</sup> Not all rules follow this process. For example, an agency may, in certain circumstances, issue a final rule without issuing a notice of proposed rulemaking, thereby skipping several steps in the process. On the other hand, some rules may be published for public comment more than once. Also, independent regulatory agencies (e.g., the Securities and Exchange Commission and the Federal Communications Commission) are not required to submit their rules to OIRA for review, and no agency is required to do so for rules that are not “significant.”

<sup>9</sup> For example, the APA states that the notice and comment procedures generally do not apply when an agency finds, for “good cause,” that those procedures are “impracticable, unnecessary, or contrary to the public interest.” The APA also provides explicit exceptions to the NPRM requirement for certain categories of regulatory actions, such as rules dealing with military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts. Further, the APA says that the NPRM requirements do not apply to interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice (which do not have to be published in the *Federal Register*).

Figure I. Federal Rulemaking Process



Source: CRS.

Note: Steps with asterisks (\*) are applicable only to rules that are reviewed by OIRA.

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<sup>10</sup> Executive Order 12866 defines a “significant” regulatory action as one likely to “(1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”

<sup>11</sup> Independent regulatory agencies are defined in the Paperwork Reduction Act (44 U.S.C. § 3502(5)), and include the Securities and Exchange Commission, the Nuclear Regulatory Commission, and the Federal Communications Commission.

## Importance of the Pre-NPRM Period

In a 2006 congressional hearing commemorating the 60<sup>th</sup> anniversary of the APA, Professor William F. West of Texas A&M University's George Bush School of Government and Public Service said that the part of the rulemaking process that precedes the publication of the NPRM frequently lasts for several years, and "is where the most critical decisions often occur."<sup>12</sup> Similarly, a 2009 report by the Government Accountability Office (GAO) noted that "much of the resource investment in a rulemaking occurs prior to the publication of the proposed rule."<sup>13</sup> GAO said that the rulemaking process officially commences no later than when a Regulation Identifier Number (RIN) is assigned (i.e., when the agency is either preparing its first Unified Agenda entry for a rule, or when it is preparing its submission to OIRA for review). GAO also said that during an "initiation" phase, agencies gather information to determine whether to issue a rule, identify needed resources, and may draft concept documents for agency management. During the development of proposed rules, agencies draft the rule and the preamble (which describes why the rule is being developed), and begin to address analytical and procedural requirements.<sup>14</sup> GAO reported that for 10 of 12 rules that had been developed by the Department of Transportation (DOT), the Environmental Protection Agency (EPA), and the Food and Drug Administration (FDA), the agencies took at least two years to issue an NPRM. Two of the FDA rules that GAO examined were under development for at least six years before they were published as proposed rules, and four EPA rules each took more than three years.<sup>15</sup>

Although federal agencies sometimes make significant changes to their proposed rules as a result of public comments,<sup>16</sup> some observers have concluded that such changes become less likely after the draft proposed rules have been reviewed and approved within the agencies and OIRA, and after they have been published for comment in the *Federal Register*.<sup>17</sup> A December 2006 report prepared for CRS by the East West Research Group at Texas A&M University concluded that the changes to proposed rules in response to comments from the public "do not tend to be of a fundamental nature for at least two reasons."<sup>18</sup>

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<sup>12</sup> Testimony of Professor William F. West, Texas A&M University, before the Subcommittee on Commercial and Administrative Law, House Committee on the Judiciary, reprinted in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Interim Report on the Administrative Law, Process and Procedure Project for the 21<sup>st</sup> Century*, committee print, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess., December 2006, p. 345.

<sup>13</sup> U.S. Government Accountability Office, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*, GAO-09-205, April 20, 2009, p. 22.

<sup>14</sup> *Ibid.*, pp. 12-13.

<sup>15</sup> *Ibid.*, p. 18.

<sup>16</sup> See, for example, Susan Webb Yackee, "Sweet-Talking the Fourth Branch: Assessing the Influence of Interest Group Comments on Federal Agency Rulemaking," *Journal of Public Administration Research and Theory*, vol. 26 (2006), pp. 103-124; and Steven J. Balla, "Administrative Procedures and Political Control of the Bureaucracy," *American Political Science Review*, vol. 92 (1998), pp. 66-80.

<sup>17</sup> See, for example, William F. West, "Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis," *Public Administration Review*, vol. 64 (2004) pp. 66-80, who concluded that "change within the comment phase of rulemaking is difficult and ... it occurs within relatively narrow bounds." See also Marissa M. Golden, "Interest Groups in the Rulemaking Process: Who Participates? Whose Voices Get Heard?" *Journal of Public Administration Research and Theory*, vol. 8 (1998), pp. 245-270.

<sup>18</sup> The East West Research Group, George Bush School of Government and Public Service, Texas A&M University, "Outside Participation in the Development of Proposed Rules," December 21, 2006, reprinted in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Interim Report on the Administrative Law, Process and Procedure Project for the 21<sup>st</sup> Century*, committee print, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess., (continued...)

Perhaps the more obvious has to do with the sunk costs in organizational resources and psychological commitments. In addition, agencies may feel compelled to invite a second round of public comment on important changes in the interest of due process. This can be an unattractive option, especially given that rulemaking is already often a protracted process and given that agencies are often under pressure from Congress or the courts to issue rules in a timely fashion. One might add that the difficulty of changing proposals also increases the incentive to develop proposals that will not need to be changed, thus reinforcing sunk costs in proposal development.

Given the number of important decisions that are made while proposed rules are under development at the agencies, and the understandable reluctance of agencies to make fundamental changes to those rules after the NPRMs are published, comments and suggestions from the public may arguably be most effective while proposed rules are still under development at the agencies. The importance and potential efficacy of pre-NPRM consultation with the public underlies current statutory requirements for advance notices of proposed rulemaking (ANPRMs),<sup>19</sup> negotiated rulemaking,<sup>20</sup> and advocacy review panels at the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA).<sup>21</sup> Agencies also sometimes hold public hearings in advance of the publication of a proposed rule, occasionally as a result of congressional requirements.

The value of early involvement in the rule-development process also underlies efforts by OIRA to review certain rules before they are formally submitted pursuant to Executive Order 12866. John Graham, OIRA Administrator during most of the George W. Bush Administration, said that

once a regulatory proposal is formally submitted to OMB, there is already powerful organizational momentum behind the proposal. Not only have agency staff devoted potentially years of work to data collection and analysis; policy officials at agencies may have managed delicate relationships among stakeholders. At this stage, any changes suggested during OMB review are destined to make waves and bruise egos, which means that they will be resisted, sometimes fiercely and effectively.<sup>22</sup>

Similarly, Sally Katzen, OIRA Administrator during most of the Clinton Administration, said that by the time an agency issues an NPRM, “the agency is invested. By that time, the agency has its own strongly held view of how it wants this thing to look. And OMB changes at that point are, I think, really at the margin rather than going to the heart of the matter.”<sup>23</sup> Both former

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December 2006, pp. 985-1057.

<sup>19</sup> An ANPRM describes the general area that may be subject to regulation and usually asks for public comment on the issues and options being discussed. Some statutes, such as the Federal Trade Commission Improvements Act, the Consumer Product Safety Act, and the Energy Policy and Conservation Act, require that the rulemaking process begin with an ANPRM. For more on ANPRMs, see Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 4<sup>th</sup> ed., (Chicago: American Bar Association, 2006) pp. 210-212.

<sup>20</sup> For more information, see CRS Report RL32452, *Negotiated Rulemaking*, by Curtis W. Copeland.

<sup>21</sup> The Regulatory Flexibility Act, as amended (5 U.S.C. § 609), requires EPA and OSHA to convene small business advocacy review panels before publishing proposed rules that are expected to have a significant economic impact on a substantial number of small entities.

<sup>22</sup> John D. Graham, remarks to the National Economists Club, March 7, 2002, available at [http://www.whitehouse.gov/omb/legislative\\_testimony\\_graham030702/](http://www.whitehouse.gov/omb/legislative_testimony_graham030702/).

<sup>23</sup> Sally Katzen, “Presidential Oversight: A Panel Discussion with Regulatory ‘Czars’ from Reagan to Bush,” p. 10, available at <http://www.law.upenn.edu/academics/institutes/regulation/papers/PPROIRAPanel.pdf>.



administrators have said that OIRA often has its most significant effect on draft rules before they are formally submitted to OIRA for review.<sup>24</sup>

Pre-NPRM public participation in rulemaking has also been advocated as part of the Obama Administration's transparency and open government initiative. At a June 2009 conference sponsored by the American Bar Association, Beth Noveck, the White House's deputy chief technology officer, said that the Obama Administration planned to use blogs and other "social media" to generate public input regarding agencies' proposed rules, even before they are drafted. Ms. Noveck was quoted as saying that "Instead of starting with a finished draft of a rule, we're co-creating from the get-go and asking people what should be in such a rule before we write it."<sup>25</sup> An editorial in *Federal Times* indicated that the potential benefits of this approach include expansion of the scope of government's engagement with its citizenry and better regulations.<sup>26</sup>

## **The Unified Agenda as a Possible Vehicle for Pre-NPRM Transparency and Public Participation**

In order for the public to participate in rulemaking before proposed rules are published, the public must first know that agencies are developing such rules. For more than 30 years, federal agencies have been required to notify the public about upcoming regulatory actions. For example, Section 2 of Executive Order 12044,<sup>27</sup> issued by President Jimmy Carter in March 1978, stated the following:

To give the public adequate notice, agencies shall publish at least semiannually an agenda of significant regulations under development or review. On the first Monday in October, each agency shall publish in the *Federal Register* a schedule showing the times during the coming fiscal year when the agency's semiannual agenda will be published. Supplements to the agenda may be published at other times during the year if necessary, but the semiannual agendas shall be as complete as possible. The head of each agency shall approve the agenda before it is published. At a minimum, each published agenda shall describe the regulations being considered by the agency, the need for and the legal basis for the action being taken, and the status of regulations previously listed on the agenda. Each item on the agenda shall also include the name and telephone number of a knowledgeable agency official and, if possible, state whether or not a regulatory analysis will be required.

The executive order went on to say that agencies should "give the public an early and meaningful opportunity to participate in the development of agency regulations. They shall consider a variety of ways to provide this opportunity, including (1) publishing an advance notice of proposed rulemaking; (2) holding open conferences or public hearings; (3) sending notices of proposed

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<sup>24</sup> U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, September 22, 2003, p. 37 and p. 114.

<sup>25</sup> Stephen Losey, "Rule-making's new mass appeal," *Federal Times*, June 15, 2009, p. 1.

<sup>26</sup> "Rethinking rule-making," *Federal Times*, June 15, 2009, p. 22.

<sup>27</sup> Executive Order 12044, "Improving Government Regulations," 43 *Federal Register* 12661, March 24, 1978. This order was repealed by Executive Order 12291 in 1981, but Section 5 of the new order continued to require the publication of semiannual regulatory agendas.

regulations to publications likely to be read by those affected; and (4) notifying interested parties directly.”<sup>28</sup>

In a 1979 report on the implementation of this executive order, OMB said that the semiannual agendas “provide the first systematic look at an agency’s regulatory activities,” and “[a]rmed with this early warning, the public now has more time to prepare its views on upcoming regulations.”<sup>29</sup> However, the report also noted that some agencies had not published their agendas on schedule (making it difficult for the public to find them), and that some of the descriptions of the regulatory actions were not as helpful as others.

Since 1983, the Regulatory Information Service Center (RISC) within GSA has published a semiannual Unified Agenda of Federal Regulatory and Deregulatory Actions that compiles the individual agencies’ agendas.<sup>30</sup> Although agencies can use a variety of other methods to alert the public about their upcoming rules, the Unified Agenda is the most systematic and widely-used vehicle to accomplish that purpose. RISC compiles the Unified Agenda for OIRA, and publication of entries in the Agenda helps agencies fulfill two current transparency requirements:

- The Regulatory Flexibility Act (5 U.S.C. § 602) requires that all agencies publish semiannual regulatory agendas in the *Federal Register* describing regulatory actions that they are developing that may have a significant economic impact on a substantial number of small entities.<sup>31</sup>
- Section 4 of Executive Order 12866 on “Regulatory Planning and Review” requires that all executive branch agencies “prepare an agenda of all regulations under development or review.”<sup>32</sup> Each agenda entry is required to contain “a regulation identifier number [RIN], a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official.” The stated purposes of this and other planning requirements in the order are (among other things) to “maximize consultation and the resolution of potential conflicts at an early stage” and to “involve the public and its State, local, and tribal officials in regulatory planning.”

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<sup>28</sup> Ibid.

<sup>29</sup> Office of Management and Budget, *Improving Government Regulations: A Progress Report*, Part 1 (September 1979), p.13.

<sup>30</sup> Beginning with the fall 2007 edition, the full Unified Agenda has been available to the public at <http://reginfo.gov>. The Agenda has been published in the *Federal Register* twice each year (usually in April or May, and in October, November, or December), and has been available online since 1995 through GPO Access (at <http://www.gpoaccess.gov/ua/index.html>). The version in the *Federal Register* and at GPO Access currently only includes entries for rules that are expected to have a significant economic impact on a substantial number of small entities, or that are considered the agencies’ most important proposed or final rules. For more information, see Regulatory Information Service Center, “Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions,” 74 *Federal Register* 21859, May 11, 2009.

<sup>31</sup> This requirement applies to all agencies covered by the Administrative Procedure Act (5 U.S.C. 551(1)).

<sup>32</sup> Executive Order 12866, “Regulatory Planning and Review,” 58 *Federal Register* 51735, Oct. 4, 1993. Although most of the requirements in this executive order do not apply to independent regulatory agencies, this section includes these agencies. Section 4 also requires other regulatory planning mechanisms, including (1) an annual meeting between the Vice President, agency heads, and other advisors to coordinate regulatory efforts; and (2) a regulatory plan prepared by each agency and submitted to OIRA and published in the Unified Agenda each October describing the most significant regulatory efforts that the agency expects to issue that year or later.

Unified Agenda entries are organized by agency, and each entry is associated with one of five rulemaking stages: (1) prerule stage (indicating actions agencies will take to determine whether or how to initiate rulemaking); (2) proposed rule stage (indicating that the agency plans to issue an NPRM, or to close an existing comment period); (3) final rule stage (indicating that the agency plans to issue a final rule); (4) long-term actions (indicating items under development, but that are not expected to result in a regulatory action in the next 12 months); and (5) completed actions (e.g., reflecting the publication of a final rule, or the withdrawal of a rule). Therefore, a “proposed rule” entry in the Unified Agenda alerts the public that the agency is in the process of developing an NPRM. The RIN is assigned before the regulatory action first appears in the Agenda, and follows the rule throughout the rulemaking process.

For example, the May 2009 edition of the Unified Agenda contained the following narrative regarding a forthcoming EPA proposed rule on “NPDES Program Management Information Rulemaking” (RIN 2020-AE47):

The U.S. Environmental Protection Agency (EPA) has responsibility to ensure that the Clean Water Act’s (CWA) National Pollutant Discharge Elimination System (NPDES) program is effectively and consistently implemented across the country. This regulation would identify the essential information that EPA needs to receive from NPDES agencies (NPDES-authorized states, territories and tribes) to manage the national NPDES permitting and enforcement program. Through this regulation, EPA seeks to ensure that such facility-specific information would be readily available, accurate, timely and nationally consistent on the facilities that are regulated by the NPDES program. In the past, EPA primarily obtained this information from the Permit Compliance System (PCS). However, the evolution of the NPDES program since the inception of PCS has created an increasing need to better reflect a more complete picture of the NPDES program and the diverse universe of regulated sources. In addition, information technology has advanced significantly so that PCS no longer meets EPA’s national needs to manage the full scope of the NPDES program or the needs of individual states that use PCS to implement and enforce the NPDES program.

This Unified Agenda entry also indicated that EPA intended to issue the proposed rule in November 2009, and that the rule’s priority level was “other significant” (i.e., that it was significant enough to be reviewed by OIRA, but that it was not expected to have a \$100 million impact on the economy).

Although the Unified Agenda is a potentially valuable resource to allow the public to know about forthcoming proposed rules, it is not clear that many people outside of academia and established interest groups know of its existence.<sup>33</sup> Also, CRS is unaware of any studies examining the extent to which federal agencies’ proposed rules were, in fact, preceded by “proposed rule” entries in the Unified Agenda.<sup>34</sup> In fact, the introduction to the Unified Agenda states the following:

Agencies may withdraw some of the regulations now under development, and they may issue or propose other regulations not included in their agendas. Agency actions in the rulemaking process may occur before or after the dates they have listed. The Unified Agenda does not

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<sup>33</sup> In an attempt to remedy this situation, OMB Watch, a public interest group, has a page on its website entitled “How to Read the Unified Agenda,” available at <http://www.ombwatch.org/node/4062>.

<sup>34</sup> In 2001, GAO reported that the Unified Agenda contained certain errors, but GAO did not discuss the extent to which the agenda’s “proposed rule” entries preceded NPRMs. U.S. General Accounting Office, *Accuracy of Information in the Unified Agenda*, GAO-01-1024R, July 27, 2001.

create a legal obligation on agencies to adhere to schedules in this publication or to confine their regulatory activities to those regulations that appear within it.<sup>35</sup>

## Agencies' Use of Unified Agenda Before Proposed Rules Varied

To determine the extent to which agencies used the Unified Agenda to notify the public about their upcoming proposed rules, CRS examined all published proposed rules that had been reviewed by OIRA during calendar year 2008.<sup>36</sup> Focusing on rules that had been reviewed by OIRA ensures that they are “significant” under Executive Order 12866, and are therefore likely to be of some consequence to the general public. Such rules are also more likely to have been under development for some time than non-significant rules, and therefore may be more likely to have been preceded by a Unified Agenda entry. However, this approach excludes rules issued by independent regulatory agencies like the Securities and Exchange Commission and the Federal Communications Commission (whose rules are not reviewed by OIRA), and also excludes rules that were issued without a prior NPRM.

For each significant proposed rule that had been reviewed by OIRA during 2008, CRS determined whether the issuing agency or agencies had published a “proposed rule” entry in the Unified Agenda (indicating that the agency planned to issue an NPRM) (1) before the NPRM was published and (2) before the start of OIRA’s review of the draft proposed rule. The NPRM date was used because, as indicated previously, once a rule is published in the *Federal Register*, both the issuing agency and OIRA have signed off on the rule as consistent with the President’s priorities. Therefore, significant changes in the proposed rules are arguably less likely to occur than before they are published in the *Federal Register*. The OIRA submission date (which always occurs before the NPRM for significant rules) was also used because, by the time draft proposed rules are submitted to OIRA, they have been approved within the agencies and any parent cabinet departments, and are arguably less likely to change substantively than earlier in the rule development process.

The results of this analysis are presented in **Table 1** below. For about three-quarters of the proposed rules (176 of 231, or 76.2%), the agencies published Unified Agenda entries for their upcoming proposed rules before they published the related NPRMs. Two-thirds of the time (154 of 231 proposed rules, or 66.7%), those Agenda entries were published even earlier, before OIRA started its reviews of the draft NPRMs. Viewed another way, however, for about one-quarter of the proposed rules, the agencies did not use the Unified Agenda to alert the public of those NPRMs before they were published in the *Federal Register*, and one-third of the time there were no “proposed rule” Agenda entries published before OIRA started its reviews. The NPRMs that were published with no prior “proposed rule” Unified Agenda entries included the following:

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<sup>35</sup> Regulatory Information Service Center, “Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions,” 74 *Federal Register* 21859, May 11, 2009, p. 21860.

<sup>36</sup> CRS identified completed OIRA reviews of draft proposed rules during 2008 that resulted in an NPRM using a database available at <http://www.reginfo.gov/public/do/eoHistoricReport>.

- an August 2008 Department of Agriculture (USDA) rule on “Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection”<sup>37</sup>
- a December 2008 Department of Commerce (DOC) rule on the “Steel Import Monitoring and Analysis System”<sup>38</sup>
- a March 2008 Department of Defense (DOD) rule on the “Relationship Between the TRICARE Program and Employer-Sponsored Group Health Insurance”<sup>39</sup>
- an April 2008 Department of Education (ED) rule on “Improving the Academic Achievement of the Disadvantaged”<sup>40</sup>
- a January 2009 Department of Health and Human Services (HHS) rule on “Payments to Sponsors of Prescription Drug Plans”<sup>41</sup>
- a March 2008 Department of Homeland Security (DHS) rule clarifying “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter”<sup>42</sup>
- an April 2008 Department of the Interior (DOI) rule on “Firearms in National Park Service Lands”<sup>43</sup>

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<sup>37</sup> U.S. Department of Agriculture, Food Safety and Inspection Service, “Requirements for the Disposition of Cattle That Become Non-Ambulatory Disabled Following Ante-Mortem Inspection,” *73 Federal Register* 50889, August 29, 2008. USDA said it issued the proposed rule in response to events in January 2008, and a petition for rulemaking received in April 2008. The first mention of this rule in the Unified Agenda was in the fall 2008 edition as a “final rule,” months after the NPRM was published.

<sup>38</sup> U.S. Department of Commerce, International Trade Administration, “Steel Import Monitoring and Analysis System,” *73 Federal Register* 75624, December 12, 2008. DOC said that it was publishing this proposed rule because a December 2005 final rule on this issue would expire in March 2009 unless extended upon review and notification in the *Federal Register*. The first mention of this rule in the Unified Agenda was in the spring 2009 edition, after the final rule had been published in March 2009.

<sup>39</sup> U.S. Department of Defense, Office of the Secretary, “TRICARE; Relationship Between the TRICARE Program and Employer-Sponsored Group Health Plans,” *73 Federal Register* 16612, March 28, 2008. DOD said it was issuing this regulation pursuant to a provision in the John Warner National Defense Authorization Act for Fiscal Year 2007 (P.L. 109-364). The first mention of this rule in the Unified Agenda was in the spring 2008 edition, after the NPRM had been published.

<sup>40</sup> U.S. Department of Education, Office of Elementary and Secondary Education, “Title I: Improving the Academic Achievement of the Disadvantaged,” *73 Federal Register* 22020, April 23, 2008. ED said it was updating its regulations to address certain issues related to the implementation of the No Child Left Behind Act of 2001. The first mention of this rule in the Unified Agenda was in the spring 2008 edition, after the NPRM had been published.

<sup>41</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicare Program; Prescription Drug Benefit Program: Payments to Sponsors of Retiree Prescription Drug Plans,” *74 Federal Register* 1550, January 12, 2009. HHS said it was issuing the proposed rule “based on a change in our interpretation of section 1860D-22(b) of the Social Security Act.” The first Unified Agenda entry for this rule was as a “long-term action” that was published in the spring 2009 edition, months after the NPRM was published.

<sup>42</sup> U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis,” *73 Federal Register* 15944, March 26, 2008. DHS said it was issuing this supplemental NPRM to clarify certain issues in its August 2007 final rule on this issue, and to address certain issues in an October 2007 district court case. The first mention in the Unified Agenda for this proposed rule was in the spring 2008 edition, months after the NPRM was published.

<sup>43</sup> U.S. Department of the Interior, Fish and Wildlife Service and National Park Service, “General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service,” *73 Federal Register* 23388, April 30, 2008. DOI said it was issuing this proposed rule to update regulations previously issued in 1981 and 1983. The first mention in the Unified Agenda for this proposed rule was in the spring 2008 edition, after the NPRM was published.

- an April 2008 Department of Justice (DOJ) rule on “Classification of Three Steroids as Schedule III Anabolic Steroids under the Controlled Substances Act,”<sup>44</sup>
- an August 2008 Department of Labor (DOL) rule on “Requirements for DOL Agencies’ Assessment of Occupational Health Risks”<sup>45</sup>
- a January 2008 DOT rule on “Passenger Car and Light Truck Corporate Average Fuel Economy, 2011-2015”<sup>46</sup>
- an April 2008 Department of Veterans Affairs (VA) rule on “Grants for the Hiring and Retention of Nurses in the State Home Program”<sup>47</sup>
- a November 2008 EPA rule on “Petroleum Refinery Residual Risk Standards”<sup>48</sup>
- a December 2008 Office of Personnel Management (OPM) and DOD rule on the “National Security Personnel System”<sup>49</sup>
- an August 2008 Social Security Administration (SSA) rule on “Authorization of Representative Fees”<sup>50</sup>
- a January 2009 GSA rule on “Federal Supply Schedule Contracting”<sup>51</sup>

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<sup>44</sup> U.S. Department of Justice, Drug Enforcement Administration, “Classification of Three Steroids as Schedule III Anabolic Steroids Under the Controlled Substances Act,” *73 Federal Register* 22294, April 25, 2008. DOJ said it was issuing this proposed rule pursuant to the Anabolic Steroid Control Act of 2004 (P.L. 108-358). The first mention in the Unified Agenda for this proposed rule was in the spring 2008 edition, after the NPRM had been published.

<sup>45</sup> U.S. Department of Labor, Office of the Secretary, “Requirements for DOL Agencies’ Assessment of Occupational Health Risks,” *73 Federal Register* 50909, August 29, 2008. DOL said it was issuing the proposed rule to implement recommendations in a 1997 report on risk assessment and risk management. The first mention in the Unified Agenda was as a “final rule” entry in the fall 2008 edition, months after the NPRM had been issued.

<sup>46</sup> U.S. Department of Transportation, National Highway Traffic Safety Administration, “Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011-2015,” *73 Federal Register* 24351, January 24, 2008. DOT said this proposed rule was being issued pursuant to Energy Independence and Security Act of 2007. The first mention of this rule in the Unified Agenda was in the spring 2008 edition, several weeks after the NPRM was published.

<sup>47</sup> U.S. Department of Veterans Affairs, “Assistance to States in Hiring and Retaining Nurses at State Veterans Homes,” *73 Federal Register* 19785, April 11, 2008. VA said it was proposing this rule to implement provisions in the Veterans Health Programs Improvement Act of 2004. The only “proposed rule” Unified Agenda entry was in the spring 2009 edition, nearly a month after the NPRM was published.

<sup>48</sup> U.S. Environmental Protection Agency, “National Emission Standards for Hazardous Air Pollutants From Petroleum Refineries,” *73 Federal Register* 66693, November 10, 2008. EPA said it was publishing this NPRM to supplement a September 2007 proposed rule on this issue. In 2007 and 2008, the Unified Agenda reflected this rule as an upcoming final rule. Therefore, the public had no advance notice regarding this supplemental proposed rule.

<sup>49</sup> U.S. Office of Personnel Management and U.S. Department of Defense, “National Security Personnel System,” *73 Federal Register* 73606, December 3, 2008. OPM and DOD said they were issuing this proposal to reflect legislation enacted in 2008. The first Unified Agenda entry was in the spring 2009 edition as a completed action.

<sup>50</sup> U.S. Social Security Administration, “Authorization of Representative Fees,” *73 Federal Register* 50260, August 26, 2008. SSA said it was proposing changes in its existing procedures to “reflect changes in representatives’ business practices, and in the ways in which claimants obtain representation, and to make more efficient the way we process representative fees.” The first Unified Agenda entry for this action was in the fall 2008 edition as an upcoming final rule.

<sup>51</sup> U.S. General Services Administration, “General Services Acquisition Regulation; GSAR Case 2006-G507; Rewrite of GSAR Part 538, Federal Supply Schedule Contracting,” *74 Federal Register* 4595, January 26, 2009. GSA said it was proposing this rule as part of an update to its acquisition regulations. The fall 2008 edition of the Unified Agenda listed this as a “long-term action.”

**Table I. Identification of Upcoming Proposed Rules in Unified Agenda, 2008**

Department/Agency	NPRMs Resulting from OIRA Reviews in 2008	Related “Proposed Rule” Entry in the Unified Agenda	
		Before NPRM	Before OIRA Review
USDA	14	13	10
DOC	20	11	10
DOD	12	4	3
ED	4	3	3
DOE	5	5	5
HHS	30	27	25
DHS	7	6	5
HUD	4	4	4
DOJ	16	14	13
DOL	17	14	12
State	1	0	0
DOT	20	15	14
Treasury	4	4	2
VA	12	7	4
EPA	27	25	22
OPM	20	10	9
SSA	8	7	7
All other agencies	10	7	6
Total	231	176	154

**Source:** CRS analysis of data from the Regulatory Information Service Center at <http://www.reginfo.gov>.

**Notes:** The “other agencies” publishing proposed rules as a result of OIRA reviews in 2008 include the Equal Employment Opportunity Commission, GSA, the Pension Benefit Guarantee Corporation, the Railroad Retirement Board, and the Small Business Administration. Abbreviations not previously introduced are HUD (Department of Housing and Urban Development) and DOL (Department of Labor).

**Table 1** also shows that the agencies differed in the extent to which they used the Unified Agenda to notify the public about upcoming proposed rules. For example, HHS published related “proposed rule” entries in the Unified Agenda before publishing 27 of the department’s 30 NPRMs (90.0%), and EPA did so before publishing 25 of its 27 proposed rules (92.6%). On the other hand, DOD published “proposed rule” entries regarding 4 of its 12 NPRMs (33.3%), and OPM did so for 10 of its 20 proposed rules (50.0%).

In many cases, the agencies published multiple “proposed rule” entries in the Unified Agenda before they published the related NPRM. For example, a December 1, 2008, DOT proposed rule on a “National Registry of Certified Medical Examiners” was preceded by “proposed rule” entries in the spring and fall editions of the Unified Agenda for 2006, 2007, and 2008.<sup>52</sup> Likewise,

<sup>52</sup> Federal Motor Carrier Safety Administration, U.S. Department of Transportation, “National Registry of Certified (continued...) ”

HHS published “proposed rule” entries regarding its September 18, 2008, NPRM on “Label Requirement for Food That Has Been Refused Admission Into the United States” in at least four previous editions of the Agenda.<sup>53</sup> USDA published “proposed rule entries regarding its March 27, 2008, NPRM on the “Child and Adult Food Program” in 14 consecutive semiannual editions of the Unified Agenda between 2001 and 2008.<sup>54</sup> In these and other cases, the public was alerted well in advance that the agencies would be publishing the proposed rules.

In some cases, even though the agencies had published “proposed rule” entries in the Unified Agenda before they published the related NPRMs, those entries were arguably too late to serve as useful notice to the public, and were sometimes significantly after the rule had been approved by the agencies and submitted to OIRA for review. See, for example, the following:

- EPA published a proposed rule on “Oil Pollution Prevention; Non-Transportation Related Onshore Facilities” on November 26, 2008.<sup>55</sup> The first Unified Agenda entry for this NPRM was published two days earlier on November 24, 2008—but more than 40 days after OIRA began its review of the proposed rule.
- DHS published a proposed rule on “Changing the Period of Time for Admission or Extension of Stay from One Year to Three for TN Nonimmigrants” on May 9, 2008.<sup>56</sup> The first Unified Agenda entry for this NPRM was published four days earlier on May 5, 2008—but 30 days after OIRA began its review of the proposed rule.
- DOL published a proposed rule on “Labor Organization Annual Financial Reports” on May 12, 2008.<sup>57</sup> The first Unified Agenda entry for this NPRM was published seven days earlier on May 5, 2008—but more than 60 days after OIRA began its review of the proposed rule.
- DOD published a proposed rule on “Defense Support of Civil Authorities” on December 4, 2008.<sup>58</sup> The first Unified Agenda entry for this NPRM was published 10 days earlier on November 24, 2008—but nearly two months after the rule was submitted to OIRA for review.

In other cases, even though the agency published an entry in the Unified Agenda before OIRA’s review and before the NPRM, the public still had little time to react. For example, OPM published a Unified Agenda entry regarding “Proposed NSPS Joint Regulations” on May 5, 2008,

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(...continued)

Medical Examiners,” 73 *Federal Register* 73129, December 1, 2008.

<sup>53</sup> Food and Drug Administration, U.S. Department of Health and Human Services, “Label Requirement for Food That Has Been Refused Admission into the United States,” 73 *Federal Register* 54106, September 18, 2008.

<sup>54</sup> U.S. Department of Agriculture, Food and Nutrition Service, “Child and Adult Care Food Program: At-Risk Afterschool Meals in Eligible States,” 73 *Federal Register* 16213, March 27, 2008.

<sup>55</sup> Environmental Protection Agency, “Oil Pollution Prevention; Non-Transportation Related Onshore Facilities,” 73 *Federal Register* 72016, November 26, 2008.

<sup>56</sup> U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, “Period of Admission and Stay for Canadian and Mexican Citizens Engaged in Professional Business Activities—TN Nonimmigrants,” 73 *Federal Register* 26340, May 9, 2008.

<sup>57</sup> Employment Standards Administration, U.S. Department of Labor, “Labor Organization Annual Financial Reports,” 73 *Federal Register* 27345, May 12, 2008.

<sup>58</sup> U.S. Department of Defense, Office of the Secretary, “Defense Support of Civil Authorities,” 73 *Federal Register* 73896, December 4, 2008.



sent the rule to OIRA for review on May 12, 2008, OIRA completed its review four days later, and the NPRM was published on May 22, 2008.<sup>59</sup> Therefore, the public was alerted to the upcoming proposed rule 7 days before OIRA’s review, and 17 days before OPM and DOD published the NPRM.

## Discussion

The Obama Administration has launched an initiative to make the policymaking process more open and transparent, and has asked for comments from the public on how the rulemaking process in particular can be improved in these respects. Some observers have concluded that the most critical part of that process occurs before the proposed rule is published in the *Federal Register*, and (for significant rules) possibly even earlier—before the rule is approved by the issuing agency and submitted to OIRA for review. Once a significant rule is submitted to OIRA, and certainly by the time the rule is published in the *Federal Register* as an NPRM, the issuing agency’s position is arguably less likely to change than earlier in the rulemaking process. The White House’s deputy chief technology officer has said that, as part of the Obama Administration’s transparency and open government initiative, the public will be able to offer comments and suggestions while proposed rules are being developed. However, in order for the public to participate prior to the publication of a proposed rule, or even to begin preparing comments during sometimes brief public comment periods, the public must first become aware that the proposed rule is about to be issued.

Although a variety of methods could be used to accomplish this goal, including blogs and other forms of new “social media,” the Unified Agenda—which has been published twice each year since 1983, and online since 1995—arguably provides agencies with the most systematic, government-wide method to alert the public about their upcoming proposed rules. The data examined for this report indicate that federal agencies are frequently using the Agenda to accomplish this goal. About three-quarters of the significant proposed rules that were published after OIRA reviewed the rules in 2008 were preceded by a “proposed rule” Unified Agenda entry. Two-thirds of the rules had such entries even earlier, before the draft rules were submitted to OIRA for review under Executive Order 12866. Therefore, by reviewing the most recent edition of the Unified Agenda, particularly shortly after its semiannual publication, the public can often know in advance when a proposed rule is about to be published.

On the other hand, there was no “proposed rule” Unified Agenda entry for about one-quarter of the proposed rules before they were published in the *Federal Register*, and there was no such entry before one-third of the rules were submitted to OIRA for review. In these cases, the issuing agencies may have notified the public about their upcoming proposed rules in some other manner (e.g., public meetings or direct notification of affected parties). Also, some proposed rules must be developed quickly, so it is understandable that a Unified Agenda that is published only once every six months would not reflect all upcoming published rules. See, for example, the following:

- USDA said it issued its August 2008 proposed rule on “Requirements for the Disposition of Cattle That Become Non-Ambulatory Disabled Following Ante-Mortem Inspection” in response to a petition for rulemaking that it received in

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<sup>59</sup> U.S. Department of Defense and Office of Personnel Management, “National Security Personnel System,” 73 *Federal Register* 29881, May 22, 2008.

April 2008.<sup>60</sup> To have been included in the previous (May 2008) edition of the Unified Agenda, USDA would have had to submit the Agenda entry to RISC by late March 2008—before the department had received the petition for rulemaking. Therefore, the first Unified Agenda entry for this rule was a “final rule” entry in the fall edition of the Agenda (published in November 2008).

- DOI said that it issued its August 2008 proposed rule amending its regulations governing the viewing of the inaugural parade after a March 20, 2008, district court opinion concluding that the National Park Service’s procedures violated its regulations.<sup>61</sup> To have been included in the previous (May 2008) edition of the Unified Agenda, DOI would have had to submit the Agenda entry to RISC within a few days after the court decision. Therefore, the first Unified Agenda entry for this rule was a “final rule” entry in the fall edition of the Agenda (published in November 2008).

In numerous other cases, however, it is unclear why the agencies did not use the Unified Agenda to alert the public about their upcoming rules. See, for example, the following:

- DOC said it was issuing its December 2008 proposed rule on steel import monitoring because a December 2005 final rule on this issue would expire in March 2009 unless it was extended.<sup>62</sup> The first mention of this rule in the Unified Agenda was as a completed action in the spring 2009 edition (published on May 11, 2009)—five months after the NPRM was published, and nearly two months after the final rule was published in March 2009.
- HHS said it published its January 2009 proposed rule on payments to sponsors of retiree prescription drug plans based on a change in the agency’s interpretation of a particular provision of the Social Security Act.<sup>63</sup> The first Unified Agenda entry for this rule was in May 2009, after the NPRM was published.
- DOI said it published its April 2008 proposed rule related to firearms in national parks to update regulations previously issued in 1981 and 1983.<sup>64</sup> The first Unified Agenda entry for this rule was in May 2008, after the NPRM was published.
- DOJ said it published its April 2008 proposed rule on the classification of three steroids pursuant to the Anabolic Steroid Control Act of 2004.<sup>65</sup> The first mention

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<sup>60</sup> U.S. Department of Agriculture, Food Safety and Inspection Service, “Requirements for the Disposition of Cattle That Become Non-Ambulatory Disabled Following Ante-Mortem Inspection,” *73 Federal Register* 50889, August 29, 2008.

<sup>61</sup> U.S. Department of the Interior, National Park Service, “Special Regulation: Areas of the National Park System, National Capital Region,” *73 Federal Register* 46215, August 8, 2008.

<sup>62</sup> U.S. Department of Commerce, International Trade Administration, “Steel Import Monitoring and Analysis System,” *73 Federal Register* 75624, December 12, 2008.

<sup>63</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicare Program; Prescription Drug Benefit Program: Payments to Sponsors of Retiree Prescription Drug Plans,” *74 Federal Register* 1550, January 12, 2009.

<sup>64</sup> U.S. Department of the Interior, Fish and Wildlife Service and National Park Service, “General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service,” *73 Federal Register* 23388, April 30, 2008.

<sup>65</sup> U.S. Department of Justice, Drug Enforcement Administration, “Classification of Three Steroids as Schedule III Anabolic Steroids Under the Controlled Substances Act,” *73 Federal Register* 22294, April 25, 2008.

of this proposed rule in the Unified Agenda was in May 2008, after the NPRM was published.

- VA said it published its April 2008 proposed rule on grants for the hiring and retention of nurses to implement provisions of the Veterans Health Programs Improvement Act of 2004.<sup>66</sup> The only “proposed rule” entry for this rule was published in May 2008, after the NPRM was published.

Also, federal agencies differed significantly in their use of the Unified Agenda for these rules. Some agencies (e.g., EPA and HHS) almost always published at least one “proposed rule” entry in the Unified Agenda before they published the related NPRMs, while other agencies (e.g., DOC, DOD, and OPM) did so about half of the time, or less.

## Policy Options

As noted earlier in this report, Congress and various Presidents have established a number of requirements and processes regarding how agencies are to develop and promulgate proposed rules, including various mechanisms to enable transparency and public participation. Therefore, Congress and the Obama Administration may conclude that those existing mechanisms are sufficient, and that no changes are needed in how the public learns about forthcoming proposed rules. However, should either Congress or the Obama Administration conclude that improvements are needed in the transparency of the rulemaking process, or in opportunities for the public to participate in that process prior to the publication of proposed rules, various policy options are available.

Some of the available options have nothing to do with the Unified Agenda. For example, either Congress or the President could require or encourage agencies to engage in pre-NPRM communications with the general or affected public through public meetings, ANPRMs, advocacy panels, or other consultative devices.<sup>67</sup> Other alternatives include newer methods of communication that have been suggested by the White House’s deputy chief technology officer, including blogs and other forms of “social media.” Also, GAO’s 2009 report on federal rulemaking discussed tracking systems in place at DOT and other agencies that identified key milestones that the agencies needed to accomplish to produce a final rule.<sup>68</sup> These tracking systems, or elements of these systems, could be made available to the public to disclose when

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<sup>66</sup> U.S. Department of Veterans Affairs, “Assistance to States in Hiring and Retaining Nurses at State Veterans Homes,” 73 *Federal Register* 19785, April 11, 2008.

<sup>67</sup> Some of the rules reviewed in this report used one or more of these other approaches. For example, in addition to using the Unified Agenda to notify the public about its upcoming proposed rule on energy efficiency standards for fluorescent and incandescent reflector lamps, DOE published an ANPRM and held at least one public meeting before issuing the proposed rule. See U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, “Energy Conservation Program: Energy Conservation Standards for General Service Fluorescent Lamps and Incandescent Reflector Lamps,” 74 *Federal Register* 16920, April 13, 2009. An October 2008 proposed rule issued by the Occupational Safety and Health Administration on cranes and derricks was the subject of negotiated rulemaking from 2002 through 2004, and was the subject of an advocacy review panel in 2006. See U.S. Department of Labor, Occupational Safety and Health Administration, “Cranes and Derricks in Construction,” 73 *Federal Register* 59714, October 9, 2008.

<sup>68</sup> U.S. Government Accountability Office, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*, GAO-09-205, April 20, 2009, pp. 14-17.

proposed rules are expected to be issued. Finally, agencies could allow the public to sign up to receive notices about upcoming regulatory actions within particular areas.<sup>69</sup>

Another set of alternatives could build on an element of the rulemaking infrastructure that has existed for more than 25 years, and use the Unified Agenda to improve participation and transparency prior to notice and comment. If Congress or the President elected to do so, several options within this category are available, either individually or in combination. One such option is to improve the visibility of the Unified Agenda to the public. As noted earlier in this report, other than federal agencies, certain members of academia, and certain interest group representatives, it is unlikely that many members of the general public know that the Unified Agenda exists. Notably, when discussing options for improving pre-NPRM rulemaking transparency and participation at a June 2009 American Bar Association conference, the White House's deputy chief technology officer did not mention the Unified Agenda.<sup>70</sup> To improve the visibility of the Unified Agenda to the public, (1) the OMB "open government" directive could identify the Agenda as a way to improve rulemaking transparency and participation, (2) agency websites could provide the public with links to the agency's Agenda entries,<sup>71</sup> and (3) agencies could use press releases to publicize Agenda entries describing upcoming proposed rules. Improvements in the visibility of the Unified Agenda to the general public could help "level the playing field" between the public and specialized interest groups who often know well in advance of agencies' forthcoming proposed rules, and are sometimes consulted as part of the rule development process.

Another option is to improve federal agencies' use of the Unified Agenda as a transparency mechanism. Although publication of a notice in the Unified Agenda is not always possible before the publication of an NPRM (e.g., when rules must be issued quickly after a precipitating event), the differences in the performances of the agencies and the reasons given for the issuance of some of the rules examined in this report suggest that improvements in this area are possible. In some cases, the agencies appeared to have been developing their proposed rules for years, but still did not use the Unified Agenda to alert the public about the forthcoming rule. To remedy this situation, either Congress or the President could require agencies to publish "proposed rule" entries in the Unified Agenda before submitting significant draft rules to OIRA, or to explain why such entries were not possible. This requirement could be enforced by OIRA as part of its review process under Executive Order 12866. While such a requirement could improve transparency and opportunities for participation, it could also have other, more negative effects (e.g., lengthening the rulemaking process, or driving agencies to issue more rules without an NPRM).

A third option is for Congress or the President to increase the frequency with which the Unified Agenda is published. As noted earlier in this report, the Agenda is currently published twice each year, usually in either April or May, and again in October, November, or December. In order for an agency's entries to appear in the Agenda, they must be submitted to RISC at least one month prior to the date of publication, although a limited number of updates are sometimes possible. As a result of the infrequency of publication and lead times, agencies sometimes publish "proposed

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<sup>69</sup> Currently, the public can bookmark documents and dockets of interest in Regulations.gov and sign up for email notifications as new documents are added to the system.

<sup>70</sup> Comments by Beth Noveck, deputy chief technology officer, Office of Science and Technology Policy, at a conference sponsored by the American Bar Association's Section of Administrative Law and Regulatory Practice, Washington, D.C., June 10, 2009.

<sup>71</sup> A few agency websites provide such links, but not all do so.

rule” entries in the Unified Agenda either after or just slightly before the NPRM is published, or publish no entry at all, thereby eliminating or diminishing the Agenda’s value as transparency mechanism for the public. If the Unified Agenda was published more frequently (e.g., every quarter), or if the Agenda could be maintained as more of an ongoing, “real-time” database, the public could have a better sense of what rules are under development within the agencies.<sup>72</sup>

Finally, even if all of the above-mentioned options were implemented and the Unified Agenda was made more visible, useful, and timely, the public would often still be unable to file pre-NPRM comments on the Unified Agenda entries. A regulatory “docket” serves as the repository for documents or information related to an agency’s rulemaking and other activities, and typically contains legal or economic analyses that the agency has prepared and the comments submitted by the public. In the past, paper rulemaking dockets were kept at the agencies. In recent years, however, agencies have been required to use the electronic docketing system at the Regulations.gov website.<sup>73</sup> In that system, agencies are not allowed to establish a rulemaking docket before an NPRM is published in the *Federal Register*.<sup>74</sup> If agencies could be allowed to establish those dockets when the first Unified Agenda entry is published (and when RIN numbers are assigned), then comments from the public on forthcoming proposed rules could be part of the rulemaking docket.

Unified Agenda entries on forthcoming proposed rules are necessarily less specific and detailed than the NPRMs. Therefore, any comments on those Agenda entries may also be less specific, and less useful to the issuing agencies, than comments on proposed rules. Nevertheless, the commenting public may have information or perspectives that the issuing agencies would find useful, particularly before the agencies have signed off on the rule or published the NPRM. Even if pre-NPRM comments from the public are not permitted, advance notice of a forthcoming proposed rule can give the public more time to gather information and prepare their comments for submission after the proposed rule is published. This can be particularly important when agencies provide the public with relatively short comment periods (e.g., 30 days, or less). Finally, a revitalized Unified Agenda could serve as a government-wide mechanism for inter-agency coordination, allowing agencies to avoid duplication of effort and conflicting regulatory requirements.

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<sup>72</sup> Section 4(b) of Executive Order 12866 requires agencies to “prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA.” It does not specify that the Unified Agenda be published at particular times of the year, or even in the *Federal Register*. However, Section 602 of the Regulatory Flexibility Act requires that each agency publish a regulatory flexibility agenda listing rules that the agency expects will have a significant economic impact on a substantial number of small entities in April and October of each year.

<sup>73</sup> For more information on this docketing system and electronic rulemaking more generally, see CRS Report RL34210, *Electronic Rulemaking in the Federal Government*, by Curtis W. Copeland.

<sup>74</sup> Telephone conversation between the author and the Regulations.gov helpdesk, June 24, 2009.