

Biden’s Fall 2023 Unified Agenda

By: Zhou dan Xie | December 11, 2023

The Office of Information and Regulatory Affairs published the Fall 2023 Unified Agenda on December 6. This commentary gives an overview of the Agenda and highlights notable actions that agencies plan to issue in the near term.

Introduction

On December 6, the Office of Information and Regulatory Affairs (OIRA) released the [Fall 2023 Unified Agenda](#). The Unified Agenda contains information about regulatory actions in development or recently completed by federal agencies. This release marks the Biden administration’s sixth Unified Agenda. This commentary gives an overview of the Agenda and highlights notable actions that agencies plan to issue in the near term.

What’s in the Fall 2023 Agenda?

The Spring 2023 Unified Agenda contains a total of 3,599 agency actions, including 304 “section 3(f)(1) significant” actions—those with an expected annual effect of more than \$200 million as defined in [Executive Order \(EO\) 14094](#) (Table 1). [EO 12866](#) had set the threshold at \$100 million for rules that had been referred to as “economically significant” actions. EO 14094, published on April 6, 2023, amended section 3(f)(1) of EO 12866 to raise the threshold to \$200 million. The Fall 2023 Unified Agenda removed the “Economically Significant” designation from the priority categories for the first time and retains only “Section 3(f)(1) Significant,” as defined by EO 14094, along with other categories.

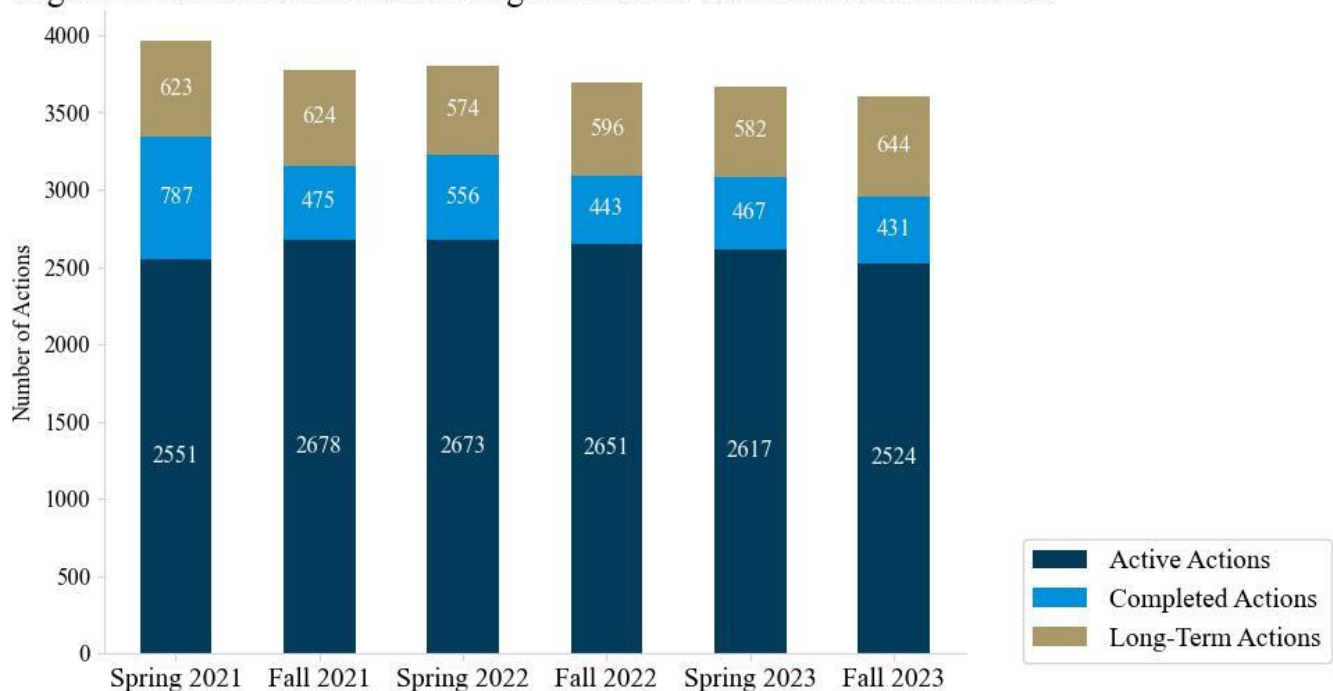
Table 1: Overview of the Fall 2023 Agenda

| Stage | All Agency Actions | Section 3(f)(1) Significant | First Time Published |
|-----------|--------------------|-----------------------------|----------------------|
| Active | 2,524 | 232 | 320 |
| Long-term | 644 | 30 | 31 |
| Completed | 431 | 42 | 40 |
| Total | 3,599 | 304 | 391 |

The Agenda lists actions by stage of development: 2,524 are active (the next agency action is expected within 12 months), 644 are long-term (beyond 12 months), and 431 are completed (rules finalized or withdrawn since the previous Unified Agenda was published). Among the 2,524 active actions, 320 (approximately 13%) are being published for the first time in this Unified Agenda, and 232 are section 3(f)(1) significant actions (of which 21 are published for the first time).

The total number of actions in this Agenda is slightly smaller than previous Biden administration Agendas (Figure 1). There is a small decline of 1.8% (from 3,666 to 3,599) in the total number of actions from the Spring 2023 Agenda. The number of active actions changed from 2,617 to 2,524, a 3.6% reduction. The number of long-term actions in the current Agenda, however, is higher than all the previous Biden Agendas, marking an 11% increase from the Spring 2023 Agenda. Most of the increase pertains to nonsignificant actions.

Figure 1: Fall 2023 and Previous Agendas under the Biden Administration



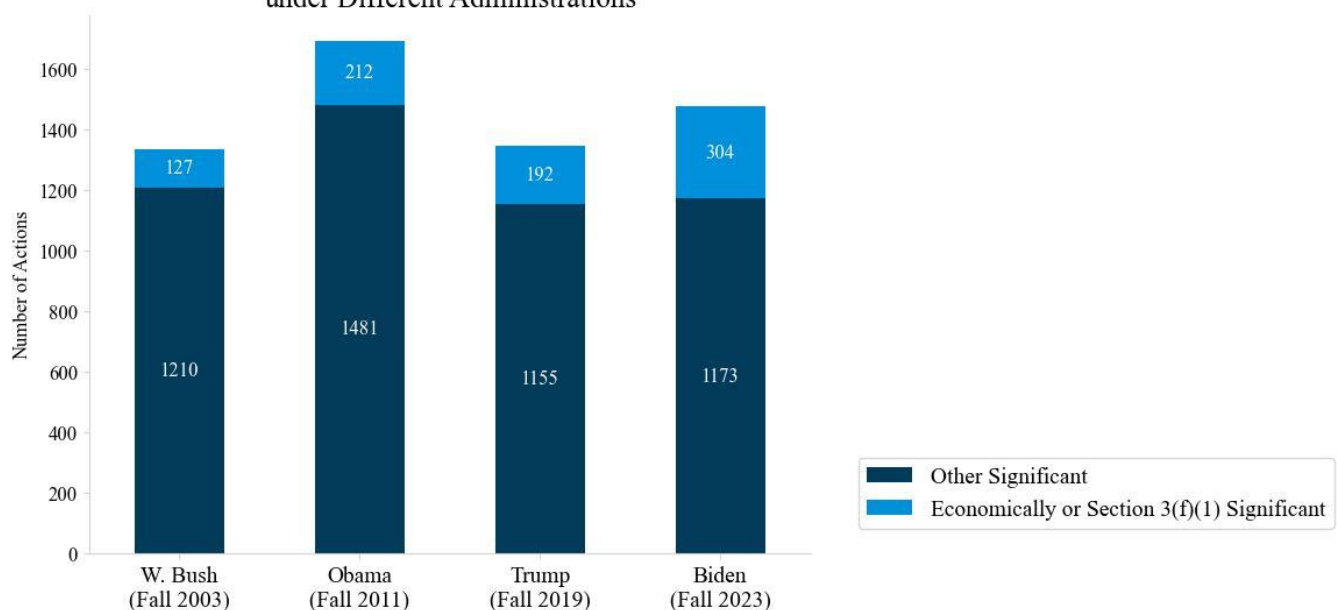
The Fall 2023 Agenda no longer designates whether an action is economically significant based on the original definition in EO 12866, which was used in the Unified Agenda beginning with Fall 1995. This Agenda includes 304 section 3(f)(1) significant actions. The number would be higher (or unchanged) if the original definition of economically significant actions was applied (due to the lower threshold of estimated annual impact). However, it is technically difficult to figure out how many actions fall into the original category without more details about each action.

Due to this change, the number of section 3(f)(1) significant actions in the current Agenda is not directly comparable to the number of economically significant actions in previous Agendas. For reference, the

Spring 2023 Agenda included 317 economically significant or section 3(f)(1) significant actions,¹ and the Fall 2022 Agenda included 332 economically significant actions. Those numbers are higher than the number of section 3(f)(1) significant actions in this Agenda. Additional caution is needed to interpret this difference as a decrease in rulemaking activity under the Biden administration, because it could merely be a result of the definition change for categorization.

In addition to the change to section 3(f)(1), EO 14094 also amended section 3(f)(4) of EO 12866, which narrowed the definition of “other significant” (i.e., significant but not section 3(f)(1) significant) actions. This category now requires the OIRA Administrator’s explicit confirmation.² The Fall 2023 Agenda includes 1,173 other significant actions, compared to 1,118 in the Spring 2023 Agenda and 1,160 in the Fall 2022 Agenda.

Figure 2: Significant Actions Published in the 6th Unified Agenda under Different Administrations



Note: This figure plots section 3(f)(1) significant actions published in the Fall 2023 Unified Agenda and economically significant actions in the previous Agendas.

The same caveats apply when comparing the current Agenda with the Agendas published by previous administrations (Figure 2). The problem may be less salient in the case of section 3(f)(1) significant actions, since the number is substantially higher than the number of economically significant actions published in previous administrations’ sixth Agenda. As also observed for previous Biden Agendas, the difference is mostly driven by the number of active rulemakings, partially attributable to continued post-

¹ The Spring 2023 Unified Agenda included both “Economically Significant” and “Section 3(f)(1) Significant” categories. Only actions published after April 6, 2023 were categorized based on the new 3(f)(1) definition, while earlier actions that meet the new definition were still categorized as “Economically Significant” based on the original definition in EO 12866. As a result, the Spring 2023 Agenda included 297 “Economically Significant” actions and 20 “Section 3(f)(1) Significant” actions.

² E.O. 14094 now defines 3(f)(4) actions as those that “raise legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.”

COVID actions such as the Paycheck Protection Program. The number of other significant actions in this Agenda, however, is lower than the W. Bush and Obama administrations' sixth Agenda (1,210 and 1,481, respectively). This difference may reflect the change to the definition in section 3(f)(4).

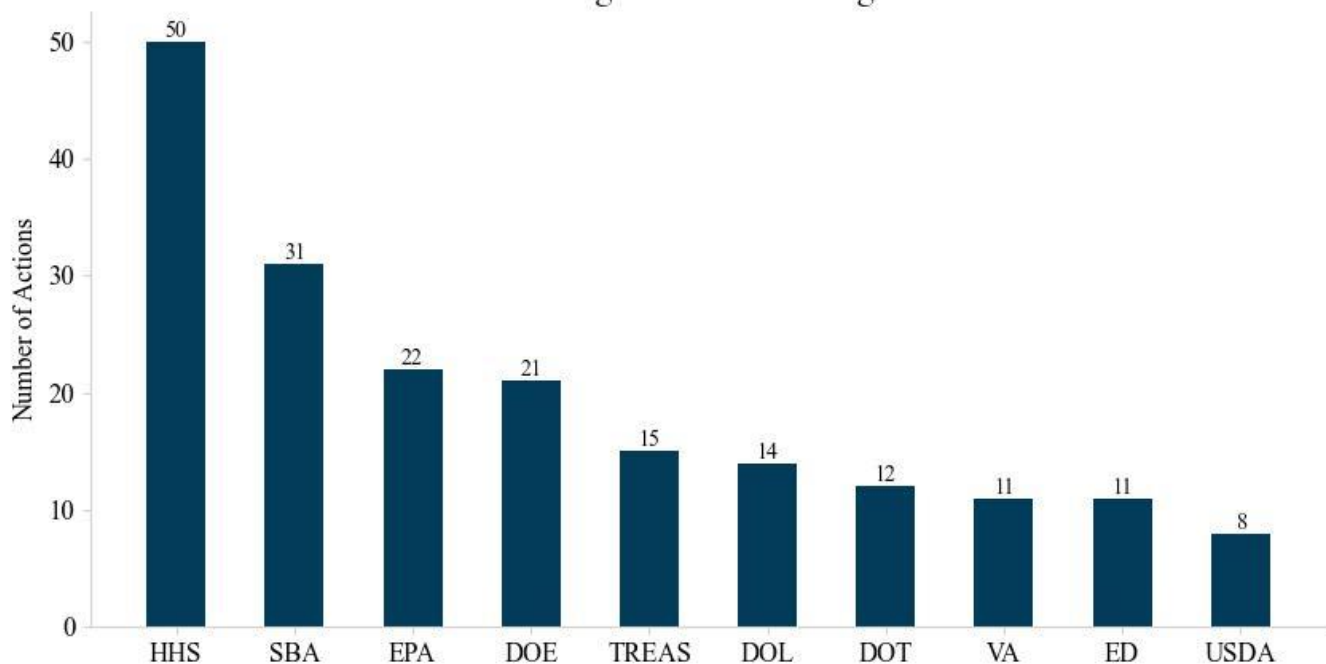
Compared with previous Agendas, another change in this Agenda is that agencies add more discussion about public participation in the rulemaking process to their [statements of regulatory priorities](#). This addition is to comply with EO 14094 and OIRA's subsequent [implementing guidance](#) on "broadening public participation and community engagement in the regulatory process." OIRA [praises](#) it as the "first Regulatory Agenda in which agencies discuss their efforts to encourage public participation and engagement in the rulemaking process and share how this engagement has informed the development of regulatory priorities." However, scholars [argue](#) that this initiative may have limited effects, since the administration's reliance on "old tools" will not necessarily lead to a dramatic increase in public participation.

Active Section 3(f)(1) Significant Actions by Agency

Breaking down the active section 3(f)(1) significant actions by agency reveals ongoing priorities reflected in the Unified Agenda. As shown in Figure 3, the agencies with the highest number of active section 3(f)(1) significant actions planned include the Department of Health and Human Services (HHS), the Small Business Administration (SBA), the Environmental Protection Agency (EPA), the Department of Energy (DOE), the Department of the Treasury (TREAS), the Department of Labor (DOL), the Department of Transportation (DOT), the Department of Veterans Affairs (VA), the Department of Education (ED), and the Department of Agriculture (USDA). Together, these agencies are responsible for 195 active section 3(f)(1) significant actions, over 80% of such actions in the current Agenda.

Like the previous Biden Agendas, HHS is working on the largest number of section 3(f)(1) significant actions. More than half (27) of these active actions come from the Centers for Medicare and Medicaid Services (CMS). Many of the CMS rules deal with recurring actions related to Medicare and Medicaid programs, such as [payment rate](#) and [quality incentive](#) updates for the upcoming fiscal and contract year. The Food and Drug Administration (FDA) plans to take 11 actions in the near term. All those actions have been previously published in the Unified Agenda, such as an intended [rulemaking](#) on front-of-package nutrition labeling, a [proposed rule](#) on registration of commercial importers of drugs, and several continuing [actions](#) on [tobacco product standards](#). Appearing for the first time in the Unified Agenda, the Office for Civil Rights in HHS is [planning](#) to propose modifications to the Security Rule under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to strengthen cybersecurity of electronic protected health information.

Figure 3: Active Section 3(f)(1) Significant Actions in the Fall 2023 Unified Agenda for Select Agencies



EPA expects to take actions on 22 section 3(f)(1) significant rulemakings during the coming year. Among those, 17 actions were published in the Spring 2023 Agenda, and EPA was able to move nine of those rulemakings from proposed rule stage to final rule stage since then. Examples include vehicle [emission standards](#) for model years 2027 and later, [reconsideration](#) of the Mercury and Air Toxics Standards (MATS), and [amendments](#) to dust-lead hazard standards. EPA is still working on its proposal on new source performance standards (NSPS) and greenhouse gas emission guidelines for fossil fuel-fired electric generating units, which would repeal the Affordable Clean Energy Rule; it issued a [supplemental notice of proposed rulemaking](#) on November 20, 2023 and [plans to](#) issue a final rule by Spring 2024.

Other notable actions that EPA is considering include [finalizing](#) its recent [proposal](#) addressing lead and copper in drinking water, which would amend the Lead and Copper Rule Revision published on January 15, 2021. EPA also published a [proposed rule](#) in January 2023 to revise the level of the primary annual PM_{2.5} standard, repealing a December 2020 decision to retain the PM standards, and it [anticipates](#) finalizing the proposal in December 2023.

As in the previous Agendas, SBA is still the agency expecting the second largest number of section 3(f)(1) significant actions within the next year, but all the actions except one are related to the Paycheck Protection Program. Relatedly, six of the 15 actions from the Treasury Department also deal with the Paycheck Protection Program. Other Treasury actions include intended proposals [establishing](#) a risk assessment requirement and supervision priorities for financial institutions, [revising](#) the process for entering low-value shipments, and [amending](#) the requirements related to surprise billing.

Among the 21 section 3(f)(1) significant actions planned by DOE, the vast majority (19) are Energy Conservation Standards, including those for consumer clothes [washers](#) and [dryers](#), [dishwashers](#), [boilers](#),

[ceiling fans](#), [refrigerators](#), and [water heaters](#). While included in the Spring 2023 Agenda, DOL has not finalized its [2022 proposal](#) on the classification of a worker's status as an employee or independent contractor and now [expects](#) to finalize the action in the coming months. The Education Department [adds](#) a new rulemaking to the current Agenda related to student loan relief, and the department is [preparing](#) proposed regulations through negotiated rulemaking.

USDA replaces the Department of Homeland Security to be one of the 10 agencies that are planning for the largest number of section 3(f)(1) significant actions in this Agenda. In addition to its ongoing regulatory actions on the Supplemental Nutrition Assistance Program and other food service programs, USDA [plans to](#) propose a rule to codify the policies and procedures for the Higher Blends Infrastructure Program which has been implemented since 2020 to “increase the sales and use of higher blends of ethanol and biodiesel by expanding the infrastructure for renewable fuels derived from U.S. agricultural products.” USDA intends to take this action because the program has a significant impact on climate change, a Biden administration's priority.

Also related to climate change, the Council on Environmental Quality (CEQ) [expects](#) to finalize by Spring 2024 its [July proposal](#) that would revise the National Environmental Policy Act (NEPA) implementing regulations. This action represents phase 2 of CEQ's rulemaking to revise the 2020 NEPA regulations, pursuant to Biden's executive orders on tackling the climate crisis.

Conclusion

The number of actions published in the Fall 2023 Unified Agenda is slightly less than the Biden administration's previous Agendas. This Agenda removes the original categorization of economically significant actions and only designates whether an action is section 3(f)(1) significant based on the new definition from EO 14094. The Agenda also reflects EO 14094's change to the definition of “other significant” rules under section 3(f)(4). Caution is therefore needed in interpreting the differences when comparing the current Agenda with previous ones. Pursuant to OIRA guidance, this Agenda also adds more discussion about public participation in the regulatory process.

The distribution of active section 3(f)(1) significant actions across agencies in this Agenda is similar to previous Agendas, with HHS, SBA, and EPA considering the largest number of such actions. Specific actions published in the Agenda reflect agencies' continued efforts in the areas of climate change, water and air pollution, public health, student debt relief, and cybersecurity.