Improving Notice of Regulatory Changes

Committee on Regulation

Proposed Recommendation for Committee | April 22, 2022

The federal government issues hundreds of thousands of pages of enacted statutes, legislative rules, guidance documents, adjudicative orders, notices, and other materials each year that affect administrative programs. Federal law generally requires that the public be notified of these changes through publication in official sources such as the Statutes at Large, Federal Register, Code of Federal Regulations, or on an official government website.

Such publication is, as a legal matter, generally considered to provide constructive notice to potentially interested persons.¹ Nevertheless, the sheer volume of such materials and the manner in which they are published and presented can make it difficult for potentially interested persons to keep track of regulatory developments, especially without the aid of legal counsel² or reference guides such as agency manuals, digests,³ or instructions that synthesize dispersed agency pronouncements into a coherent whole.⁴ Although large, well-resourced entities generally

¹ See, e.g., 5 U.S.C. § 552(a); 44 U.S.C. § 1507. Constitutional due process may require additional notice in some circumstances; as technologies such as email and the internet evolve, courts may hold in some circumstances that publication in a statutorily prescribed manner is insufficient to provide notice to an affected party. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (due process requires notice that is reasonably calculated to provide the best notice practical under the circumstances and therefore constructive notice by publication is insufficient if other better methods such as notice by mail are available); Higashi v. United States, 225 F.3d 1343, 1348–49 (Fed. Cir. 2000) (holding that Mullane applies in the case of recission of an executive order but finding, as a factual matter, that the agency provided adequate notice under the Mullane standard). Agencies should be aware of this possibility when developing and implementing plans to notify potentially interested persons of significant regulatory changes.


find publication in official sources such as the *Federal Register* sufficient to provide effective notice of regulatory changes, smaller entities with less internal expertise and fewer resources may find it more difficult to track regulatory changes or pay lawyers and consultants to do so. Historically underserved communities also often struggle to get effective notice of regulatory changes.

Furthermore, agencies often use guidance documents to announce new interpretations of law or to advise the public of the manner in which they propose to exercise a discretionary power, and they may announce changes in law through adjudicative decisions. Because these changes may not be published in the *Federal Register*, it can be difficult even for larger, well-resourced entities to track them. Similarly, even well-resourced and sophisticated persons may struggle to understand regulatory changes that emerge not from a single pronouncement but from a combination of agency materials without agency reference guides such as digests, manuals, or summaries that assemble these dispersed materials into a coherent whole.

Without actual notice of regulatory changes, individuals may miss out on benefits to which the law entitles them, regulated persons may find themselves subject to enforcement actions for noncompliance with legal requirements of which they were unaware, and other potentially interested persons may be unaware of regulatory developments that affect them.

By taking steps to promote actual notice of regulatory changes, agencies can promote compliance with legal requirements, thereby reducing the need for enforcement proceedings. Effective notice also promotes fairness and transparency and encourages greater public participation in agency decision making. When agencies communicate with the public, seek public input, and understand public perspectives, they generate greater understanding and acceptance of agency actions.5

Although agencies must comply with legal requirements for notice, agencies can take additional steps to improve notice of regulatory changes. This is of particular importance when a change is significant, meaning it could reasonably be expected to change the behavior of regulated parties or regulatory beneficiaries. An agency might consider strategies such as

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publishing information about the change on its website, issuing a press release or fact sheet
summarizing and explaining the change, communicating the change using social media or email
lists, holding a public meeting to explain and answer questions about the change, and updating
agency reference guides that synthesize dispersed agency pronouncements into a coherent whole
and explain how a change fits into a broader regulatory scheme.

An agency’s strategy for a particular regulatory change will depend, in large part, on the
agency’s objectives; the nature, purpose, and significance of the regulatory change; and the
needs of the intended audience. This Recommendation provides a framework for developing
effective notice strategies and for evaluating their effectiveness for future improvement.6

This Recommendation acknowledges differences across agencies in terms of the number
and kinds of significant regulatory changes they make, the types of potentially interested persons
with whom they engage, and their resources and capacities for providing notice. The appropriate
notice strategy will therefore differ between agencies. Accordingly, although it is likely that
agencies following this Recommendation will employ some of the strategies enumerated, this
Recommendation should not be understood as necessarily advising agencies to employ every
strategy for every significant regulatory change.

6 The Administrative Conference has in recent years issued several recommendations on providing public access to
legal materials related to administrative programs including agency guidance documents, adjudication rules, and
adjudicative decisions. See, e.g., Admin. Conf. of the U.S., Recommendation 2021-7, Public Availability of
Inoperative Agency Guidance Documents, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S.,
Recommendation 2020-6, Agency Litigation Webpages, 86 Fed. Reg. 6624 (Jan. 22, 2021); Admin. Conf. of the
2021); Admin. Conf. of the U.S., Recommendation 2019-3, Public Availability of Agency Guidance Documents, 84
Adjudication Rules, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1,
Adjudication Materials on Agency Websites, 82 Fed. Reg. 31,039 (July 5, 2017). This Recommendation expands
on those recommendations by specifically addressing strategies for improving public notice of significant regulatory
changes that agencies make through such materials.
RECOMMENDATION

Developing Notice Plans

1. Agencies should develop notice plans, as appropriate for the needs of potentially interested persons, for providing effective notice of significant regulatory changes, meaning any changes in law or policy that can reasonably be expected to change the behavior of such persons. Notice plans should:
   a. Identify potentially interested persons for the agency’s significant regulatory changes;
   b. Specify strategies the agency proposes to use to provide notice;
   c. Assess the expected costs and benefits of each strategy; and
   d. Establish processes and metrics for evaluating the effectiveness of each strategy.

2. In developing their notice plans, agencies should consider the range of persons that may be interested in the agency’s significant regulatory changes, including regulated entities and regulatory beneficiaries; organizations and individuals; large and small entities; well-resourced and under-resourced entities; and intermediaries, including for-profit and nonprofit organizations, and the optimal approach to tailoring notice to each of the different types of persons.

3. In developing their notice plans, agencies should consider the variety of legal materials, including legislative rules, guidance documents, and adjudicative orders and opinions, through which significant regulatory changes are made and the optimal approach to tailoring notice based upon the nature of each change and the range of persons it affects.

4. In developing their notice plans, agencies should obtain feedback from potentially interested persons regarding which methods for providing notice they consider most effective. Methods for obtaining feedback could include convening focus groups, liaising with intermediary organizations, or taking broad surveys of potentially interested persons.
5. Agencies should consider whether individual significant regulatory changes might warrant additional strategies not included in the agency’s notice plan, either because they affect persons not previously regulated or new regulatory beneficiaries, or because the potentially interested persons have specific needs for effective notice.

6. Agencies should periodically evaluate which strategies are most effective at notifying potentially interested persons, including historically underserved communities, of significant regulatory changes. In doing so, agencies should obtain feedback from potentially interested persons regarding which methods for providing notice they considered most effective and suggestions for improvement.

Strategies for Providing Effective Notice

7. While no single technique will work for all agencies or in all circumstances, in assessing the notice strategies they may wish to undertake generally both as a general matter and with regard to specific significant regulatory changes, agencies should consider whether the techniques they have adopted such strategies:

a. Are cost-effective;

b. Are likely to increase compliance and reduce the need for enforcement;

c. Are targeted to reach members of historically underserved communities and small or under-resourced potentially interested persons who may have less capacity to monitor changes;

d. Reduce the administrative burden for regulated persons to assemble changes that emerge from a combination of agency materials; and

e. Have proven effective when used by other agencies to provide actual notice.

8. Agencies should consider publishing any regulatory changes for which they anticipate widespread public interest in the Federal Register, even if not required to do so by law. In so doing, they should assess whether the benefits of making the change permanently available to a broad audience justify the costs of publication. Agencies should consider publishing particularly important significant regulatory changes in
which they anticipate there will be widespread interest in the Federal Register, even if not required to do so by law, if they deem that the benefits of providing widespread notice in the Federal Register a single place—including making the change permanently available to a broad audience for reference purposes—justify the costs of publication.

9. Agencies should consider publishing brief notices of availability in the Federal Register with links to their websites alerting potentially interested persons when they publish significant regulatory changes in the form of agency guidance documents on their websites.

10. Agencies should ensure that their websites organize and present material in a way that makes significant regulatory changes clear and obvious to potentially interested persons and provides clear instructions to users regarding how to access materials announcing significant regulatory changes.

11. Agencies should optimize their websites to improve the visibility of significant regulatory changes in commercial search engines.

12. Agencies should consider publishing summaries of legal materials related to particular topics, which are particularly useful in providing notice when regulatory changes emerge from different agencies or when agencies make policy through adjudications or guidance documents, because it can be difficult for potentially interested persons to synthesize the changes. Agencies that do publish such summaries should revise those summaries promptly to reflect significant regulatory changes. Agencies must, however, balance the benefits of providing such summaries of the law against the costs in terms of staff time and potential oversimplification of the applicable law.

13. Agencies should consider issuing press releases when they make significant regulatory changes, which are particularly useful in alerting both potentially interested persons about new or expanded regulatory requirements that have not previously affected them and small or under-resourced potentially interested persons who may have less capacity to monitor changes.

14. Agencies should consider developing and using listservs and other email lists to inform potentially interested persons about significant regulatory changes. Listservs
and other email lists are an effective way to provide notice to targeted groups of
discrete and defined potentially interested persons, such as specific community or
advocacy groups, for very low cost. Agencies should also bear in mind the following
limitations of listservs and email lists:

a. Listservs and other email lists are less effective in providing notice to large
groups of individuals or those not previously affected by regulatory requirements.
b. Potentially interested persons also must know that lists exist and affirmatively
sign up for them.

15. Agencies should avoid over-using listservs and other email lists, which could result in
a significant regulatory change being obscured by less relevant messages. To mitigate
this risk, agencies should consider allowing users to opt in to narrowly defined topics.

16. Agencies should consider using social media tools, which are inexpensive and far-
reaching, to publicize significant regulatory changes.

17. Agencies should consider using blogs on their websites to inform potentially interested
persons about significant regulatory changes. Blogs allow agencies to tailor notice to
the interests and needs of particular groups and provide notice in ways that are
accessible to those groups.

18. Agencies should consider hosting public meetings or participating in conferences or
other meetings convened by outside organizations to share information and answer
questions about significant regulatory changes. Agencies, however, must balance the
advantages of such meetings against the cost in terms of staff time and administration.

19. When agencies host public meetings to share information about significant regulatory
changes, they should generally provide a means for potentially interested persons to
attend or participate remotely, to expand access for members of historically
underserved communities, potentially interested persons who live far from where the
agency holds meetings, and potentially interested persons who face other accessibility
issues.

20. Agencies should consider training and equipping front-line agency employees, such as
those in field offices, to answer questions about significant regulatory changes and to
work with community organizations and other intermediaries to provide notice of changes. Such agency employees may be particularly effective in providing notice to underserved communities.

21. Agencies should identify and work with intermediary organizations such as states, trade associations, lawyers, consultants, commercial and non-profit trainers, and newsletter publishers, which can assist in providing effective notice to different groups of potentially interested persons.

Oversight and Assessment

22. Agencies should consider designating an officer or office to coordinate and support the development, implementation, and evaluation of notice plans. This officer or office should:

a. Be responsible for evaluating the effectiveness of the agency’s notice plan;
b. Keep abreast of technological developments for improving notice strategies, such as new social media platforms or improved methods for indexing and organizing documents on the agency’s website;
c. Evaluate practices that other agencies use to provide notice of significant regulatory changes; and
d. Make recommendations for improving the agency’s practices and procedures to better provide effective notice of significant regulatory changes to potentially interested persons.

23. Agencies should share information with each other about their experiences with and practices for improving notice of significant regulatory changes. To help carry out this Recommendation, the Conference’s Office of the Chairman should provide, as authorized by 5 U.S.C. § 594(2), for the “interchange among administrative agencies of information potentially useful in improving” agency notice strategies.