



Improving Notice of Regulatory Changes

Committee on Regulation

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

6 Such publication is, as a legal matter, generally considered to provide constructive notice
7 to potentially interested persons.¹ Nevertheless, the sheer volume of such materials and the
8 manner in which they are published and presented can make it difficult for potentially interested
9 persons to keep track of regulatory developments, especially without the aid of legal counsel or
10 reference guides such as agency manuals, digests, or instructions that synthesize dispersed
11 agency pronouncements into a coherent whole.² Although large, well-resourced entities generally
12 find publication in official sources such as the *Federal Register* sufficient to provide effective
13 notice of regulatory changes, smaller entities with less internal expertise and fewer resources

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 rescission 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.

² Joshua Galperin & E. Donald Elliott, *Providing Effective Notice of Regulatory Changes* (Mar. 25, 2022) (draft report to the Admin. Conf. of the U.S.).



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14 may find it more difficult to track regulatory changes or pay lawyers and consultants to do so.
15 Historically underserved communities³ also often do not get effective notice of regulatory
16 changes.

17 Even larger, well-resourced persons may have difficulty tracking regulatory changes that
18 are not published in the *Federal Register*, such as guidance documents announcing new
19 interpretations of law or proposals to exercise a discretionary power, as well as changes in law
20 announced through adjudicative decisions. Similarly, well-resourced and sophisticated persons
21 may struggle to understand regulatory changes that emerge not from a single pronouncement but
22 from a combination of agency materials without reference guides such as digests, manuals, or
23 summaries that assemble these dispersed materials into a coherent whole.

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

28 By taking steps to promote actual notice of regulatory changes, agencies can promote
29 compliance with legal requirements, thereby reducing the need for enforcement proceedings.
30 Such steps also promote fairness and transparency and encourage greater public participation in
31 agency decision making. When agencies communicate with the public, seek public input, and
32 understand public perspectives, they generate greater understanding and acceptance of agency
33 actions.⁴

34 Although agencies must comply with legal requirements for notice, agencies can take
35 additional steps to improve notice of regulatory changes. This is of particular importance when a
36 change is significant, meaning it could reasonably be expected to change the behavior of
37 regulated parties or regulatory beneficiaries.⁵ An agency might consider strategies such as

³ Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

⁴ Admin. Conf. of U.S., Forum, Underserved Communities and the Regulatory Process, Panel 1: Identifying Underserved Communities, Admin. Conf. of U.S. (2021).

⁵ Reference to ‘significant’ regulatory changes in this Recommendation does not refer to ‘significant’ or ‘major’ rules as those terms are used in Executive Order 12,866 and the Congressional Review Act.



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38 publishing information about the change on its website, issuing a press release or fact sheet
39 summarizing and explaining the change, communicating the change using social media or email
40 lists, holding a public meeting to explain and answer questions about the change, and updating
41 agency reference guides that comprehensively summarize dispersed agency pronouncements into
42 a coherent whole and explain how a change fits into a broader regulatory scheme. Agencies
43 might also design their websites to organize and present information in a way that makes
44 significant regulatory changes clear and obvious to users and allow users to identify particular
45 topics on which they wish to receive email alerts.

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

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

⁶ The Administrative Conference in recent years has issued several recommendations on providing public access to legal materials related to administrative programs, including agency guidance documents, adjudicative 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 U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of 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 and Reviewing Notice Plans

- 57 1. Agencies should develop written notice plans, as appropriate, for providing effective
58 notice of significant regulatory changes, meaning changes in law or policy, however
59 announced, that can reasonably be expected to alter the behavior of potentially
60 interested persons. Notice plans should:
- 61 a. Identify potentially interested persons for the agency’s significant regulatory
62 changes;
 - 63 b. Specify strategies the agency proposes to use to provide notice;
 - 64 c. Assess the expected costs and benefits of each strategy; and
 - 65 d. Establish processes and metrics for evaluating the effectiveness of each strategy.
- 66 2. In developing their notice plans, agencies should consider the range of persons that
67 may be interested in the agency’s significant regulatory changes and the optimal
68 approach to tailoring notice to each of the different types of persons. Persons who may
69 be interested include regulated entities and regulatory beneficiaries; organizations and
70 individuals; large and small entities; well-resourced and under-resourced entities; and
71 intermediaries, including for-profit and nonprofit organizations.
- 72 3. In developing their notice plans, agencies should consider the variety of legal
73 materials, including legislative rules, guidance documents, and adjudicative decisions,
74 through which significant regulatory changes are made and the optimal approach to
75 tailoring notice based upon the nature of each change and the range of persons it
76 affects.
- 77 4. In developing their notice plans, agencies should obtain feedback from potentially
78 interested persons regarding which methods for providing notice they consider most
79 effective. Methods for obtaining feedback could include convening focus groups,
80 liaising with intermediary organizations, or taking broad surveys of potentially
81 interested persons.



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- 82 5. In developing their notice plans, agencies should consider providing potentially
83 interested persons with means for identifying areas of interest for which they wish to
84 receive notice.
- 85 6. Agencies should consider whether individual significant regulatory changes might
86 warrant additional strategies not included in the agency's notice plan, either because
87 they affect persons not previously regulated or new regulatory beneficiaries, or
88 because the potentially interested persons have specific needs for effective notice.
- 89 7. Agencies should periodically evaluate which strategies are most effective at notifying
90 potentially interested persons, including historically underserved communities, of
91 significant regulatory changes. In doing so, agencies should obtain feedback from
92 potentially interested persons regarding which methods for providing notice they
93 consider most effective and suggestions for improvement.

Strategies for Providing Effective Notice

- 94 8. Although no single technique will work for all agencies or in all circumstances, in
95 assessing the strategies they wish to undertake both as a general matter and with
96 regard to specific significant regulatory changes, agencies should consider whether
97 such strategies:
- 98 a. Are cost-effective;
- 99 b. Are likely to increase compliance and reduce the need for enforcement;
- 100 c. Are targeted to reach members of historically underserved communities and small
101 or under-resourced potentially interested persons who may have less capacity to
102 monitor changes;
- 103 d. Reduce the administrative burden for regulated persons to assemble changes that
104 emerge from a combination of agency materials;
- 105 e. Have proven effective when used by other agencies to provide actual notice; and
106 f. Provide opportunities for interested persons to identify areas about which they
107 would like to receive notice about significant regulatory changes.



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- 108 9. Agencies should consider publishing in the *Federal Register* regulatory changes for
109 which they anticipate the most widespread public interest, even if not required to do so
110 by law. In so doing, they should assess whether the benefits of making the change
111 permanently available to a broad audience justify the costs of publication. Agencies
112 should consider publishing brief notices of availability in the *Federal Register* alerting
113 potentially interested persons when they publish significant regulatory changes in the
114 form of agency guidance documents on their websites.
- 115 10. Agencies should seek to organize and present material on their websites in a way that
116 makes significant regulatory changes clear and obvious to potentially interested
117 persons and provides clear instructions to users regarding how to access materials
118 announcing significant regulatory changes.
- 119 11. Agencies should consider optimizing their websites to improve the visibility of
120 significant regulatory changes in commercial search engines.
- 121 12. Agencies should consider publishing summaries of legal materials organized by topic.
122 This approach is particularly useful in providing notice when regulatory changes
123 emerge from different agencies or when agencies announce policy through
124 adjudications or guidance documents, because it can be difficult for potentially
125 interested persons to synthesize the changes. Agencies that do publish such summaries
126 should revise those summaries promptly to reflect significant regulatory changes.
127 Agencies must, however, balance the benefits of providing such summaries of the law
128 against the costs in terms of staff time and potential oversimplification of the
129 applicable law.
- 130 13. Agencies should consider issuing press releases when they make significant regulatory
131 changes. This approach is particularly useful in alerting both potentially interested
132 persons about new or expanded regulatory requirements that have not previously
133 affected them and small or under-resourced potentially interested persons who may
134 have less capacity to monitor changes.
- 135 14. Agencies should consider developing and using email distribution lists to inform
136 potentially interested persons about significant regulatory changes. Email distribution



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- 137 lists are an effective way to provide notice to targeted groups of discrete and defined
138 potentially interested persons, such as specific community or advocacy groups, at low
139 cost. Agencies should, however, bear in mind the following limitations of listservs and
140 email lists:
- 141 a. Email distribution lists are less effective in providing notice to large groups of
142 individuals or those not previously affected by regulatory requirements;
 - 143 b. Potentially interested persons must know that lists exist and affirmatively sign up
144 for them; and
 - 145 c. Overuse of email distribution lists could result in a significant regulatory change
146 being obscured by less relevant messages. Agencies can mitigate this risk by
147 allowing users to opt in to narrowly defined topics.
- 148 15. Agencies should consider providing electronic means for interested persons to identify
149 particular issues on which they wish to receive automated notice.
- 150 16. Agencies should consider using social media tools, which are inexpensive and far-
151 reaching, to publicize significant regulatory changes.
- 152 17. Agencies should consider using blogs on their websites to inform potentially interested
153 persons about significant regulatory changes. Blogs allow agencies to tailor notice to
154 the interests and needs of particular groups and provide notice in ways that are
155 accessible to those groups.
- 156 18. Agencies should consider hosting public meetings or participating in conferences or
157 other meetings convened by outside organizations to share information and answer
158 questions about significant regulatory changes. Agencies, however, must balance the
159 advantages of such meetings against the cost in terms of staff time and administration.
- 160 19. When agencies host public meetings to share information about significant regulatory
161 changes, they should generally provide a means for potentially interested persons to
162 attend or participate remotely, to expand access for members of historically
163 underserved communities, small or under-resourced potentially interested persons,
164 potentially interested persons who live far from where the agency holds meetings, and
165 potentially interested persons who face other accessibility issues.



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- 166 20. Agencies should consider training and equipping front-line agency employees,
167 including those in field offices, to answer questions about significant regulatory
168 changes and to work with community organizations and other intermediaries to
169 provide notice of changes. These agency employees may be particularly effective in
170 providing notice to underserved communities.
- 171 21. Agencies should consider identifying and working with intermediary organizations
172 such as states, trade associations, professional associations, commercial and non-profit
173 trainers, advocacy groups, and newsletter publishers, which can assist in providing
174 effective notice to different groups of potentially interested persons, particularly
175 historically underserved communities.

Oversight and Assessment

- 176 22. Agencies should consider designating an officer or office to coordinate and support the
177 development, implementation, and evaluation of notice plans. This officer or office
178 should:
- 179 a. Be responsible for evaluating the effectiveness of the agency's notice plan;
 - 180 b. Keep abreast of technological developments for improving notice strategies, such
181 as new social media platforms or improved methods for indexing and organizing
182 documents on the agency's website;
 - 183 c. Evaluate practices that other agencies use to provide notice of significant
184 regulatory changes; and
 - 185 d. Make recommendations for improving the agency's practices and procedures for
186 providing effective notice of significant regulatory changes to potentially
187 interested persons.
- 188 23. Agencies should share information with each other about their experiences with and
189 practices for improving notice of significant regulatory changes.