Improving Notice of Regulatory Changes

Committee on Regulation

Proposed Recommendation from Committee on Regulation | 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. 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 counsel or reference guides such as agency manuals, digests, or instructions that synthesize dispersed agency pronouncements into a coherent whole. Although large, well-resourced entities generally 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

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.

may find it more difficult to track regulatory changes or pay lawyers and consultants to do so. Historically underserved communities\(^3\) also often do not get effective notice of regulatory changes.

Even larger, well-resourced persons may have difficulty tracking regulatory changes that are not published in the *Federal Register*, such as guidance documents announcing new interpretations of law or proposals to exercise a discretionary power, as well as changes in law announced through adjudicative decisions. Similarly, 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 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. Such steps also promote fairness and transparency and encourage 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.\(^4\)

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.\(^5\) An agency might consider strategies such as

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\(^5\) 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.
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 comprehensively summarize dispersed agency pronouncements into
a coherent whole and explain how a change fits into a broader regulatory scheme. Agencies
might also design their websites to organize and present information in a way that makes
significant regulatory changes clear and obvious to users and allow users to identify particular
topics on which they wish to receive email alerts.

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. Appropriate
notice strategies 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.

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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
2021); Admin. Conf. of the U.S., Recommendation 2019-3, Public Availability of Agency Guidance
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

1. Agencies should develop written notice plans, as appropriate, for providing effective notice of significant regulatory changes, meaning changes in law or policy, however announced, that can reasonably be expected to alter the behavior of potentially interested 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 and the optimal approach to tailoring notice to each of the different types of persons. Persons who may be interested include 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.

3. In developing their notice plans, agencies should consider the variety of legal materials, including legislative rules, guidance documents, and adjudicative decisions, 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. In developing their notice plans, agencies should consider providing potentially interested persons with means for identifying areas of interest for which they wish to receive notice.

6. 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.

7. 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 consider most effective and suggestions for improvement.

**Strategies for Providing Effective Notice**

8. Although no single technique will work for all agencies or in all circumstances, in assessing the strategies they wish to undertake both as a general matter and with regard to specific significant regulatory changes, agencies should consider whether 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;
   
   e. Have proven effective when used by other agencies to provide actual notice; and
   
   f. Provide opportunities for interested persons to identify areas about which they would like to receive notice about significant regulatory changes.
9. Agencies should consider publishing in the *Federal Register* regulatory changes for which they anticipate the most widespread public interest, 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 brief notices of availability in the *Federal Register* alerting potentially interested persons when they publish significant regulatory changes in the form of agency guidance documents on their websites.

10. Agencies should seek to organize and present material on their websites 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 consider optimizing their websites to improve the visibility of significant regulatory changes in commercial search engines.

12. Agencies should consider publishing summaries of legal materials organized by topic. This approach is particularly useful in providing notice when regulatory changes emerge from different agencies or when agencies announce 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. This approach is 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 email distribution lists to inform potentially interested persons about significant regulatory changes. Email distribution
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, at low cost. Agencies should, however, bear in mind the following limitations of listservs and email lists:

a. Email distribution lists are less effective in providing notice to large groups of individuals or those not previously affected by regulatory requirements;
b. Potentially interested persons must know that lists exist and affirmatively sign up for them; and
c. Overuse of email distribution lists could result in a significant regulatory change being obscured by less relevant messages. Agencies can mitigate this risk by allowing users to opt in to narrowly defined topics.

15. Agencies should consider providing electronic means for interested persons to identify particular issues on which they wish to receive automated notice.

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, small or under-resourced potentially interested persons, 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, including 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. These agency employees may be particularly effective in providing notice to underserved communities.

21. Agencies should consider identifying and working with intermediary organizations such as states, trade associations, professional associations, commercial and non-profit trainers, advocacy groups, and newsletter publishers, which can assist in providing effective notice to different groups of potentially interested persons, particularly historically underserved communities.

**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 for providing 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.