



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Improving Notice of Regulatory Changes

Committee on Regulation

Proposed Recommendation | June 16, 2022

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 Federal administrative programs are governed by large and complex systems of statutes,
2 rules, and other materials setting forth policies. Although the law generally requires these
3 materials to be made publicly available,¹ individuals and organizations often lack the resources
4 or expertise to track and understand regulatory changes that might affect them. This is
5 particularly true for small entities and members of communities that have been historically
6 underserved by government programs.² Without effective notice of regulatory changes,
7 interested persons may miss out on benefits to which the law entitles them or find themselves
8 subject to enforcement actions for noncompliance with legal requirements of which they were
9 unaware. A lack of effective notice may also make it less likely that regulated parties will come
10 into compliance without the need for an agency to undertake an enforcement action.³ The federal
11 government issues hundreds of thousands of pages of enacted statutes, legislative rules, guidance
12 documents, adjudicative orders, notices, and other materials each year that affect administrative
13 programs. Federal law generally requires that the public be notified of these changes through
14 publication in official sources such as the *Statutes at Large*, *Federal Register*, *Code of Federal*
15 *Regulations*, or on an official government website.

¹ See, e.g., 1 U.S.C. § 112; 5 U.S.C. § 552(a); 44 U.S.C. § 1505.

² Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

³ See Joshua Galperin & E. Donald Elliott, Providing Effective Notice of Regulatory Changes (May 17, 2022) (report to the Admin. Conf. of the U.S.).



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16 Such publication is, as a legal matter, generally considered to provide constructive notice
17 to potentially interested persons.⁴ Nevertheless, the sheer volume of such materials and the
18 manner in which they are published and presented can make it difficult for potentially interested
19 persons to keep track of regulatory developments, especially without the aid of legal counsel or
20 reference guides such as agency manuals, digests, or instructions that synthesize dispersed
21 agency pronouncements into a coherent whole.⁵ Although large, well-resourced entities generally
22 find publication in official sources such as the *Federal Register* sufficient to provide effective
23 notice of regulatory changes, smaller entities with less internal expertise and fewer resources
24 may find it more difficult to track regulatory changes or pay lawyers and consultants to do so.
25 Historically underserved communities⁶ also often do not get effective notice of regulatory
26 changes.

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

⁴See, 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.

⁵Joshua Galperin & E. Donald Elliott, Providing Effective Notice of Regulatory Changes (Mar. 25, 2022) (draft report to the Admin. Conf. of the U.S.).

⁶Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).



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

38 By taking steps to promote actual notice of regulatory changes, agencies can promote
39 compliance with legal requirements, thereby reducing the need for enforcement proceedings.
40 Such steps also promote fairness and transparency and encourage greater public participation in
41 agency decision making. When agencies communicate with the public, seek public input, and
42 understand public perspectives, they generate greater understanding and acceptance of agency
43 actions.⁷

44 Although agencies must comply with legal requirements for notice, agencies can take
45 additional a variety of steps to improve notice of regulatory changes. This is of particular
46 importance when a change is significant, meaning that it could reasonably be expected to change
47 the behavior of regulated parties or regulatory beneficiaries.⁸ An agency might consider
48 strategies such as publishing information about the change on its website, issuing a press release
49 or fact sheet summarizing and explaining the change, communicating the change using social
50 media or email lists, holding a public meeting to explain and answer questions about the change,
51 and creating and updating agency reference guides that comprehensively summarize dispersed
52 agency pronouncements into a coherent whole and explain how a change fits into a broader
53 regulatory scheme. Agencies might should also design their websites to organize and present
54 information in a way that makes significant regulatory changes clear and obvious to users and
55 allow users them to identify particular topics on which they wish to receive email alerts.

⁷ Admin. Conf. of U.S., Forum, Underserved Communities and the Regulatory Process, Panel 1: Identifying Underserved Communities, Admin. Conf. of U.S. (2021).

⁸ Reference to “significant” regulatory changes in this Recommendation does not refer is not limited to “significant” or “major” rules as those terms are used in Executive Order 12,866 and the Congressional Review Act.

Commented [CA1]: Proposed Amendment from Council #1:

The Council proposes this amendment to simplify the language and eliminate unnecessary points. With respect to original footnote 1 (shown in the redline as footnote 4) in particular, the Council thinks it is unnecessary and overbroad. The Council does not agree that, as the footnote suggests, publication of a statute in the Statutes at Large (or the U.S. Code), a legislative rule in the Federal Register, and so forth would fail to satisfy due process. (Of course, notice by publication of certain agency actions in an adjudication or similar proceeding might well not satisfy due process, but that is not the concern of this Recommendation.) It may be that the Committee intended a narrower point in footnote 1. If so, the Committee may wish to offer a revision for the Assembly’s consideration. The Council still might question the relevance of the footnote to the Recommendation.

Commented [CMA2]: Proposed Amendment from Special Counsel Jeffrey Lubbers #1:

See footnote 8 for proposed edits.

Commented [CMA3]: Proposed Amendment from Public Member Jack Beermann #1:

“I would add the words ‘creating and’ before the word ‘updating’ to suggest that such guides are created where they do not already exist to update.”

Commented [CA4]: Proposed Amendment from Council #2

Commented [CA5]: Proposed Amendment from Council #3



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56 An agency's strategy for a particular regulatory change will depend, in large part, on the
57 agency's objectives; the nature, purpose, and significance of the regulatory change; and the
58 needs of the intended audience. This Recommendation provides a framework for developing
59 effective notice strategies and for evaluating their effectiveness for future improvement.⁹

Commented [CA6]: Inquiry from Council #1:

Can the Committee provide more specificity as to what's intended here?

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

Commented [CA7]: Inquiry from Council #2:

Can the Committee provide more specificity as to what's intended here?

RECOMMENDATION

Developing and Reviewing Notice Plans

- 67 1. Agencies should develop written notice plans, as appropriate, for providing effective
68 notice of significant regulatory changes, meaning changes A significant regulatory
69 change is any change in law or policy, however announced, that can reasonably be
70 expected to alter the behavior of potentially-interested persons, meaning persons who

⁹ 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.



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71 may be interested in or affected by the agency's significant regulatory changes. Notice
72 plans should:

- 73 a. Identify potentially interested persons for the agency's significant regulatory
74 changes;
- 75 b. Specify strategies the agency proposes to use to provide notice;
- 76 c. Assess the expected costs and benefits of each strategy; and
- 77 d. Establish processes and metrics for evaluating the effectiveness of each strategy.
- 78 2. In developing their notice plans, agencies should consider the range categories of persons
79 that may be interested in the agency's significant regulatory changes and the optimal
80 approach to tailoring notice to each of the different types categories of persons. Persons
81 who may be interested include regulated entities and regulatory beneficiaries;
82 organizations and individuals; large and small entities; well resourced and under-
83 resourced entities; and intermediaries, including for profit and nonprofit organizations.
- 84 3. In developing their notice plans, agencies should consider the variety of legal materials,
85 including legislative rules, guidance documents, and adjudicative decisions, through
86 which significant regulatory changes are made and the optimal approach to tailoring
87 notice based upon the nature of each change and the range categories of persons it affects.
- 88 4. In developing their notice plans, agencies should obtain feedback from potentially
89 interested persons regarding as to which methods for providing notice they consider most
90 effective, consistent with the Paperwork Reduction Act. Methods for obtaining feedback
91 could include convening focus groups, liaising with intermediary organizations, or taking
92 broad surveys of potentially interested persons.
- 93 5. In developing their notice plans, agencies should consider providing potentially interested
94 persons with means for identifying areas of interest for which they wish to receive notice.
- 95 6. Agencies should consider whether individual significant regulatory changes might
96 warrant additional strategies not included in the agency's notice plan, either because they
97 affect persons not previously regulated or new regulatory beneficiaries, or because the
98 potentially interested persons have specific needs for effective notice.

Commented [CMA8]: Proposed Amendment from Special Counsel Jeffrey Lubbers #2:

"Recommendation 1 seems awkward. I would use the same language used in #2--'Identify persons who may be interested in the agency's significant regulatory changes'--(you could also add 'or affected by' after 'interested in')"

Note from the Office of the Chairman: If the Assembly accepts this change, conforming changes would be made in the preamble and throughout the recommendation, including removing "potentially" from before "interested persons."

Commented [CA9]: Proposed Amendment from Council #4

Commented [CMA10]: Proposed Amendment from Special Counsel Jeffrey Lubbers #3

Commented [CA11]: Proposed Amendment from Council #5

Commented [CA12]: Inquiry from Council #3:

Can the Committee provide more specificity as to what's intended here?



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

Strategies for Providing Effective Notice

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

Commented [CA13]: Proposed Amendment from Council #6 (see parallel amendments at lines 143 and 173-174)

117 9. Agencies should consider publishing in the *Federal Register* regulatory changes for
118 which they anticipate the most widespread public interest, even ~~if when~~ not required ~~by~~
119 ~~law to do so by law. In so doing, they should assess whether the benefits of making the~~
120 ~~change permanently available to a broad audience justify the costs of publication.~~ _____
121 9.10. When agencies publish guidance documents announcing significant regulatory
122 changes on their websites, they ~~Agencies~~ should consider publishing ~~brief notices of~~
123 ~~availability in the Federal Register alerting potentially interested persons when they~~

Commented [CA14]: Proposed Amendment from Council #7



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124 publish significant regulatory changes in the form of agency guidance documents on their
125 websitesthat the documents are available.

126 **10.11.** Agencies should seek to organize and present material on their websites in a way
127 that makes significant regulatory changes clear and obvious to potentially interested
128 persons and provides clear instructions to users regarding how to access materials
129 announcing significant regulatory changes.

130 **11.12.** Agencies should consider optimizing their websites to improve the visibility of
131 significant regulatory changes in commercial search engines.

132 **12.13.** Agencies should consider publishing summaries of legal materials organized by
133 topic. This approach is particularly useful in providing notice when regulatory changes
134 emerge from different agencies or when agencies announce policy through adjudications
135 or guidance documents, because it can be difficult for potentially interested persons to
136 synthesize the changes. Agencies that ~~do~~ publish such summaries should revise those
137 summaries promptly to reflect significant regulatory changes. Agencies must, however,
138 balance the benefits of providing such summaries of the law against the costs in terms of
139 staff time and potential oversimplification of the applicable law.

140 **13.14.** Agencies should consider issuing press releases when they make significant
141 regulatory changes. This approach is particularly useful in alerting both potentially
142 interested persons about new or expanded regulatory requirements that have not
143 previously affected them and small or under resourced potentially interested persons who
144 may have less capacity to monitor changes.

145 **14.15.** Agencies should consider developing and using email distribution lists to inform
146 potentially interested persons about significant regulatory changes. Email distribution
147 lists are an effective way to provide notice to targeted groups of discrete and defined
148 potentially interested persons, such as specific community or advocacy groups, at low
149 cost. Agencies should, however, bear in mind the following limitations of listservs and
150 email distribution lists:

Commented [CA15]: Proposed Amendment from Council #6 (see parallel amendments at lines 109-110 and 173-174)

Commented [CMA16]: Proposed Amendment from Public Member Jack Beermann #2



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

158 15.16. Agencies should consider providing electronic means for interested persons to
159 identify particular issues on which they wish to receive automated notice.

Commented [CA17]: Inquiry from Council #4:

Can the Committee provide more specificity as to what's intended here? Did the Committee intend to use language similar to that at lines 53-55 of the Preamble?

160 16.17. Agencies should consider using social media ~~tools~~, which are inexpensive and far-
161 reaching, to publicize significant regulatory changes.

162 17.18. Agencies should consider using blogs on their websites to inform potentially
163 interested persons about significant regulatory changes. Blogs allow agencies to tailor
164 notice to the interests and needs of particular groups and provide notice in ways that are
165 accessible to those groups.

166 18.19. Agencies should consider hosting public meetings or participating in conferences
167 or other meetings convened by outside organizations to share information and answer
168 questions about significant regulatory changes. Agencies ~~must~~, however, ~~must~~ balance
169 the advantages of such meetings against the cost in terms of staff time and administration.

170 19.20. When agencies host public meetings to share information about significant
171 regulatory changes, they should generally provide a means for potentially interested
172 persons to attend or participate remotely. ~~By so doing, to-they can~~ expand access for
173 members of historically underserved communities, ~~small or under resourced potentially~~
174 ~~interested persons,~~ potentially interested persons who live far from where the agency
175 holds meetings, and potentially interested persons who face other accessibility issues.

Commented [CA18]: Proposed Amendment from Council #6 (see parallel amendments at lines 109-110 and 143)

176 20.21. Agencies should consider training and equipping front-line agency employees,
177 including those in field offices, to answer questions about significant regulatory changes
178 ~~and to work with community organizations and other intermediaries to provide notice of~~



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179 changes. These agency employees may be particularly effective in providing notice to
180 underserved communities.

181 21.22. Agencies should consider identifying and working with states and intermediary
182 organizations (e.g., such as states, trade associations, professional associations,
183 commercial and non-profit trainerscommunity organizations, and advocacy groups),
184 newsletter publishers, which that can assist in providing effective notice to different
185 groups of potentially interested persons, particularly historically underserved
186 communities.

Commented [CA19]: Proposed Amendment from Council #8

Commented [CA20]: Inquiry from Council #5:

Can the Committee provide more specificity as to what's intended here?

Oversight and Assessment

187 22.23. Agencies should consider designating an officer or office to coordinate and
188 support the development, implementation, and evaluation of notice plans. This officer or
189 office should:

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

199 23.24. Agencies should share information with each other about their experiences with
200 and practices for improving notice of significant regulatory changes.