



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,<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.

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

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

<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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 communities<sup>6</sup> 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.

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<sup>4</sup> 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.

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

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



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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.<sup>7</sup>

Although agencies must comply with legal requirements for notice, agencies can take additional a variety of steps to improve notice of regulatory changes. This is of particular importance when a change is significant, meaning that it could reasonably be expected to change the behavior of regulated parties or regulatory beneficiaries.<sup>8</sup> An agency might consider strategies such as 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 creating 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 should 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 them to identify particular topics on which they wish to receive email alerts.

<sup>7</sup> Admin. Conf. of U.S., Forum, Underserved Communities and the Regulatory Process, Panel I: Identifying Underserved Communities, Admin. Conf. of U.S. (2021).

<sup>8</sup> 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.<sup>9</sup>

**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~~

<sup>9</sup> 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.

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

**Commented [CA14]:** Proposed Amendment from Council #7



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publish significant regulatory changes in the form of agency guidance documents on their websites that the documents are available.

~~10~~11. 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~~12. Agencies should consider optimizing their websites to improve the visibility of significant regulatory changes in commercial search engines.

~~12~~13. 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~~14. 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~~15. 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 ~~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.

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.

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~~

**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?

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





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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 (c.g., such as states, trade associations, professional associations,  
183 commercial and non-profit trainers community organizations, and advocacy groups), ~~and~~  
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.