



Improving Notice of Regulatory Changes

Committee on Regulation

Proposed Recommendation for Committee | April 8, 2022

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 interested persons.¹ However, the sheer volume of such materials and the manner in which
8 they are published and presented can make it difficult for interested persons to keep track of
9 regulatory developments, especially without the aid of legal counsel,² or reference guides such as
10 agency manuals, digests,³ or instructions that synthesize dispersed agency pronouncements into a
11 coherent whole.⁴ Although large, well-resourced entities generally find publication in official
12 sources such as the *Federal Register* sufficient to provide effective notice of regulatory changes,

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, 1348-1349 (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 interested persons of significant regulatory changes.

² See, e.g., Denise A. Banaszewski, “Validly Adopted Interpretations”: *Defining the Deference Standard in Aviation Certificate Action Appeals*, 73 WASH. L. REV. 637, 665 (1998).

³ Christopher J. Walker & Matthew Lee Wiener, *Agency Appellate Systems* 44 (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.).

⁴ Joshua Galperin & E. Donald Elliott, *Providing Effective Notice of Regulatory Changes* (April 25, 2022) (draft report to the Admin. Conf. of the U.S.).



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13 smaller entities with less internal expertise and fewer resources may find it more difficult to track
14 regulatory changes or pay lawyers and consultants to do so. Historically underserved
15 communities also often struggle to get effective notice of regulatory changes.

16 Furthermore, agencies often use guidance documents to announce new interpretations of
17 law or to advise the public of the manner in which they propose to exercise a discretionary
18 power, and they may announce changes in law through adjudicative decisions. Because these
19 changes may not be published in the *Federal Register*, it can be difficult even for larger, well-
20 resourced entities to track them. Similarly, even well-resourced and sophisticated persons may
21 struggle to understand regulatory changes that emerge not from a single pronouncement but from
22 a combination of agency materials without agency 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 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 Effective notice also promotes fairness and transparency and encourages greater public
31 participation in agency decision making. When agencies communicate with the public, seek
32 public input, and understand public perspectives, they generate greater understanding and
33 acceptance of agency actions.⁵

34 Although agencies must comply with legal requirements for notice, agencies can take
35 additional steps to improve notice of regulatory changes. An agency might consider strategies
36 such as publishing information about the change on their websites, issuing a press release or fact
37 sheet summarizing and explaining the change, communicating the change using social media or
38 email lists, holding a public meeting to explain and answer questions about the change, and
39 updating agency reference guides that synthesize dispersed agency pronouncements into a

⁵ Webinar: Identifying Underserved Communities, Admin. Conf. of U.S. (Nov. 3, 2021) (presentation of Lee Raine).



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40 coherent whole and explain how a change fits into a broader regulatory scheme. An agency's
41 strategy for a particular regulatory change will depend, in large part, on the agency's objectives;
42 the nature, purpose, and significance of the regulatory change; and the needs of the intended
43 audience. This Recommendation provides a framework for developing effective notice strategies
44 and for evaluating their effectiveness for future improvement.

45 The Administrative Conference has in recent years issued several recommendations on
46 providing public access to legal materials related to administrative programs including agency
47 guidance documents, adjudication rules, and adjudicative decisions.⁶ This Recommendation
48 expands on those recommendations by specifically addressing strategies for improving public
49 notice of significant regulatory changes that agencies make through such materials.

RECOMMENDATION

Developing Notice Plans

- 50 1. Agencies should develop general notice plans for providing effective notice of
51 significant regulatory changes to potentially interested persons. Notice plans should:
- 52 a. Identify potentially interested persons for the agency's significant regulatory
53 changes;
 - 54 b. Specify strategies the agency proposes to use to provide notice;
 - 55 c. Assess the expected costs and benefits of each strategy; and
 - 56 d. Establish processes and metrics for evaluating the effectiveness of each strategy.
- 57 2. In developing their notice plans, agencies should consider the range of persons that
58 may be interested in the agency's regulatory changes, including regulated entities and
59 regulatory beneficiaries; organizations and individuals; large and small entities; well-

⁶ 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).



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- 60 resourced and under-resourced entities; and intermediaries, including for-profit and
61 nonprofit organizations, and the optimal approach to tailoring notice to each of the
62 different types of persons.
- 63 3. In developing their notice plans, agencies should consider the range of legal materials,
64 including legislative rules, guidance documents, and adjudicative orders and opinions,
65 through which regulatory changes are made and the optimal approach to tailoring
66 notice based upon the significance of each change and the range of persons it affects.
- 67 4. In developing their notice plans, agencies should obtain feedback from interested
68 persons regarding which methods for providing notice they consider most effective.
- 69 5. Agencies should consider whether individual significant regulatory changes might
70 warrant supplemental, specific notice plans, either because they affect persons not
71 previously regulated or new regulatory beneficiaries, or because the potentially
72 interested persons have specific needs for effective notice.
- 73 6. Agencies should periodically evaluate which strategies are most effective at notifying
74 potentially interested persons, including historically underserved communities, of
75 significant regulatory changes. In doing so, agencies should obtain feedback from
76 interested persons regarding which methods for providing notice they considered most
77 effective and suggestions for improvement.

Strategies for Providing Effective Notice

- 78 7. In assessing the notice strategies they wish to undertake generally and with regard to
79 specific regulatory changes, agencies should consider whether they:
- 80 a. Are cost-effective;
- 81 b. Are likely to increase compliance and reduce the need for enforcement;
- 82 c. Are targeted to reach members of historically underserved communities and small
83 or under-resourced potentially interested persons who may have less capacity to
84 monitor changes;



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- 85 d. Reduce the administrative and paperwork hurdles for regulated persons to
86 assemble changes that emerge not from a single pronouncement but from a
87 combination of agency materials; and
- 88 e. Have proven effective when used by other agencies to provide actual notice.
- 89 8. Agencies should consider publishing significant regulatory changes in the *Federal*
90 *Register*, even if not required to do so by law, if they deem that the benefits of
91 providing widespread notice in a single place justify the costs of publication.
- 92 9. Agencies should consider publishing brief notices of availability in the *Federal*
93 *Register* with links to their websites alerting potentially interested persons when they
94 publish significant regulatory changes in the form of agency guidance documents on
95 their websites.
- 96 10. Agencies should ensure that their websites organize and present material in a way that
97 makes significant regulatory changes clear and obvious to potentially interested
98 persons and provide clear instructions to users regarding how to access materials
99 announcing significant regulatory changes.
- 100 11. Agencies should optimize their websites to improve the visibility of significant
101 regulatory changes in commercial search engines.
- 102 12. Agencies should consider publishing summaries of legal materials related to a
103 particular topic, which are particularly useful in providing notice when regulatory
104 changes emerge from different agencies or when agencies make policy through
105 adjudications, because it can be difficult for interested persons to synthesize the
106 changes. Agencies must, however, balance the benefits of providing such summaries
107 of the law against the costs in terms of staff time and potential oversimplification of
108 the applicable law.
- 109 13. Agencies should consider issuing press releases when they make significant regulatory
110 changes, which are particularly useful in alerting potentially interested persons about
111 new or expanded regulatory requirements that have not previously affected them, as
112 well as small or under-resourced potentially interested persons who may have less
113 capacity to monitor changes.



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- 114 14. Agencies should consider developing and using listservs and other email lists to
115 inform interested persons about significant regulatory changes. Listservs and other
116 email lists are an effective way to provide notice to targeted groups of discrete and
117 defined potentially interested persons, such as specific community or advocacy
118 groups, for very low cost.
- 119 a. Listservs and other email lists are less effective in providing notice to large
120 groups of individuals or those not previously affected by regulatory requirements.
 - 121 b. Potentially interested persons also must know that the list exists and affirmatively
122 sign up for it.
- 123 15. Agencies should avoid over-using listservs and other email lists, which could result in
124 a significant regulatory change being obscured by less relevant messages. To mitigate
125 this, agencies should consider allowing users to opt-in to narrowly defined topics.
- 126 16. Agencies should consider using social media tools, which are inexpensive and far-
127 reaching, to publicize significant regulatory changes.
- 128 17. Agencies should consider using blogs on their websites to inform interested persons
129 about significant regulatory changes. Blogs allow agencies to tailor notice to the
130 interests and needs of particular groups and provide notice in ways that are accessible
131 to those groups.
- 132 18. Agencies should consider hosting public meetings or participating in conferences or
133 other meetings convened by outside organizations to share information and answer
134 questions about significant regulatory changes. Agencies, however, must balance the
135 advantages of such meetings against the cost in terms of staff time and administration.
- 136 19. When agencies host public meetings to share information about significant regulatory
137 changes, they should generally provide a means for interested persons to attend or
138 participate remotely, to expand access for members of historically underserved
139 communities, interested persons who live far from where the agency holds meetings,
140 and interested persons who face other accessibility issues.
- 141 20. Agencies should consider training and equipping front-line agency employees, such as
142 those in field offices, to answer questions about significant regulatory changes to



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- 143 interested persons and to work with community organizations and other intermediaries
144 to provide notice of changes. Such agency employees may be particularly effective in
145 providing notice to underserved communities.
- 146 21. Agencies should identify and work with intermediary organizations like states, trade
147 associations, lawyers, consultants, commercial and non-profit trainers, and newsletters,
148 which can assist in providing effective notice to potentially interested persons in
149 specific industries or other categories.

Assessment and Oversight

- 150 22. Agencies should consider designating an officer or office to coordinate and support the
151 development, implementation, and evaluation of notice plans. Such officer or office
152 should:
- 153 a. Be responsible for evaluating the effectiveness of the agency's notice plan;
 - 154 b. Keep abreast of technological developments for improving notice strategies, such
155 as new social media platforms or improved methods for indexing and organizing
156 documents on the agency's website;
 - 157 c. Evaluate practices that other agencies use to provide notice of significant
158 regulatory changes; and
 - 159 d. Make recommendations for improving the agency's practices and procedures to
160 better provide effective notice of significant regulatory changes to potentially
161 interested persons.
- 162 23. Agencies should share information with each other about their experiences with and
163 practices for improving notice of regulatory changes. To help carry out this
164 Recommendation, the Conference's Office of the Chairman should provide, as
165 authorized by 5 U.S.C. § 594(2), for the "interchange among administrative agencies
166 of information potentially useful in improving" agency notice strategies.