



## Improving Notice of Regulatory Changes

### Committee on Regulation

#### Proposed Recommendation for Committee | April 22, 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 potentially interested persons.<sup>1</sup> 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<sup>2</sup> or  
10 reference guides such as agency manuals, digests,<sup>3</sup> or instructions that synthesize dispersed  
11 agency pronouncements into a coherent whole.<sup>4</sup> Although large, well-resourced entities generally

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<sup>1</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>2</sup> 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).

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

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



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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  
14 may find it more difficult to track regulatory changes or pay lawyers and consultants to do so.  
15 Historically underserved communities also often struggle to get effective notice of regulatory  
16 changes.

17 Furthermore, agencies often use guidance documents to announce new interpretations of  
18 law or to advise the public of the manner in which they propose to exercise a discretionary  
19 power, and they may announce changes in law through adjudicative decisions. Because these  
20 changes may not be published in the *Federal Register*, it can be difficult even for larger, well-  
21 resourced entities to track them. Similarly, even well-resourced and sophisticated persons may  
22 struggle to understand regulatory changes that emerge not from a single pronouncement but from  
23 a combination of agency materials without agency reference guides such as digests, manuals, or  
24 summaries that assemble these dispersed materials into a coherent whole.

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

29 By taking steps to promote actual notice of regulatory changes, agencies can promote  
30 compliance with legal requirements, thereby reducing the need for enforcement proceedings.  
31 Effective notice also promotes fairness and transparency and encourages greater public  
32 participation in agency decision making. When agencies communicate with the public, seek  
33 public input, and understand public perspectives, they generate greater understanding and  
34 acceptance of agency actions.<sup>5</sup>

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

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<sup>5</sup> Admin. Conf. of U.S., Forum, Underserved Communities and the Regulatory Process, Panel 1: Identifying Underserved Communities, Admin. Conf. of U.S. (2021).



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39 publishing information about the change on its website, issuing a press release or fact sheet  
40 summarizing and explaining the change, communicating the change using social media or email  
41 lists, holding a public meeting to explain and answer questions about the change, and updating  
42 agency reference guides that synthesize dispersed agency pronouncements into a coherent whole  
43 and explain how a change fits into a broader regulatory scheme.

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

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

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<sup>6</sup> The Administrative Conference has in recent years issued several recommendations on providing public access to legal materials related to administrative programs including agency guidance documents, adjudication 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 Notice Plans

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



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- 80           5. Agencies should consider whether individual significant regulatory changes might  
81           warrant additional strategies not included in the agency’s notice plan, either because  
82           they affect persons not previously regulated or new regulatory beneficiaries, or  
83           because the potentially interested persons have specific needs for effective notice.  
84           6. Agencies should periodically evaluate which strategies are most effective at notifying  
85           potentially interested persons, including historically underserved communities, of  
86           significant regulatory changes. In doing so, agencies should obtain feedback from  
87           potentially interested persons regarding which methods for providing notice they  
88           considered most effective and suggestions for improvement.

### Strategies for Providing Effective Notice

- 89           7. While no single technique will work for all agencies or in all circumstances, in  
90           assessing the ~~notice~~-strategies they ~~may~~-wish to undertake generally both as a general  
91           matter and with regard to specific significant regulatory changes, agencies should  
92           consider whether ~~the techniques they have adopted~~such strategies:  
93           a. Are cost-effective;  
94           b. Are likely to increase compliance and reduce the need for enforcement;  
95           c. Are targeted to reach members of historically underserved communities and small  
96           or under-resourced potentially interested persons who may have less capacity to  
97           monitor changes;  
98           d. Reduce the administrative burden for regulated persons to assemble changes that  
99           emerge from a combination of agency materials; and  
100           e. Have proven effective when used by other agencies to provide actual notice.

101           8.

102           ~~8.~~ Agencies should consider publishing any regulatory changes for which they anticipate  
103           widespread public interest in the *Federal Register*, even if not required to do so by  
104           law. In so doing, they should assess whether the benefits of making the change  
105           permanently available to a broad audience justify the costs of publication. Agencies  
106           should consider publishing particularly important significant regulatory changes in



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~~which they anticipate there will be widespread interest in the *Federal Register*, even if not required to do so by law, if they deem that the benefits of providing widespread notice in the *Federal Register* a single place including making the change permanently available to a broad audience for reference purposes justify the costs of publication.~~

9. Agencies should consider publishing brief notices of availability in the *Federal Register* with links to their websites alerting potentially interested persons when they publish significant regulatory changes in the form of agency guidance documents on their websites.
10. Agencies should ensure that their websites organize and present material 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 optimize their websites to improve the visibility of significant regulatory changes in commercial search engines.
12. Agencies should consider publishing summaries of legal materials related to particular topics, which are particularly useful in providing notice when regulatory changes emerge from different agencies or when agencies make 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, which are 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 listservs and other email lists to inform potentially interested persons about significant regulatory changes. Listservs



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





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- 165 work with community organizations and other intermediaries to provide notice of  
166 changes. Such agency employees may be particularly effective in providing notice to  
167 underserved communities.
- 168 21. Agencies should identify and work with intermediary organizations such as states,  
169 trade associations, lawyers, consultants, commercial and non-profit trainers, and  
170 newsletter publishers, which can assist in providing effective notice to different groups  
171 of potentially interested persons.

### **Oversight and Assessment**

- 172 22. Agencies should consider designating an officer or office to coordinate and support the  
173 development, implementation, and evaluation of notice plans. This officer or office  
174 should:
- 175 a. Be responsible for evaluating the effectiveness of the agency's notice plan;
  - 176 b. Keep abreast of technological developments for improving notice strategies, such  
177 as new social media platforms or improved methods for indexing and organizing  
178 documents on the agency's website;
  - 179 c. Evaluate practices that other agencies use to provide notice of significant  
180 regulatory changes; and
  - 181 d. Make recommendations for improving the agency's practices and procedures to  
182 better provide effective notice of significant regulatory changes to potentially  
183 interested persons.
- 184 23. Agencies should share information with each other about their experiences with and  
185 practices for improving notice of significant regulatory changes. To help carry out this  
186 Recommendation, the Conference's Office of the Chairman should provide, as  
187 authorized by 5 U.S.C. § 594(2), for the "interchange among administrative agencies  
188 of information potentially useful in improving" agency notice strategies.