

Guide for Notices of Supplemental Proposed Rulemaking (September 12, 2002)

The APA states that an agency shall not make a rule that is “substantially different” from the proposed rule published in the Notice of Proposed Rulemaking or Notice of Supplemental Proposed Rulemaking. G.R.R.C. shall not approve a final rule that contains a “substantial change” from the proposed rule or supplemental notice.

If there is a substantial change made to a rule after it is proposed, an agency has three options:

1. Do nothing. The docket for the rulemaking will expire one year after the proposed is published if the agency does not submit the final rule to G.R.R.C.
2. File a Notice of Termination of Rulemaking. The agency then has the option of starting the rulemaking over with a new docket and a new proposed.
3. File a Notice of Supplemental Proposed Rulemaking and provide for additional public comment.

Supplemental notices have raised publishing questions because of the SOS instructions on how to prepare them. To answer these questions and promote consistency among rulewriters and the Office, SOS provides this brief guide on the requirements for supplemental notices. **These requirements differ from past instructions on supplementals.**

1. If I need to make changes to my proposed rule, do I have to do a supplemental?

Maybe. If the changes you want to make are not considered “substantial” under A.R.S. § 41-1025, you may simply make the changes in the Notice of Final Rulemaking and explain the changes in item #10 of the Preamble. But if the changes are substantial, a supplemental is necessary to continue the rulemaking process -- unless you terminate the rules and start over.

2. What Sections go in a supplemental?

In the past, SOS advised rulewriters to include only the Sections undergoing change *after* the publication of the proposed rule (or supplemental). SOS now advises that the supplemental include every Section undergoing change. Rather than being considered an addendum to the proposed, the supplemental should be considered a “do-over” -- as if you were resubmitting the original proposed, but now with new changes.

3. What changes to the text do I show?

In the past, SOS advised rulewriters to show *all changes*, interpreted to mean the changes (striking and underlining) from the proposed rule and the “new” changes that required the supplemental notice -- but only for Sections undergoing change in the supplemental. These two sets of

changes were seen to exist essentially as two separate layers. Some text, therefore, might have had both underlining and striking if multiple changes were made to the same words.

SOS now advises that the supplemental simply appear as if it were the original proposed rule package. Include all desired changes from the original Code text (the base text from which all proposed rulemakings start) as if the supplemental were your first version of the proposed rule.

4. How do I distinguish the changes in the proposed from the changes in the supplemental?

There are three ways readers can understand the changes in text:

1. Compare the two (or more) texts from the Registers in which they appeared.
2. Look at item #6 of the Preamble of the supplemental(s) for an explanation of the substantial change that resulted in the supplemental notice.
3. Look at item #10 of the Preamble of the final notice for a description of the changes between the proposed rules, including supplemental notices, and final rules.

The Preamble is therefore very important to the public as the quickest and easiest resource for understanding the agency's actions.

5. What should be in the Preamble and table of contents?

The Preamble should list all Sections appearing in the text of the supplemental, regardless of whether the Sections appeared in the proposed. The Preamble should list the rulemaking action that is taking place in the supplemental -- not the rulemaking action that occurred in the proposed. The table of contents should reflect what is in the text of the rules (what follows the table of contents).

Publishing the supplemental as a "do-over" (that is, including all Sections) may mean republication of Sections that are identical to the proposed. However, showing all Sections together gives the public a more complete understanding of the agency's intentions and the effects of the rulemaking. It also provides for public comment on the rulemaking as a whole, not just Sections undergoing change in the supplemental.

6. What happens to the rulemaking timetable?

A.R.S. § 41-1021 states that a rulemaking docket expires one year after publication of the proposed rulemaking if the agency does not submit a final rule to G.R.R.C. within that time. The start date of that one-year period is reset upon publication of a supplemental rulemaking.