



Administrative Conference Recommendation 2019-3

Public Availability of Agency Guidance Documents

Adopted June 13, 2019

Among their many activities, government agencies issue guidance documents that help explain their programs and policies or communicate other important information to regulated entities and the public. Members of the public should have ready access to these guidance documents so that they can understand how their government works and how their government relates to them. Agencies should manage their guidance documents consistent with legal requirements and principles of governmental transparency and accountability.

Guidance documents can take many forms.¹ They include what the Administrative Procedure Act (APA) calls “interpretative rules” and “general statements of policy,” which are two types of rules that are not required to undergo the notice-and-comment procedures applicable to legislative rules.² They may also include other materials considered to be guidance documents under other, separate definitions adopted by government agencies.³ When managing

¹ To allow agencies flexibility to manage their varied and unique types of guidance documents, this Recommendation does not seek to provide an all-encompassing definition of guidance documents. This Recommendation is addressed, at a minimum, to those guidance documents required by law to be published in the *Federal Register* and any other guidance document required by law to be made publicly available. *See infra* notes 4–7 and accompanying text.

² Interpretative rules and general statements of policy are “rules” under the APA. *See* 5 U.S.C. §§ 551(4), 553. Although the APA does not define these two terms, the *Attorney General’s Manual on the Administrative Procedure Act* defines “interpretative rules” as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers,” and “general statements of policy” as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947). In accordance with standard parlance, this Recommendation uses the term “interpretive” in place of the APA’s word “interpretative.”

³ *See* Cary Coglianesi, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/consultant-report-public-availability-agency-guidance-documents>.



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the public availability of agency information in implementing this Recommendation, agencies should be clear about what constitutes guidance and what does not.

Several laws require agencies to make at least certain guidance documents available to the public. The Federal Records Act requires agencies to identify “records of general interest or use to the public that are appropriate for public disclosure, and . . . post[] such records in a publicly accessible electronic format.”⁴ The Freedom of Information Act (FOIA) requires that agencies publish “statements of *general* policy or interpretations of *general* applicability formulated and adopted by the agency” in the *Federal Register*.⁵ FOIA also requires that agencies “make available for public inspection in an electronic format . . . [specific] statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*,” as well as “administrative staff manuals and instructions to staff that affect a member of the public.”⁶ Finally, Congress has occasionally enacted agency-specific requirements for posting guidance documents online. For example, the Food and Drug Administration is required to “maintain electronically and update and publish periodically in the *Federal Register* a list of guidance documents” and to ensure that “[a]ll such documents [are] made available to the public.”⁷

The Administrative Conference has recommended that various types of guidance documents be made available online. Recommendation 2017-5, *Agency Guidance Through*

⁴ 44 U.S.C. § 3102.

⁵ 5 U.S.C. § 552(a)(1)(D) (emphasis added). To the extent that the documents an agency considers guidance would fall within any of the nine FOIA exceptions, such as “records or information compiled for law enforcement purposes,” 5 U.S.C. § 552(b)(7), agencies would not be required to disclose them.

⁶ 5 U.S.C. § 552(a)(2). “Agencies often accomplish this electronic availability requirement by posting records on their FOIA websites in a designated area known as a ‘FOIA Library.’” U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 6 (2019 ed.), available at https://www.justice.gov/oip/foia-guide/proactive_disclosures/download; see also E-Government Act, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915 (Dec. 17, 2002) (codified at 44 U.S.C. 3501 note) (requiring agencies, to the extent practicable, to publish online documents that FOIA requires be published in the *Federal Register*); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note) (requiring agencies to produce a “small entity compliance guide” for some legislative rules and post those guides “in an easily identified location on the website of the agency”).

⁷ 21 U.S.C. § 371(h)(3).



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Policy Statements, provided that “[a]ll written policy statements affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found.”⁸

Recommendation 2019-1 includes identical language directing agencies to do the same for interpretive rules.⁹ Similarly, Recommendation 2018-5, *Public Availability of Adjudication Rules*, urged agencies to “provide updated access on their websites to all sources of procedural rules and related guidance documents and explanatory materials that apply to agency adjudications.”¹⁰

Although many agencies do post guidance documents online, in recent years concerns have emerged about how well organized, up to date, and easily accessible these documents are to the public. At various times, the Office of Management and Budget (OMB) has instructed agencies on their management of guidance documents.¹¹ The United States Government Accountability Office has conducted an audit that highlights the management challenges associated with agency dissemination of guidance documents online.¹² Several legislative proposals have been introduced (but not enacted) to create standards for public disclosure of guidance documents.¹³

⁸ Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 12, 82 Fed. Reg. 61,728, 61,737 (Dec. 29, 2017).

⁹ Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, ___ Fed. Reg. ___.

¹⁰ Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019).

¹¹ For example, OMB Bulletin 07-02 directs Executive Branch departments and agencies to provide a current list of significant guidance documents in effect on their websites. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007); Office of Mgmt. & Budget, Memorandum No. M-07-07, *Issuance of OMB’s “Final Bulletin for Agency Good Guidance Practices”* (Jan. 18, 2007), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-07.pdf>; see also Office of Mgmt. & Budget, Memorandum No. M-19-14, *Guidance on Compliance with the Congressional Review Act* (Apr. 11, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf> (calling upon both executive and independent regulatory agencies to send certain pre-publication guidance materials to the Office of Information and Regulatory Affairs).

¹² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (2015).

¹³ The most notable of the pending legislation would require agencies to publish guidance documents on their websites and a centralized website selected by OMB. See Guidance Out of Darkness Act, S. 380, 116th Cong.



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Agencies should be cognizant that the primary goal of online publication is to facilitate access to guidance documents by regulated entities and the public. In deciding how to manage the availability of their guidance documents, agencies must be mindful of how members of the public will find the documents they need. Four principles for agencies to consider when developing and implementing plans to track and disclose their guidance documents to the public include: (a) comprehensiveness (whether all relevant guidance documents are available), (b) currency (whether guidance documents are up to date), (c) accessibility (whether guidance documents can be easily located by website users), and (d) comprehensibility (whether website users are likely to be able to understand the information they have located).

With these principles in mind, this Recommendation calls on agencies to consider opportunities for improving the public availability of their guidance documents. Each agency must decide which guidance documents to post online and how to present them in a manner that will ensure their availability and usefulness for regulated parties and the public. The Recommendation provides best practices to guide agencies to make their guidance documents more publicly available. These best practices are intended to be adaptable to fit agency-specific circumstances.¹⁴ The Administrative Conference notes that each agency is different, and the practices outlined in this Recommendation may be employed with flexibility as necessary (perhaps based on factors such as an agency's internal structures, available resources, types and volume of documents, the parties it regulates, and its end users) so that guidance documents are made available to the public in a logical and suitably comprehensive manner.

(2019); S. REP. NO. 116-12 (2019); Guidance Out of Darkness Act, H.R. 4809, 115th Cong. (2018); H.R. REP. NO. 115-972 (2018); *see also* H.R. 2142, 116th Cong. (2019) (requiring the creation of a centralized website for small business compliance guides). For other legislation, see Coglianese, *supra* note 3, at 6–7.

¹⁴ For example, even the term “agency” as used in the Recommendation can be construed to address either agencies or sub-agencies within larger departments. JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 11 (2d ed. 2018), *available at* <https://www.acus.gov/publication/sourcebook-united-states-executive-agencies-second-edition>.



RECOMMENDATION

Procedures for Managing Guidance Documents

1. Agencies should develop written procedures pertaining to their internal management of guidance documents.
 - a. The procedures should include:
 - i. a description of relevant categories or types of guidance documents subject to the procedures; and
 - ii. examples of specific materials not subject to the procedures, as appropriate.
 - b. The procedures should address measures to be taken for the:
 - i. development of guidance documents, including any opportunity for public comment;
 - ii. publication and dissemination of draft or final guidance documents; and
 - iii. periodic review of existing guidance documents.
 - c. Agency procedures should indicate the extent to which any of the measures created or identified in response to Paragraph 1(b) should vary depending on the type of guidance document or its category, as defined by any provisions in agency procedures responsive to Paragraph 1(a).
2. All relevant agency staff should receive training in agencies' guidance document management procedures.
3. Agencies should develop and apply appropriate internal controls to ensure adherence to guidance document management procedures.
4. To facilitate internal tracking of guidance documents, as well as to help members of the public more easily identify relevant guidance documents, agencies should consider assigning unique identification numbers to guidance documents covered by their written guidance procedures. Once a guidance identification number has been assigned to a guidance document, it should appear on that document and be used to refer to the



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document whenever it is listed or referenced on the agency's website, in public announcements, or in the *Federal Register* or the *Code of Federal Regulations*.

5. Using appropriate metrics, agencies should periodically review their guidance document management procedures and their implementation in order to assess their performance in making guidance documents available as well as to identify opportunities for improvement.
6. Agencies should provide opportunities for public feedback on their efforts to promote the public availability of their guidance documents.

Guidance Documents on Agency Websites

7. Agencies should maintain a page on their websites dedicated to informing the public about the availability of guidance documents and facilitating access to those documents.

Such guidance document webpages should include:

- a. Agencies' written guidance document management procedures pursuant to Paragraph 1, if developed;
- b. Plain language explanations (sometimes known as "explainers") that define guidance documents, explain their legal effects, or give examples of different types of guidance documents;
- c. A method for users to find relevant guidance documents, which might include:
 - i. Comprehensively listing and indexing agency guidance documents;
 - ii. Displaying links to pages where guidance documents are located, which could be organized by topic, type of guidance document, agency sub-division, or some other rubric; or
 - iii. A dedicated search engine; and
- d. Contact information or a comment form to facilitate public feedback related to potentially broken links, missing documents, or other errors or issues related to the agency's procedures for the development, publication, or disclosure of its guidance documents.



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8. Agencies should provide the public with access to a comprehensive set of its guidance documents—either on the dedicated guidance document webpage or other webpages—in accordance with its written procedures.
 - a. Agency websites should include, at minimum, (1) all guidance documents required by law to be published in the *Federal Register* and (2) all other guidance documents required by law to otherwise be made publicly available.
 - b. Guidance documents should generally be made available in downloadable form.
 - c. Links to downloadable copies of agencies’ Small Entity Compliance Guides—issued in accordance with the Small Business Regulatory Enforcement Fairness Act¹⁵—should be provided.
 - d. Agency websites should include relevant information for each guidance document, such as its title, any corresponding regulatory or statutory provision that the guidance document relates to or interprets (if applicable), the date of issuance, and any assigned identifying number.
 - e. Agencies should keep guidance documents on their websites current. To the extent a website contains obsolete or modified guidance documents, it should include notations indicating that such guidance documents have been revised or withdrawn. To the extent feasible, each guidance document should be clearly marked within the document to show whether it is current and identify its effective date, and, if appropriate, its rescission date. If a guidance document has been rescinded, agencies should provide a link to any successor guidance document.
9. Although not every agency website will have the same population of users, agency websites should be designed to ensure that they are as helpful to the end user as possible. In particular, agencies should ensure:
 - a. Simple words, such as “guidance,” are used in describing webpages that discuss or list guidance documents;

¹⁵ Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note).



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- b. Agency guidance document webpages are easy to find from their website's home page, through such techniques as a linked tab or entry in a pull-down menu;
 - c. The search engine on agency websites works effectively for finding relevant guidance information;
 - d. Guidance documents, when listed on webpages, are displayed in a manner that helps the public find a particular document, by using such techniques as indexing, tagging, or sortable tables; and
 - e. Websites displaying guidance documents are kept up to date, with any broken links fixed and any amended or withdrawn documents clearly labeled as such.
10. To make guidance documents accessible to users who are searching for information elsewhere on agency websites, agencies should strive to ensure that clearly labeled links to all guidance documents related to specific rules, issues, or programs are easily found in the corresponding section of the website where users are likely to find that information especially helpful.

Public Notice of Guidance Documents

11. Agencies should undertake affirmative measures to alert interested members of the public to new and revised guidance documents. Such measures could include, among other things, establishing public email distribution lists to disseminate alerts about new or revised guidance documents, using social media to disseminate guidance documents and related information, having agency staff speak about guidance documents at relevant conferences or meetings, or preparing printed pamphlets or other hard-copy documents. Even when not required to do so by law, agencies should consider publishing information about new or revised guidance documents in the *Federal Register*.
12. Agencies should consider providing descriptive references (such as links, if possible) to relevant guidance documents in appropriate sections of the *Code of Federal Regulations*, stating where the public can access the documents.