

Comment from Carol S. Jun, alternate for Government Member Christina McDonald, on *Public Availability of Inoperative Agency Guidance Documents*
November 9, 2021

Good morning Todd,

Apologies for the delay, thanks for your patience and for sending us the documents. I was collecting a bit of feedback from some components, especially the ones that issue a lot of guidance. As you know DHS is a large agency with a lot of components, so materials and recommendation took quite some time to review. Below are 2 comments we received:

Overall: I know it's just a recommendation but, as ACUS is uncannily good at getting its recommendations implemented, I would love to see some of this trimmed back. What's described is too much documentation, for minimal public benefit; agencies are not libraries for legal academic research, but in fact are supposed to get rid of their old paperwork regularly.

Related question: did ACUS look at the way guidance is commonly treated in agency records schedules? Keeping superseded documents (at all anywhere, not even publicly) is not typical. We are not supposed to keep things forever, and that is built into the archiving policies.

[We] see value in keeping some inoperative guidance publicly available on our websites. However in the vast majority of cases, there is no utility in keeping the old versions online; it's only in the outlier cases, such as where there is reliance value or danger of confusion, that it makes sense.

- The sheer volume of guidance that we would have to maintain online in perpetuity – decades of superseded, publicly available instructions, for example – is overwhelming. Has ACUS done any kind of survey to understand the volume of what it is suggesting, in pages/terabytes?
- Keeping this stuff does not benefit the public – if anything, it's a potential source of confusion if people find the old document online rather than the new one. They think the “cancelled” stamp is going to help but I am confident people will still use the old versions. I saw no mention of public benefit in the narrative, beyond a general sense people might be “interested.”
- Posting things online is not free. It costs money to maintain an online archive, money to index and sort documents, etc.

Specific paragraphs:

- It seems to me that 2a and 2b encompass pretty much everything an agency issues. That renders c-through-end superfluous, and also is way too broad to be usable to agencies. I see line 53 saying they don't mean us to post everything ... but that's what they wrote in the recommendations.
- If paragraph 2 provided more tailored guidance focused on the utility of keeping certain types of guidance available, then possibly there would also be no need for paragraph 1 telling the agency which rescinded things it will maintain.

- The focus on controversy or media attention in para. 2 should be limited to things that are still controversial. What was controversial when a document was issued in 2010 is likely not still controversial in 2020, and even less so if that 2010 document is now being replaced. The person cancelling it in 2010 likely doesn't know it was ever controversial.
- Paragraph 3 presents technological challenges that agencies are unlikely to have the funding to deal with. Does ACUS have a sense of what this would cost, for the average agency?

I want to highlight the danger of confusion as a result of maintaining multiple versions of inoperative guidance online. I am also confident that it would create, rather than alleviate, public confusion no matter what kind of “stamp” an agency chooses to use. Sometimes disaster situations require disaster-specific guidance that is unlikely to be applicable to the next event. COVID has been a prime example of such specific needs and there are particular programs created via executive order, just for this event, that [an agency] will not continue to provide when it resumes normal disaster operations.

In addition, it could exacerbate contentious issues. If an applicant did not receive the amount of assistance which they believed they should have received, it could lead to forum shopping in which the applicant sought old guidance that might support their position.