



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Public Availability of Agency Guidance

### Committee on Regulation

#### Proposed Recommendation for Committee | April 29, 2019

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

7           Guidance documents can take many forms.<sup>1</sup> These documents include what the  
8 Administrative Procedure Act (APA) calls “interpretative rules” and “general statements of  
9 policy,” which are two types of rules that are not required to undergo the notice-and-comment  
10 procedures applicable to legislative rules.<sup>2</sup> They may also include other materials considered to

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<sup>1</sup> To allow agencies flexibility to manage their varied and unique types of guidance, this Recommendation does not seek to provide an all-encompassing definition of what constitutes guidance. This Recommendation is addressed, at a minimum, to those guidance documents required under the Administrative Procedure Act to be published in the *Federal Register*, and any other guidance document required by statute to be made publicly available.

<sup>2</sup> Just as with a binding or legislative rule, interpretative rules and general statements of policy are defined as “rules” within the APA. *See* 5 U.S.C. § 551(4) (“the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”); *see also* 5 U.S.C. § 553 (“Except when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”). Although the APA does not define these two terms, the Attorney General’s Manual on the Administrative Procedure Act offers definitions: “interpretative rules” are defined 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” are defined 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).



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11 be guidance under other separate definitions adopted by government agencies.<sup>3</sup> When managing  
12 the public availability of agency information in implementing this Recommendation, agencies  
13 should be clear about what constitutes guidance and what does not.

14 Several laws require agencies to make at least certain guidance documents available to  
15 the public. The Federal Records Act requires agencies to identify “records of general interest or  
16 use to the public that are appropriate for public disclosure, and . . . post[] such records in a  
17 publicly accessible electronic format.”<sup>4</sup> The Freedom of Information Act (FOIA) requires that  
18 agencies publish certain guidance documents in the *Federal Register*: “substantive rules of  
19 general applicability adopted as authorized by law, and statements of general policy or  
20 interpretations of general applicability formulated and adopted by the agency.”<sup>5</sup> FOIA also  
21 requires agencies to make available “in an electronic format” those “statements of policy and  
22 interpretations which have been adopted by the agency and are not published in the *Federal*  
23 *Register*,” as well as “administrative staff manuals and instructions to staff that affect a member  
24 of the public.”<sup>6</sup> Finally, Congress has occasionally enacted some agency-specific requirements  
25 for posting guidance online. For example, the Food and Drug Administration is required to  
26 “maintain electronically and update and publish periodically in the *Federal Register* a list of  
27 guidance documents,” and to ensure that “[a]ll such documents [are] made available to the  
28 public.”<sup>7</sup>

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<sup>3</sup> See Cary Coglianese, Public Availability of Agency Guidance Documents (Mar. 29, 2019) (draft report to the Admin. Conf. of the U.S.) <https://www.acus.gov/sites/default/files/documents/ACUS%20Guidance%20Report%2003.29.19%20DRAFT.pdf>.

<sup>4</sup> 44 U.S.C. § 3102.

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

<sup>6</sup> 5 U.S.C. § 552(a)(2); see also E-Government Act, Pub. L. No. 107-347 (Dec. 17, 2002) (codified in scattered sections of 44 U.S.C.) (requiring agencies, to the extent practicable, to publish online documents FOIA requires be published in the *Federal Register*); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note) (requiring agencies produce a “small entity compliance guide” for some legislative rules and post those guides “in an easily identified location on the web site of the agency.”).

<sup>7</sup> 21 U.S.C. § 371(h)(3).



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29 The Administrative Conference has urged that various types of guidance documents be  
30 made available online. Recommendation 2017-5, *Agency Guidance Through Policy Statements*,  
31 provided that “[a]ll written policy statements affecting the interests of regulated parties,  
32 regulatory beneficiaries, or other interested parties should be promptly made available  
33 electronically and indexed, in a manner in which they may readily be found.”<sup>8</sup> Similarly,  
34 Recommendation 2018-5, *Public Availability of Adjudication Rules*, urged agencies to “provide  
35 updated access on their web sites to all sources of procedural rules and related guidance  
36 documents and explanatory materials that apply to agency adjudications.”<sup>9</sup>

37 While many agencies do post guidance materials online, in recent years, concerns have  
38 emerged about how well organized, up to date, and easily accessible these documents are to the  
39 public. [The White House has announced policies that call upon agencies to report their guidance  
40 documents to the Office of Information and Regulatory Affairs. At various times, the Office of  
41 Management and Budget has instructed agencies on their management of guidance documents.  
42 For example, OMB Bulletin 07-02 required a current list of significant guidance documents in  
43 effect on each agency’s website.](#)<sup>10</sup> The U.S. Government Accountability Office has conducted an  
44 audit that highlights the management challenges associated with agency dissemination of  
45 guidance documents online.<sup>11</sup> Several legislative proposals have been introduced (but not  
46 enacted) to create standards for public disclosure of guidance documents.<sup>12</sup>

**Commented [TP1]:** Note to the committee: The Committee on Judicial Review is currently considering a project on *Interpretive Rules* that examines whether the recommendations applied to policy statements in 2017-5 should be extended to interpretive rules. The draft recommendation the Committee on Judicial Review is considering currently includes language that is largely identical to that quoted here. ACUS staff will update this recommendation to include an appropriate reference to the Committee on Judicial Review’s draft recommendation once that committee has completed it work.

**Commented [RDJ2]:** Only OMB Bulletin 07-02 and OMB Memorandum 07-07 address public access to guidance documents. M-19-14 does not address public access to guidance document beyond notice to GAO under the CRA.

<sup>8</sup> Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61728 (Dec. 29, 2017).

<sup>9</sup> Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019).

<sup>10</sup> Office of Management and Budget (OMB), Bulletin 07-02, 72 Fed. Reg. 3432 (January 24, 2007) and OMB, M-07-07, “Issuance of OMB’s “Final Bulletin for Agency Good Guidance Practices” (January 18, 2007). [See also Office of Management and Budget, M-19-14, \*Guidance on Compliance with the Congressional Review Act\* \(Apr. 11, 2019\). See also Exec. Order No. 13,422, 72 Fed. Reg. 2763 \(Jan. 23, 2007\). But note Exec. Order No. 13,497, 74 Fed. Reg. 6113 \(Feb. 04, 2009\) \(rescinding Exec. Order No. 13,422\).](#)

<sup>11</sup> Government Accountability Office, “Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices,” No. 15-368 (2015), <https://www.gao.gov/assets/670/669688.pdf>.

<sup>12</sup> See, e.g., Guidance out of Darkness Act, S. 380, 116th Cong. (2019); S. Rept. No. 116-12 (2019); [H.R. 2142, 116<sup>th</sup> Cong. \(2019\)](#); Guidance out of Darkness Act, H.R. 4809, 115th Cong. (2018); H. Rept. No. 115-972 (2018). For other legislation, see Coglianese, *supra* note 7.

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

56 With these principles in mind, this Recommendation calls on agencies to consider  
57 opportunities for improving the public availability of their guidance. Each agency must decide  
58 which guidance documents to post online and how to present them in a manner that will ensure  
59 their availability and usefulness for regulated parties and the public. The Recommendation  
60 provides best practices to guide agencies to make their guidance documents more publicly  
61 available. It is intended to be construed so as to be adapted to fit different circumstances, as  
62 appropriate. For example, even the term “agency” as used in the Recommendation can be  
63 construed to address either agencies or sub-agencies within larger departments. The Conference  
64 notes that each agency is different, and the practices outlined in the Recommendation may be  
65 employed with flexibility as necessary (perhaps based on an agency’s internal structures,  
66 regulated parties, and end users) so that guidance documents are made available to the public in a  
67 logical and suitably comprehensive manner.

### RECOMMENDATION

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#### 69 Guidance Procedures

70 1. Agencies should develop written procedures pertaining to their internal management of  
71 guidance documents.

72 a. The procedures should include:



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- 73                   i. a description of relevant categories or types of guidance subject to the  
74                   procedures; and
- 75                   ii. examples of specific materials not subject to the procedures, as  
76                   appropriate.
- 77           b. The procedures should address steps to be taken for the:
- 78                   i. development of guidance documents, including any opportunity for public  
79                   comment;
- 80                   ii. publication and dissemination of draft or final guidance documents; and  
81                   iii. periodic review of existing guidance documents.
- 82           c. Agency procedures should indicate the extent to which any of the steps created or  
83           identified in response to Section 1(b) of this Recommendation should vary  
84           depending on the type of guidance document or its category, as defined by any  
85           provisions in agency procedures responsive to 1(a) of this Recommendation.
- 86   2. All relevant agency staff should receive training in agencies' guidance procedures.
- 87   3. Agencies should develop and apply appropriate internal controls to ensure that guidance  
88   procedures are adhered to in practice.
- 89   4. To facilitate internal tracking of guidance documents, as well as to help members of the  
90   public more easily identify relevant guidance documents, agencies should consider  
91   assigning unique identification numbers to guidance documents covered by their written  
92   guidance procedures. Once a guidance identification number has been assigned to a  
93   guidance document, it should appear on that document and be used to refer to the  
94   document whenever it is listed or referenced on the agency's web site, in public  
95   announcements, or in the *Federal Register* or the Code of Federal Regulation.
- 96   5. Using appropriate metrics, agencies should periodically review their guidance procedures  
97   and their implementation in order to assess the agency's performance in making guidance  
98   documents available as well as to identify opportunities for improvement.
- 99   6. Agencies should provide opportunities for public feedback on the public availability of  
100   their guidance.

### Guidance on Agency Web sites



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- 102 7. The agency should maintain a web page dedicated to educating the public regarding the  
103 availability of its guidance documents and facilitating access to those documents. The  
104 dedicated guidance web page should include:
- 105 a. The agency's written guidance procedures;
  - 106 b. Plain language "explainers" that define guidance, explain its legal effect, or give  
107 examples of different types of guidance;
  - 108 c. A search engine to facilitate finding relevant guidance documents; links that  
109 direct users to separate guidance-related pages, such as those organized by topic,  
110 type of guidance document, or agency sub-division; or a list of the agency's  
111 guidance documents;
  - 112 d. Contact information or a comment form to facilitate public feedback related to  
113 potentially broken links, missing documents, or other errors or issues related to  
114 the agency's procedures for the development, publication, or disclosure of its  
115 guidance documents.
- 116 8. Each agency should provide the public with access to a comprehensive set of its guidance  
117 documents, in accordance with its written procedures.
- 118 a. The agency web site should include, at minimum, (1) all guidance documents  
119 required under the Administrative Procedure Act to be published in the *Federal*  
120 *Register* and (2) all other guidance documents required by statute to be made  
121 publicly available.
  - 122 b. Guidance documents should generally be made available in downloadable form;
  - 123 c. Links to downloadable copies of any Small Entity Compliance guides should be  
124 provided;
  - 125 d. Agency web sites should include relevant information for each guidance  
126 document, such as a title, any corresponding regulatory or statutory provision that  
127 the guidance relates to or interprets (if applicable), the date of issue, and any  
128 assigned identifying number.
  - 129 ~~e.~~ Each agency should keep its guidance documents on its web site current.  
130 [Guidance documents should be clearly marked within the document to show](#)



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131 [whether it is current, its effective date, and, if appropriate, its repeal date and a](#)  
132 [link to any successor guidance.](#)

133 ~~f.e. To help members of the public know the status of any agency guidance document~~  
134 ~~they may come across, a~~ An agency's ~~guidance~~ web site should [similarly](#) include  
135 notations indicating whether [each](#) guidance documents ~~have~~ [has](#) been revised or  
136 withdrawn.

137 9. In determining whether to make a particular guidance document available to the public  
138 via the agency's web site, if it is not clear whether the document falls into a category that  
139 would require such publication under the agency's procedures or other applicable  
140 standards, the agency should consider erring on the side of posting the document online.

141 10. Although not every agency web site will have the same population of users, agency web  
142 sites should be designed to ensure that they are as helpful to the end user as possible. In  
143 particular, agencies should ensure:

- 144 a. Simple words, such as "guidance," are used in describing web pages that discuss  
145 or list guidance documents;
- 146 b. [the agency's dedicated guidance web page is easy to find from the home page of](#)  
147 [the agency, through such techniques as a](#) ~~A~~ [linked tab, word, or entry in a pull-](#)  
148 [down menu](#) ~~from the home page of the agency's web site leads the user to the~~  
149 [agency's dedicated guidance web page;](#)
- 150 c. The search engine on the agency's web site works effectively for finding relevant  
151 guidance information;
- 152 d. Guidance documents, when ~~displayed-listed~~ on web pages, are [displayed an a](#)  
153 [manner that helps the public find a particular document, through such techniques](#)  
154 [as appropriately-indexed](#) ~~ing~~, [tagged](#) ~~ing~~, or ~~available in~~ [sortable tables](#); and
- 155 e. Web sites displaying guidance documents are kept up to date, with any broken  
156 links fixed and any amended or withdrawn documents clearly labeled as such.

157 11. To make guidance documents accessible to users who are searching for information  
158 elsewhere on an agency's web site, each agency should strive to ensure that clearly  
159 labeled links to all guidance documents related to specific rules, issues, or programs are



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160 easily found in the corresponding section of the agency’s web site where users are likely  
161 to find that information especially helpful.

162 Guidance Outreach

163 12. Agencies should undertake affirmative steps to alert interested members of the public to  
164 new and revised guidance. Such steps could include, among other things: allowing  
165 members of the public to sign up for listservs used ~~establishing public email distribution~~  
166 lists to disseminate alerts about new or revised guidance; using social media to  
167 disseminate guidance documents and related information; having agency staff speak  
168 about guidance documents at relevant conferences or meetings; or, even when  
169 appropriate, preparing printed pamphlets or other hard-copy documents ~~when~~  
170 appropriate.

171 Even when they are not already required to do so under the Administrative Procedure  
172 Act, agencies should consider publishing information about new or revised guidance  
173 documents in the *Federal Register*.

174 13. They Agencies should ~~also~~ consider providing descriptive references to relevant guidance  
175 documents in appropriate sections of the Code of Federal Regulations and indicating  
176 where members of the public saying where the public can access such documents.

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Commented [RDJ3]: Incorporate into recommendation 12 and let descriptions in the CFR stand alone.