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 principles of governmental transparency and accountability.

Guidance documents can take many forms.¹ These documents 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

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¹ 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.

² 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).
be guidance under other separate definitions adopted by government agencies. When managing
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.” The Freedom of Information Act (FOIA) requires that
agencies publish certain guidance documents in the Federal Register: “substantive rules of
general applicability adopted as authorized by law, and statements of general policy or
interpretations of general applicability formulated and adopted by the agency.” FOIA also
requires agencies to make available “in an electronic format” those “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.” Finally, Congress has occasionally enacted some agency-specific requirements
for posting guidance 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.”

1 See Cary Coglianese, Public Availability of Agency Guidance Documents (Mar. 29, 2019) (draft report to the
5 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.
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
some legislative rules and post those guides “in an easily identified location on the web site of the agency.”).
The Administrative Conference has urged that various types of guidance documents be made available online. Recommendation 2017-5, *Agency Guidance Through 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.” Similarly, Recommendation 2018-5, *Public Availability of Adjudication Rules*, urged agencies to “provide updated access on their web sites to all sources of procedural rules and related guidance documents and explanatory materials that apply to agency adjudications.”

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

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Agencies should be cognizant that the primary goal of online publication is to facilitate access to guidance information 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 web site users), and (d) comprehensibility (whether web site 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. 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. It is intended to be construed so as to be adapted to fit different circumstances, as appropriate. For example, even the term “agency” as used in the Recommendation can be construed to address either agencies or sub-agencies within larger departments. The Conference notes that each agency is different, and the practices outlined in the Recommendation may be employed with flexibility as necessary (perhaps based on an agency’s internal structures, regulated parties, and end users) so that guidance documents are made available to the public in a logical and suitably comprehensive manner.

RECOMMENDATION

Guidance Procedures

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 subject to the
   procedures; and
ii. examples of specific materials not subject to the procedures, as
   appropriate.

b. The procedures should address steps 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 steps created or
   identified in response to Section 1(b) of this Recommendation should vary
   depending on the type of guidance document or its category, as defined by any
   provisions in agency procedures responsive to 1(a) of this Recommendation.

2. All relevant agency staff should receive training in agencies’ guidance procedures.

3. Agencies should develop and apply appropriate internal controls to ensure that guidance
   procedures are adhered to in practice.

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
   document whenever it is listed or referenced on the agency’s web site, in public
   announcements, or in the Federal Register or the Code of Federal Regulation.

5. Using appropriate metrics, agencies should periodically review their guidance procedures
   and their implementation in order to assess the agency’s performance in making guidance
   documents available as well as to identify opportunities for improvement.

6. Agencies should provide opportunities for public feedback on the public availability of
   their guidance.

Guidance on Agency Web sites
7. The agency should maintain a web page dedicated to educating the public regarding the availability of its guidance documents and facilitating access to those documents. The dedicated guidance web page should include:
   a. The agency’s written guidance procedures;
   b. Plain language “explainers” that define guidance, explain its legal effect, or give examples of different types of guidance;
   c. A search engine to facilitate finding relevant guidance documents; links that direct users to separate guidance-related pages, such as those organized by topic, type of guidance document, or agency sub-division; or a list of the agency’s guidance documents;
   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.

8. Each agency should provide the public with access to a comprehensive set of its guidance documents, in accordance with its written procedures.
   a. The agency web site should include, at minimum, (1) all guidance documents required under the Administrative Procedure Act to be published in the Federal Register and (2) all other guidance documents required by statute to be made publicly available.
   b. Guidance documents should generally be made available in downloadable form;
   c. Links to downloadable copies of any Small Entity Compliance guides should be provided;
   d. Agency web sites should include relevant information for each guidance document, such as a title, any corresponding regulatory or statutory provision that the guidance relates to or interprets (if applicable), the date of issue, and any assigned identifying number.

   e. Each agency should keep its guidance documents on its web site current.

   Guidance documents should be clearly marked within the document to show
whether it is current, its effective date, and, if appropriate, its repeal date and a link to any successor guidance.

Le. To help members of the public know the status of any agency guidance document they may come across, a guidance web site should similarly include notations indicating whether each guidance document has been revised or withdrawn.

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

10. Although not every agency web site will have the same population of users, agency web sites 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 web pages that discuss or list guidance documents;

b. the agency’s dedicated guidance web page is easy to find from the home page of the agency, through such techniques as a linked tab, word, or entry in a pull-down menu from the home page of the agency’s web site leads the user to the agency’s dedicated guidance web page;

c. The search engine on the agency’s web site works effectively for finding relevant guidance information;

d. Guidance documents, when displayed on web pages, are displayed in a manner that helps the public find a particular document, through such techniques as appropriately indexing, tagging, or available in sortable tables; and

e. Web sites displaying guidance documents are kept up to date, with any broken links fixed and any amended or withdrawn documents clearly labeled as such.

11. To make guidance documents accessible to users who are searching for information elsewhere on an agency’s web site, each agency should strive to ensure that clearly labeled links to all guidance documents related to specific rules, issues, or programs are
160 easily found in the corresponding section of the agency’s web site where users are likely
to find that information especially helpful.

Guidance Outreach

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

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

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