



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Availability of Agency Guidance

Committee on Regulation

Proposed Recommendation for Committee | April 16, 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. These documents include what the Administrative Procedure Act (APA)
4 calls “interpretative rules” and “general statements of policy,” which are two types of rules that
5 are not required to undergo the notice-and-comment procedures applicable to legislative rules.¹
6 They may also include other materials considered to be guidance under other separate definitions
7 adopted by government agencies.²

8 Ensuring access to guidance materials is necessary to ensure that regulated entities and
9 the public understand important aspects of how federal agencies interpret and apply the laws that
10 they are charged with implementing. When guidance is produced but not disclosed to the public
11 in a readily accessible manner, members of the public may be limited in their understanding of

¹ 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”). Though 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).

² *See* Cary Coglianese, Public Availability of Agency Guidance Documents (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>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

12 what agency officials do and how they will apply the law. Ensuring ready access to relevant
13 guidance documents is consistent with governmental transparency and rule of law principles.

14 Several laws require agencies to place at least certain guidance documents online. The
15 Federal Records Act requires agencies to identify “records of general interest or use to the public
16 that are appropriate for public disclosure, and . . . post[] such records in a publicly accessible
17 electronic format.”³ The Freedom of Information Act (FOIA) requires that, with some
18 exceptions, agencies publish certain guidance documents in the *Federal Register*.⁴ FOIA also
19 requires agencies to make available “in an electronic format” those “statements of policy and
20 interpretations which have been adopted by the agency and are not published in the *Federal*
21 *Register*,” as well as “administrative staff manuals and instructions to staff that affect a member
22 of the public.”⁵ Finally, Congress has occasionally enacted some agency-specific requirements
23 for posting guidance online. For example, the Food and Drug Administration is required to
24 “maintain electronically and update and publish periodically in the *Federal Register* a list of
25 guidance documents,” and to ensure that “[a]ll such documents [are] made available to the
26 public.”⁶

27 The Administrative Conference has also urged that various types of guidance documents
28 be made available online. Recommendation 2017-5 on *Agency Guidance Through Policy*
29 *Statements* provided that “[a]ll written policy statements affecting the interests of regulated
30 parties, regulatory beneficiaries, or other interested parties should be promptly made available
31 electronically and indexed, in a manner in which they may readily be found.”⁷ Similarly,

³ 44 U.S.C. § 3102.

⁴ 5 U.S.C. § 552(a)(1)(D).

⁵ 5 U.S.C. § 552(a)(2); *see also* E-Government Act, 1 Pub. L. No. 107-347 (Dec. 17, 2002) (codified in scattered sections of 44 U.S.C.) (requiring agencies to the extent practicable, publish online documents FOIA requires be published in the *Federal Register*); Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 605(b) (requiring agencies 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”).

⁶ 21 U.S.C. § 371(h)(3).

⁷ Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61728 (Dec. 29, 2017).

Commented [RB1]: 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 its work.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

32 Recommendation 2018-5 on *Public Availability of Adjudication Rules* urged agencies to
33 “provide updated access on their websites to all sources of procedural rules and related guidance
34 documents and explanatory materials that apply to agency adjudications.”⁸

35 In recent years, indicators of concern have been emerged about the ease with which
36 members of the public, including regulated entities, are able to find relevant agency guidance
37 materials. The U.S. Government Accountability Office has conducted an audit of agency
38 dissemination of guidance documents.⁹ Several legislative proposals have been introduced (but
39 not enacted) to create standards for public disclosure of guidance documents.¹⁰

40 In deciding when and how to make guidance documents available online, agencies must
41 be mindful of the potential tensions between completeness, on the one hand, and usefulness, on
42 the other. Simply ensuring that every single guidance document appears on some agency
43 webpage may not be particularly useful to the public, especially if the agency has issued a very
44 large number of guidance documents.

45 In this light, agencies should be cognizant that the primary goal of online publication is to
46 facilitate access to guidance information by regulated entities and the public. Four principles for
47 agencies to consider when developing and implementing plans to track and disclosure their
48 guidance documents to the public include: (a) comprehensiveness (whether all relevant guidance
49 documents are available), (b) currency (whether guidance documents are up to date), (c)
50 accessibility (whether guidance documents can be easily located by web site users), and (d)
51 comprehensibility (whether web site users are likely to be able to understand the information
52 they have located).

53 With these principles in mind, each agency must decide which guidance documents to
54 post online and how to present those documents in a manner that will ensure their availability

⁸ Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019).

⁹ 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>.

¹⁰ See Coglianese, *supra* note 7.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

55 and usefulness for regulated parties and the public. The following recommendation provides
56 “best practices” to guide agencies that seek to make their guidance documents more publicly
57 accessible. The recommendation is intended to be construed so as to be adapted to fit different
58 circumstances, as appropriate. For example, even the term “agency” as used in the
59 recommendation can be construed to address either agencies or sub-agencies within larger
60 departments. The Conference notes that each agency is different, and the practices outlined in
61 the recommendation may be employed with flexibility as necessary (perhaps based on an
62 agency’s internal structures, regulated parties, and end users) so that guidance documents are
63 made available to the public in a logical and suitably in a comprehensive manner.

RECOMMENDATION

64 The following are intended to be best practices agencies should consider adopting as
65 appropriate.

Guidance Procedures

- 67 1. Agencies should develop written procedures pertaining to their internal management of
68 guidance documents.
 - 69 a. The procedures should include:
 - 70 i. a description of relevant categories or types of guidance subject to the
71 procedures, if any; and
 - 72 ii. examples of specific materials not subject to the procedures, as
73 appropriate.
 - 74 b. The procedures should address steps to be taken for the:
 - 75 i. development of guidance documents, including any opportunity for public
76 comment;
 - 77 ii. publication and dissemination of draft or final guidance documents; and
 - 78 iii. periodic review of existing guidance documents.
 - 79 c. Agency procedures should indicate the extent to which any of the steps created or
80 identified in response to Section 1(b) of this Recommendation should vary

Commented [TP2]: Note to Committee: This sentence was included at the behest of the Committee during the last meeting. At that time there was no preamble to review. With the newly-added preamble, it is the opinion of ACUS staff and Professor Coglianese that this sentence is now unnecessary and should be removed.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 81 depending on the type of guidance document or its category, as defined by any
82 provisions in agency procedures responsive to 1(a)(ii) of this Recommendation.
- 83 2. All relevant agency staff should receive training in agencies' guidance procedures.
- 84 3. Agencies should develop and apply appropriate internal controls to ensure that guidance
85 procedures are adhered to in practice.
- 86 4. To facilitate internal tracking of guidance documents, as well as to help members of the
87 public more easily identify relevant guidance documents, agencies should consider
88 assigning unique identification numbers to guidance documents covered by their written
89 guidance procedures. Once a guidance identification number has been assigned to a
90 guidance document, it should appear on that document and be used to refer to the
91 document whenever it is listed or referenced on the agency's Web site, in public
92 announcements, or in the *Federal Register* or the Code of Federal Regulation.
- 93 5. Using appropriate metrics, agencies should periodically review their guidance procedures
94 and their implementation in order to assess the agency's performance in making guidance
95 documents available as well as to identify opportunities for improvement.
- 96 6. Agencies should provide opportunities for public feedback on the public availability of
97 their guidance.
- 98 Guidance on Agency Web sites
- 99 7. The agency should maintain a Web page dedicated to its guidance documents, even if
100 that dedicated page contains links that direct users to separate guidance-related pages,
101 such as those organized by topic, type of guidance document, or agency sub-division.
- 102 8. Each agency should provide the public with access to a comprehensive set of its guidance
103 documents, in accordance with its written procedures.
- 104 a. The Web site should include, at minimum, (1) all guidance documents required
105 under the Administrative Procedure Act to be published in the *Federal Register*
106 and (2) all other guidance documents required by statute to be made publicly
107 available.
- 108 b. Entries in the Web site should include relevant information for each guidance
109 document, such as a title, any corresponding regulatory or statutory provision that



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 110 the guidance relates to or interprets (if applicable), the date of issue, and any
111 assigned identifying number.
- 112 c. Each agency should strive to keep its Web site current.
- 113 d. To help members of the public know the status of any agency guidance document
114 they may come across, an agency's guidance Web site should include notations
115 indicating whether guidance documents have been revised or withdrawn.
- 116 9. Each agency should make available to the public on its dedicated guidance Web page:
- 117 a. The agency's written guidance procedures;
- 118 b. Plain language "explainers" that define guidance, explain its legal effect, or give
119 examples of different types of guidance;
- 120 c. The latest list of the agency's guidance documents prepared pursuant to
121 Recommendation 8, or links to such a list on another page on the agency's Web
122 site;
- 123 d. Links to downloadable copies of the guidance documents contained on the
124 agency's latest guidance list or to other agency Web pages containing
125 downloadable copies of such documents;
- 126 e. Links to downloadable copies of any Small Entity Compliance guides or to other
127 agency Web pages containing downloadable copies of such guides;
- 128 f. Contact information or a comment form to facilitate public feedback related to
129 potentially broken links, missing documents, or other errors or issues related to
130 the agency's procedures for the development, publication, or disclosure of its
131 guidance documents.
- 132 10. In determining whether to make a particular guidance document available to the public
133 via the agency's Web site, if it is not clear whether the document falls into a category that
134 would require such publication under the agency's procedures or other applicable
135 standards, the agency should consider erring on the side of posting the document online.
- 136 11. Although not every agency Web site will have the same population of users, agency Web
137 sites should be designed to ensure that they are as helpful to the end user as possible. In
138 particular, agencies should ensure:



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 139 a. Simple words, such as “guidance,” are used in describing Web pages that discuss
140 or list guidance documents;
- 141 b. A linked tab, word, or entry in a pull-down menu from the home page of the
142 agency’s Web site leads the user to the agency’s dedicated guidance Web page;
- 143 c. The search engine on the agency’s Web site works effectively for finding relevant
144 guidance information;
- 145 d. Guidance documents, when displayed on Web pages, are appropriately indexed,
146 tagged, or available in sortable tables; and
- 147 e. Web sites displaying guidance documents are kept up to date, with any broken
148 links fixed and any amended or withdrawn documents clearly labeled as such.
- 149 12. To make guidance documents accessible to users who are searching for information
150 elsewhere on an agency’s Web site, each agency should strive to ensure that clearly
151 labeled links to all guidance documents related to specific rules, issues, or programs are
152 easily found in the corresponding section of the agency’s Web site where users are likely
153 to find that information especially helpful.
- 154 Guidance Outreach
- 155 13. Agencies should undertake affirmative steps to alert interested members of the public to
156 new and revised guidance. Such steps could include, among other things: allowing
157 members of the public to sign up for listservs used to disseminate alerts about new or
158 revised guidance; using social media to disseminate guidance documents and related
159 information; having agency staff speak about guidance documents at relevant conferences
160 or meetings; or even preparing printed pamphlets or other hard-copy documents when
161 appropriate.
- 162 14. Even when they are not already required to do so under the Administrative Procedure
163 Act, agencies should consider publishing information about new or revised guidance
164 documents in the *Federal Register*. They should also consider providing descriptive
165 references to relevant guidance documents in appropriate sections of the Code of Federal
166 Regulations and indicating where members of the public can access such documents.