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. 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.\(^1\) They may also include other materials considered to be guidance under other separate definitions adopted by government agencies.\(^2\)

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

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\(^1\) 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).

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

Several laws require agencies to place at least certain guidance documents online. 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, with some exceptions, agencies publish certain guidance documents in the Federal Register. 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.”

The Administrative Conference has also urged that various types of guidance documents be made available online. Recommendation 2017-5 on 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.”

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 it work.

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1 44 U.S.C. § 3102.
Recommendation 2018-5 on 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.”

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

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

In this light, agencies should be cognizant that the primary goal of online publication is to facilitate access to guidance information by regulated entities and the public. Four principles for agencies to consider when developing and implementing plans to track and disclosure 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, each agency must decide which guidance documents to post online and how to present those documents in a manner that will ensure their availability.

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10 See Coglianese, supra note 7.
and usefulness for regulated parties and the public. The following recommendation provides “best practices” to guide agencies that seek to make their guidance documents more publicly accessible. The recommendation 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 in a comprehensive manner.

RECOMMENDATION

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

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, if any; 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.

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.
depending on the type of guidance document or its category, as defined by any provisions in agency procedures responsive to 1(a)(ii) 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 its guidance documents, even if that dedicated page contains links that direct users to separate guidance-related pages, such as those organized by topic, type of guidance document, or agency sub-division.

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 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. Entries in the Web site 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.

c. Each agency should strive to keep its Web site current.
d. To help members of the public know the status of any agency guidance document
they may come across, an agency’s guidance Web site should include notations
indicating whether guidance documents have been revised or withdrawn.

9. Each agency should make available to the public on its dedicated guidance Web page:

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. The latest list of the agency’s guidance documents prepared pursuant to
   Recommendation 8, or links to such a list on another page on the agency’s Web
   site;
d. Links to downloadable copies of the guidance documents contained on the
   agency’s latest guidance list or to other agency Web pages containing
downloadable copies of such documents;
e. Links to downloadable copies of any Small Entity Compliance guides or to other
   agency Web pages containing downloadable copies of such guides;
f. 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.

10. 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.

11. 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:
12. 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 easily found in the corresponding section of the agency’s Web site where users are likely to find that information especially helpful.

Guidance Outreach

13. 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 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 preparing printed pamphlets or other hard-copy documents when appropriate.

14. 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. They 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.