



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.¹ 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.² They may also include other materials considered to

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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

11 be guidance under other separate definitions adopted by government agencies.³ 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.”⁴ 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.”⁵ 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.”⁶ 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.”⁷

³ 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>.

⁴ 44 U.S.C. § 3102.

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.

⁶ 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.”).

⁷ 21 U.S.C. § 371(h)(3).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.”⁸ 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.”⁹

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.¹⁰ The U.S. Government
41 Accountability Office has conducted an audit that highlights the management challenges
42 associated with agency dissemination of guidance documents online.¹¹ Several legislative
43 proposals have been introduced (but not enacted) to create standards for public disclosure of
44 guidance documents.¹²

45 Agencies should be cognizant that the primary goal of online publication is to facilitate
46 access to guidance information by regulated entities and the public. In deciding how to manage
47 the availability of their guidance documents, agencies must be mindful of how members of the

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.

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

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

¹⁰ See 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).

¹¹ 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>.

¹² See, e.g., Guidance out of Darkness Act, S. 380, 116th Cong. (2019); S. Rept. No. 116-12 (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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

48 public will find the documents they need. Four principles for agencies to consider when
49 developing and implementing plans to track and disclose their guidance documents to the public
50 include: (a) comprehensiveness (whether all relevant guidance documents are available), (b)
51 currency (whether guidance documents are up to date), (c) accessibility (whether guidance
52 documents can be easily located by web site users), and (d) comprehensibility (whether web site
53 users are likely to be able to understand the information they have located).

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

RECOMMENDATION

66

67 Guidance Procedures

- 68 1. Agencies should develop written procedures pertaining to their internal management of
69 guidance documents.
- 70 a. The procedures should include:
- 71 i. a description of relevant categories or types of guidance subject to the
72 procedures; and
- 73 ii. examples of specific materials not subject to the procedures, as
74 appropriate.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 75 b. The procedures should address steps to be taken for the:
- 76 i. development of guidance documents, including any opportunity for public
- 77 comment;
- 78 ii. publication and dissemination of draft or final guidance documents; and
- 79 iii. periodic review of existing guidance documents.
- 80 c. Agency procedures should indicate the extent to which any of the steps created or
- 81 identified in response to Section 1(b) of this Recommendation should vary
- 82 depending on the type of guidance document or its category, as defined by any
- 83 provisions in agency procedures responsive to 1(a) of this Recommendation.
- 84 2. All relevant agency staff should receive training in agencies' guidance procedures.
- 85 3. Agencies should develop and apply appropriate internal controls to ensure that guidance
- 86 procedures are adhered to in practice.
- 87 4. To facilitate internal tracking of guidance documents, as well as to help members of the
- 88 public more easily identify relevant guidance documents, agencies should consider
- 89 assigning unique identification numbers to guidance documents covered by their written
- 90 guidance procedures. Once a guidance identification number has been assigned to a
- 91 guidance document, it should appear on that document and be used to refer to the
- 92 document whenever it is listed or referenced on the agency's web site, in public
- 93 announcements, or in the *Federal Register* or the Code of Federal Regulation.
- 94 5. Using appropriate metrics, agencies should periodically review their guidance procedures
- 95 and their implementation in order to assess the agency's performance in making guidance
- 96 documents available as well as to identify opportunities for improvement.
- 97 6. Agencies should provide opportunities for public feedback on the public availability of
- 98 their guidance.
- 99 Guidance on Agency Web sites
- 100 7. The agency should maintain a web page dedicated to educating the public regarding the
- 101 availability of its guidance documents and facilitating access to those documents. The
- 102 dedicated guidance web page should include:
- 103 a. The agency's written guidance procedures;



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 104 b. Plain language “explainers” that define guidance, explain its legal effect, or give
105 examples of different types of guidance;
- 106 c. A search engine to facilitate finding relevant guidance documents; links that
107 direct users to separate guidance-related pages, such as those organized by topic,
108 type of guidance document, or agency sub-division; or a list of the agency’s
109 guidance documents;
- 110 d. Contact information or a comment form to facilitate public feedback related to
111 potentially broken links, missing documents, or other errors or issues related to
112 the agency’s procedures for the development, publication, or disclosure of its
113 guidance documents.
- 114 8. Each agency should provide the public with access to a comprehensive set of its guidance
115 documents, in accordance with its written procedures.
- 116 a. The agency web site should include, at minimum, (1) all guidance documents
117 required under the Administrative Procedure Act to be published in the *Federal*
118 *Register* and (2) all other guidance documents required by statute to be made
119 publicly available.
- 120 b. Guidance documents should generally be made available in downloadable form;
- 121 c. Links to downloadable copies of any Small Entity Compliance guides should be
122 provided;
- 123 d. Agency web sites should include relevant information for each guidance
124 document, such as a title, any corresponding regulatory or statutory provision that
125 the guidance relates to or interprets (if applicable), the date of issue, and any
126 assigned identifying number.
- 127 e. Each agency should keep its guidance documents on its web site current.
- 128 f. To help members of the public know the status of any agency guidance document
129 they may come across, an agency’s ~~guidance~~ web site should include notations
130 indicating whether guidance documents have been revised or withdrawn.
- 131 9. In determining whether to make a particular guidance document available to the public
132 via the agency’s web site, if it is not clear whether the document falls into a category that



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 133 would require such publication under the agency's procedures or other applicable
134 standards, the agency should consider erring on the side of posting the document online.
- 135 10. Although not every agency web site will have the same population of users, agency web
136 sites should be designed to ensure that they are as helpful to the end user as possible. In
137 particular, agencies should ensure:
- 138 a. Simple words, such as "guidance," are used in describing web pages that discuss
139 or list guidance documents;
 - 140 b. A linked tab, word, or entry in a pull-down menu from the home page of the
141 agency's web site leads the user to the agency's dedicated guidance web page;
 - 142 c. The search engine on the agency's web site works effectively for finding relevant
143 guidance information;
 - 144 d. Guidance documents, when displayed on web pages, are appropriately indexed,
145 tagged, or available in sortable tables; and
 - 146 e. Web sites displaying guidance documents are kept up to date, with any broken
147 links fixed and any amended or withdrawn documents clearly labeled as such.
- 148 11. To make guidance documents accessible to users who are searching for information
149 elsewhere on an agency's web site, each agency should strive to ensure that clearly
150 labeled links to all guidance documents related to specific rules, issues, or programs are
151 easily found in the corresponding section of the agency's web site where users are likely
152 to find that information especially helpful.

Guidance Outreach

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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

161 13. Even when they are not already required to do so under the Administrative Procedure
162 Act, agencies should consider publishing information about new or revised guidance
163 documents in the *Federal Register*. They should also consider providing descriptive
164 references to relevant guidance documents in appropriate sections of the Code of Federal
165 Regulations and indicating where members of the public can access such documents.