



Public Availability of Agency Guidance

Committee on Regulation

Proposed Recommendation | June 13, 2019

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and additional amendments from Conference members (with sources shown in the margin).

Commented [CMA1]: Proposed Amendment by Government Member Connor N. Raso #1. The Committee on Regulation voted to change the title of this Recommendation to “Public Availability of Agency Guidance Documents”

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 legal
6 requirements and the principles of governmental transparency and accountability.

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

¹ To allow agencies flexibility to manage their varied and unique types of guidance documents, this Recommendation does not seek to provide an all-encompassing definition of guidance documents. This Recommendation is addressed, at a minimum, to those guidance documents required by law to be published in the *Federal Register* and any other guidance document required by law to be made publicly available. *See infra* notes 4–7 and accompanying text.

² Interpretative rules and general statements of policy are “rules” under the APA. *See* 5 U.S.C. §§ 551(4), 553. Although the APA does not define these two terms, the *Attorney General’s Manual on the Administrative Procedure Act* defines “interpretative rules” 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” 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). [in](#)



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

11 under other, separate definitions adopted by government agencies.³ When managing the public
12 availability of agency information in implementing this Recommendation, agencies should be
13 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 “statements of *general* policy or interpretations of general applicability
19 formulated and adopted by the agency” in the *Federal Register*.⁵ FOIA also requires that
20 agencies “make available for public inspection in an electronic format . . . [specific] statements
21 of policy and interpretations which have been adopted by the agency and are not published in the
22 *Federal Register*,” as well as “administrative staff manuals and instructions to staff that affect a
23 member of the public.”⁶ Finally, Congress has occasionally enacted agency-specific
24 requirements for posting guidance documents online. For example, the Food and Drug
25 Administration is required to “maintain electronically and update and publish periodically in the

Commented [CMA2]: Proposed Amendment by Government Member Connor N. Raso #2. Proposed amendment italicizes the word “general” in the first sentence, adds the word “specific” in the second sentence, and adds text to footnote 5.

Commented [CMA3]: Proposed Amendment by Government Member Connor N. Raso #3. Proposed amendment adds language to footnote 6.

accordance with standard parlance, this Recommendation uses the term “interpretive” in place of the APA’s word “interpretative.”

³ See Cary Coglianese, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/consultant-report-public-availability-agency-guidance-documents>.

⁴ 44 U.S.C. § 3102.

⁵ 5 U.S.C. § 552(a)(1)(D) (**emphasis added**). To the extent that the documents an agency considers guidance would fall within any of the nine FOIA exceptions, such as “records or information compiled for law enforcement purposes,” 5 U.S.C. § 552(b)(7), agencies would not be required to disclose them.

⁶ 5 U.S.C. § 552(a)(2). “Agencies often accomplish this electronic availability requirement by posting records on their FOIA websites in a designated area known as a ‘FOIA Library.’” U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, *GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 6 (2019 ed.)*, available at https://www.justice.gov/oip/foia-guide/proactive_disclosures/download; see also E-Government Act, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915 (Dec. 17, 2002) (codified at 44 U.S.C. 3501 note) (requiring agencies, to the extent practicable, to publish online documents that FOIA requires be published in the *Federal Register*); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note) (requiring agencies to 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”).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

26 *Federal Register* a list of guidance documents,” and to ensure that “[a]ll such documents [are]
27 made available to the public.”⁷

28 The Administrative Conference has recommended that various types of guidance
29 documents be made available online. Recommendation 2017-5, *Agency Guidance Through*
30 *Policy Statements*, provided that “[a]ll written policy statements affecting the interests of
31 regulated parties, regulatory beneficiaries, or other interested parties should be promptly made
32 available electronically and indexed, in a manner in which they may readily be found.”⁸
33 Recommendation 2019-__ includes identical language directing agencies to do the same for
34 interpretive rules.⁹ Similarly, Recommendation 2018-5, *Public Availability of Adjudication*
35 *Rules*, urged agencies to “provide updated access on their websites to all sources of procedural
36 rules and related guidance documents and explanatory materials that apply to agency
37 adjudications.”¹⁰

38 While many agencies do post guidance documents online, in recent years, concerns have
39 emerged about how well organized, up to date, and easily accessible these documents are to the
40 public. At various times, the Office of Management and Budget (OMB) has instructed agencies
41 on their management of guidance documents.¹¹ The United States Government Accountability
42 Office has conducted an audit that highlights the management challenges associated with agency

⁷ 21 U.S.C. § 371(h)(3).

⁸ Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 12, 82 Fed. Reg. 61,728, 61,737 (Dec. 29, 2017).

⁹ Admin. Conf. of the U.S., Proposed Recommendation, *Agency Guidance Through Interpretive Rules* (Apr. 30, 2019).

¹⁰ Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019).

¹¹ For example, OMB Bulletin 07-02 directs Executive Branch departments and agencies to provide a current list of significant guidance documents in effect on their websites. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007); Office of Mgmt. & Budget, Memorandum No. M-07-07, *Issuance of OMB’s “Final Bulletin for Agency Good Guidance Practices”* (Jan. 18, 2007), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-07.pdf>; see also Office of Mgmt. & Budget, Memorandum No. M-19-14, *Guidance on Compliance with the Congressional Review Act* (Apr. 11, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf> (calling upon both executive and independent regulatory agencies to send certain pre-publication guidance materials to the Office of Information and Regulatory Affairs).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

43 dissemination of guidance documents online.¹² Several legislative proposals have been
44 introduced (but not enacted) to create standards for public disclosure of guidance documents.¹³

45 Agencies should be cognizant that the primary goal of online publication is to facilitate
46 access to guidance documents 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
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 website users), and (d) comprehensibility (whether website
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 documents. Each agency
56 must decide which guidance documents to post online and how to present them in a manner that
57 will ensure their availability and usefulness for regulated parties and the public. The
58 Recommendation provides best practices to guide agencies to make their guidance documents
59 more publicly available. These best practices are intended to be adaptable to fit agency-specific
60 circumstances.¹⁴ The Administrative Conference notes that each agency is different, and the
61 practices outlined in this Recommendation may be employed with flexibility as necessary
62 (perhaps based on factors such as an agency's internal structures, available resources, types and

¹² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (2015).

¹³ The most notable of the pending legislation would require agencies to publish guidance documents on their websites and a centralized website selected by OMB. *See* Guidance Out of Darkness Act, S. 380, 116th Cong. (2019); S. REP. NO. 116-12 (2019); Guidance Out of Darkness Act, H.R. 4809, 115th Cong. (2018); H.R. REP. NO. 115-972 (2018); *see also* H.R. 2142, 116th Cong. (2019) (requiring the creation of a centralized website for small business compliance guides). For other legislation, see Coglianese, *supra* note 3, at 6–7.

¹⁴ For example, even the term “agency” as used in the Recommendation can be construed to address either agencies or sub-agencies within larger departments. JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 11 (2d ed. 2018), *available at* <https://www.acus.gov/publication/sourcebook-united-states-executive-agencies-second-edition>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

63 volume of documents, the parties it regulates, and its end users) so that guidance documents are
64 made available to the public in a logical and suitably comprehensive manner.

Commented [CMA4]: Proposed Amendment from Public Member Sidney A. Shapiro

RECOMMENDATION

Procedures for Managing Guidance Documents

- 65 1. Agencies should develop written procedures pertaining to their internal management of
66 guidance documents generated by agency leadership, including relevant bureaus, in the
67 expectation of shaping staff behaviors and/or public expectations.
- 68 a. The procedures should include:
- 69 i. a description of relevant categories or types of guidance documents
70 subject to the procedures; and
- 71 ii. examples of specific materials not subject to the procedures, as
72 appropriate.
- 73 b. The procedures should address steps-measures to be taken for the:
- 74 i. development of guidance documents, including any opportunity for public
75 comment;
- 76 ii. publication and dissemination of draft or final guidance documents; and
77 iii. periodic review of existing guidance documents.
- 78 c. Agency procedures should indicate the extent to which any of the steps-measures
79 created or identified in response to Paragraph 1(b) should vary depending on the
80 type of guidance document or its category, as defined by any provisions in agency
81 procedures responsive to Paragraph 1(a).
- 82 2. All relevant agency staff should receive training in agencies' guidance document
83 management procedures.
- 84 3. Agencies should develop and apply appropriate internal controls to ensure adherence to
85 guidance document management procedures.
- 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

Commented [CMA5]: Proposed Amendment from Senior Fellow Peter L. Strauss



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 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 website, in public
92 announcements, or in the *Federal Register* or the *Code of Federal Regulations*.
- 93 5. Using appropriate metrics, agencies should periodically review their guidance document
94 management procedures and their implementation in order to assess their performance in
95 making guidance documents available as well as to identify opportunities for
96 improvement.
- 97 6. Agencies should provide opportunities for public feedback on their efforts to promote the
98 public availability of their guidance documents.

Guidance on Agency Websites

- 99 7. Agencies should maintain a page on their websites dedicated to informing the public
100 about the availability of guidance documents and facilitating access to those documents.
101 Such guidance document webpages should include:
- 102 a. Agencies' written guidance document management procedures pursuant to
103 Paragraph 1, if developed;
- 104 b. Plain language explanations (sometimes known as "explainers") that define
105 guidance documents, explain their legal effects, or give examples of different
106 types of guidance documents;
- 107 c. A method for users to find relevant guidance documents, which might include:
108 i. Comprehensively listing agency guidance documents;
109 ii. Displaying links to pages where guidance documents are located, which
110 could be organized by topic, type of guidance document, agency sub-
111 division, or some other rubric; or
112 iii. A search engine; and
- 113 d. Contact information or a comment form to facilitate public feedback related to
114 potentially broken links, missing documents, or other errors or issues related to

Commented [CMA6]: Comment by Senior Fellow Judge Stephen F. Williams: "It seemed to me that the suggestions in 7.c. could bear expansion. It seems amazing that a website used for access to guidance would not always and automatically have a search engine, so for that to be just one possible avenue for users seems inadequate. (Maybe I've got the technology wrong.) Nor does 7.c. include the possibility of a detailed index."



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 115 the agency's procedures for the development, publication, or disclosure of its
116 guidance documents.
- 117 8. Agencies should provide the public with access to a comprehensive set of its guidance
118 documents—either on the dedicated guidance document webpage or other webpages—in
119 accordance with its written procedures.
- 120 a. Agency websites should include, at minimum, (1) all guidance documents
121 required by law to be published in the *Federal Register* and (2) all other guidance
122 documents required by law to otherwise be made publicly available.
- 123 b. Guidance documents should generally be made available in downloadable form.
- 124 c. Links to downloadable copies of agencies' Small Entity Compliance Guides—
125 issued in accordance with the Small Business Regulatory Enforcement Fairness
126 Act¹⁵—should be provided.
- 127 d. Agency websites should include relevant information for each guidance
128 document, such as its title, any corresponding regulatory or statutory provision
129 that the guidance relates to or interprets (if applicable), the date of issuance, and
130 any assigned identifying number.
- 131 e. Agencies should keep guidance documents on their websites current. To the
132 extent a website contains obsolete or modified guidance, it should include
133 notations indicating that such guidance documents have been revised or
134 withdrawn. To the extent feasible, each guidance document should be clearly
135 marked within the document to show whether it is current and identify its
136 effective date, and, if appropriate, its rescission date. If a guidance document has
137 been rescinded, agencies should provide a link to any successor guidance.
- 138 9. Although not every agency website will have the same population of users, agency
139 websites should be designed to ensure that they are as helpful to the end user as possible.
140 In particular, agencies should ensure:

¹⁵ Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 141 a. Simple words, such as “guidance,” are used in describing webpages that discuss
142 or list guidance documents;
- 143 b. Agency guidance document webpages are easy to find from their website’s home
144 page, through such techniques as a linked tab or entry in a pull-down menu;
- 145 c. The search engine on agency websites works effectively for finding relevant
146 guidance information;
- 147 d. Guidance documents, when listed on webpages, are displayed in a manner that
148 helps the public find a particular document, by using such techniques as indexing,
149 tagging, or sortable tables; and
- 150 e. Websites displaying guidance documents are kept up to date, with any broken
151 links fixed and any amended or withdrawn documents clearly labeled as such.
- 152 10. To make guidance documents accessible to users who are searching for information
153 elsewhere on agency websites, agencies should strive to ensure that clearly labeled links
154 to all guidance documents related to specific rules, issues, or programs are easily found in
155 the corresponding section of the website where users are likely to find that information
156 especially helpful.

Public Notice of Guidance Documents

- 157 11. Agencies should undertake affirmative **steps-measures** to alert interested members of the
158 public to new and revised guidance documents. Such **steps-measures** could include,
159 among other things, establishing public email distribution lists to disseminate alerts about
160 new or revised guidance; using social media to disseminate guidance documents and
161 related information; having agency staff speak about guidance documents at relevant
162 conferences or meetings; or preparing printed pamphlets or other hard-copy documents.
163 Even when not required to do so by law, agencies should consider publishing information
164 about new or revised guidance documents in the *Federal Register*.
- 165 12. Agencies should consider providing descriptive references (such as links, if possible) to
166 relevant guidance documents in appropriate sections of the *Code of Federal Regulations*,
167 stating where the public can access the documents.