Public Availability of Inoperative Agency Guidance Documents

Committee on Regulation

Proposed Recommendation for Committee | October 20, 2021

Preamble to include the following subjects:

- Explanation of the term “inoperative guidance document.”
- Description of statutory and regulatory requirements, as well as general guidance from the Office of Management and Budget, that govern the posting, organizing, and labeling of inoperative guidance documents.
- Description of Recommendation 2019-3 and other Administrative Conference recommendations that speak to public availability of agency materials.
- Description of current agency practices regarding posting, organizing, and labeling inoperative guidance documents on agency websites.
- Description of means agencies use outside of their websites to alert the public to the availability and fact of rescission inoperative guidance documents.

RECOMMENDATION

Deciding Which Types of Inoperative Guidance Documents to Make Publicly Available on Agencies’ Websites

1. Agencies should determine which types of guidance documents that have been rescinded, superseded, or have fallen into disuse (collectively “inoperative guidance documents”) should be made publicly available on their websites.

2. In determining which types of inoperative guidance documents to make publicly available on their websites, agencies should consider, among others, the following factors:

Commented [TR1]: Preamble to be circulated to Committee before the November 3 meeting.

Commented [TR2]: For Committee discussion: should agencies apply the below recommendations solely on a prospective basis: that is, to guidance documents that become inoperative in the future? Or should agencies also apply them retrospectively: that is, to guidance documents that are already inoperative?

Commented [TR3]: For Committee discussion: if an agency did not post an operative guidance document, might there be any circumstances under which the agency should post the inoperative version of that guidance document? How, if at all, should the Recommendation address this question?
a. Whether the inoperative guidance documents appear to be of interest to the public, as indicated by many unique page views or downloads of the documents (either while the documents were operative or while they were inoperative but already made available) or by many unique inquiries about the documents;
b. Whether the inoperative guidance documents, while operative, generated reliance interests, as indicated by frequent citations of the operative versions of the documents in regulations, briefs, or news sources, or substantial public feedback; or
c. Whether the inoperative guidance documents, while operative, dealt with issues of widespread significance or controversial matters, as indicated by submission to the Office of Information and Regulatory Affairs of the operative versions of the guidance documents or publication in the agencies’ Unified Agenda of the same.

Establishing Written Procedures for Inoperative Guidance Documents

3. Agencies should develop and publish on their websites written procedures governing the storage and display of those inoperative guidance documents the agencies have determined should be made publicly available on their websites. These procedures should either be part of their general procedures governing storage and display of their guidance documents or can be stand-alone procedures. At a minimum, these procedures should:
   a. Provide for how inoperative guidance documents are to be compiled and organized on agencies’ websites to make it easy for the public to find the inoperative guidance documents in which they are interested; and
   b. Specify the labels and explanations agencies will use to ensure the public can readily understand the significance and effect of inoperative guidance documents.

Organizing and Labeling Inoperative Guidance Documents on Agencies’ Websites

4. Agencies should organize inoperative guidance documents on their websites to make it easy for the public to find the inoperative guidance documents in which they are
interested. Among the options agencies should consider, alone or in tandem with one another, are:

a. Creating a table that is indexed, tagged, or sortable, and is dedicated exclusively to housing inoperative guidance documents, with links to such documents;
b. Providing a search function that uncovers inoperative guidance documents; and
c. Using a method, such as a pull-down menu, that allows the public to view inoperative guidance documents at different points in time, with an indication on all inoperative versions of the documents that they are inoperative.

5. Agencies should label inoperative guidance documents on their websites to ensure that the public can readily understand the significance and effect of those guidance documents. Among the labeling methods agencies should consider, alone or in tandem with one another, are:

a. Including a watermark that reads “rescinded,” or uses similar terminology, across each page of inoperative guidance documents;
b. Including prominent stamps at the top of inoperative guidance documents noting that the documents are rescinded and indicating the dates of rescission;
c. Publishing notices of rescission on agencies’ websites and providing links to the notices in inoperative guidance documents; and
d. Including the word “rescinded,” or similar terminology, within a table in which links to inoperative guidance documents appear.

Using Means Other Than Agencies’ Websites to Notify the Public of the Rescission and Posting of Inoperative Guidance Documents

6. Agencies should consider using the following methods, alone or in conjunction with one another, to notify the public when they have rescinded guidance documents and to notify the public that inoperative guidance documents are available on their websites:

a. Publishing such notifications in the Federal Register, even when not required to do so by law;
b. Sending such notifications over listservs that consist of interested members of the public;

c. Conveying such notifications during virtual meetings, in-person meetings, or webinars;

d. Conveying such notifications through press releases; and

e. Using or developing subscription services to allow the public to subscribe to such notifications.