Public Availability of Inoperative Agency Guidance Documents

Committee on Regulation

Proposed Recommendation for Committee | October 20 | November 3, 2021

Agencies issue guidance documents to help explain their programs and policies, announce their interpretation of laws, and communicate other important information to regulated entities, regulatory beneficiaries, and the broader public. The Administrative Conference has issued several recent recommendations regarding guidance documents. Among them was Recommendation 2019-3, Public Availability of Agency Guidance Documents, which encourages agencies to facilitate public access to guidance documents on their websites.

Over time, a given guidance document may no longer reflect an agency’s position. An agency may rescind the document in whole or in part by announcing that it no longer reflects the agency’s position. Even without being rescinded in whole or in part, a guidance document can be superseded in whole or in part by later statutory, regulatory, or judicial developments, or it can fall into disuse in whole or in part. The present Recommendation terms these documents “inoperative guidance documents.”

Some inoperative guidance documents will be of interest to the public because they disclose how an agency’s legal interpretations have changed or how policies or programs have changed.

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changed over time. But if these documents are not posted on an agency’s website, they will be either inaccessible (except through a Freedom of Information Act (FOIA) request), in the case of documents not published in the Federal Register, or not as accessible as they should be, in the case of documents that appeared in the Federal Register.

Three statutes require agencies to make some inoperative guidance documents publicly available. The Federal Records Act requires agencies to post on their websites materials that are of “general interest or use to the public.” FOIA requires agencies to publish notices in the Federal Register when they have rescinded or partially rescinded guidance documents that are addressed to the public generally rather than to specific individuals or organizations. The E-Government Act requires agencies to publish these rescission and partial rescission notices on their websites. Many agencies have also issued regulations pertaining to the public availability of their inoperative guidance documents.

The Office of Management and Budget’s 2007 Final Bulletin for Agency Good Guidance Practices imposes additional requirements on agencies relating to inoperative guidance documents. It directs all agencies other than independent regulatory agencies to post notices on their websites whenever they have rescinded or partially rescinded significant guidance documents and to keep those notices in place for a year. It also states that such agencies should stamp or otherwise prominently identify as “superseded” those significant guidance documents that have become inoperative but which remain available for historical purposes.

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Recommendation 2019-3, though concerned primarily with operative guidance documents, makes several recommendations relating to the posting of inoperative guidance documents. In summary, it recommends that agencies (1) mark posted guidance documents to indicate whether they are current or were withdrawn or rescinded and (2) in the case of rescinded or withdrawn documents, note their rescission or withdrawal date and provide links to any successor document.

Recommendation 2019-3 reserved the question, however, of which inoperative guidance documents agencies should publish online. This Recommendation takes up that issue, building on the principles Recommendation 2019-3 set forth for operative documents by extending them, as appropriate, to inoperative guidance documents. Specifically, it advises agencies to develop written procedures for publishing inoperative guidance documents, devise effective strategies for labeling and organizing such documents on their websites, and deploy other means of disseminating information about such documents.\(^\text{10}\)

This Recommendation, like Recommendation 2019-3, accounts for differences across agencies in terms of the number of guidance documents they issue, how they use guidance documents, and their resources and capacities for managing online access to these documents. Accordingly, this Recommendation does not advise agencies to post all of their inoperative guidance documents online.

This Recommendation is limited to guidance documents that become inoperative in the future. Agencies may, of course, choose to apply it retrospectively to existing inoperative guidance documents.

\(^{10}\) Several paragraphs of this Recommendation directly or indirectly apply the paragraphs of Recommendation 2019-3, supra note 1, to inoperative guidance documents. Compare Paragraph 1 of this Recommendation with Recommendation 2019-3, ¶ 1; Paragraph 3 with Recommendation 2019-3, ¶¶ 4, 7, and 9; Paragraph 4 with Recommendation 2019-3, ¶ 8; and Paragraph 6 with Recommendation 2019-3, ¶ 11.
RECOMMENDATION

Deciding Which Types of Written Procedures Governing the Public Availability of Inoperative Guidance Documents to Make Publicly Available on Agencies’ Websites

1. Agencies

Each agency should determine which types of written procedures governing the public availability of inoperative guidance documents and should consider doing the following in its procedures:

a. Defining what it considers to be an “inoperative guidance document,” with consideration of categories such as rescinded guidance documents, partially rescinded guidance documents, superseded guidance documents, partially superseded guidance documents, and guidance documents that have been rescinded, superseded, or have fallen into disuse (collectively “in whole or in part”);

b.Specifying how it will notify the public when a guidance document has been rescinded, partially rescinded, superseded, partially superseded, or has fallen into disuse in whole or in part;

c. Identifying, as elaborated in Paragraph 2 below, which kinds of inoperative guidance documents should be made publicly available on its website;

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

e. Whether the some types of previously unpublished operative documents are to be posted on its website when they become inoperative and, if so, under what circumstances;

f. Providing for how inoperative guidance documents appear to be of interest are to be organized on its website to facilitate searching and public access;

g. Identifying, 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;
g. Whether elaborated in Paragraph 3 below, what labels and explanations it will use
to communicate clearly the inoperative status of guidance documents; and
h. Indicating whether any or all of the procedures should be applied retroactively.

**Determining Which Kinds of Inoperative Guidance Documents to Publish Online**

2. In deciding which kinds of inoperative guidance documents to post on its website, an
agency should at least consider the following factors:

a. Whether it previously posted the operative version of the inoperative guidance
document on its website;
b. Whether its current policy for posting operative guidance documents, while would
call for posting such an inoperative guidance document if it were operative;
c. Whether the inoperative guidance document generates—or, when it was
operative, generated—numerous unique inquiries from the public;
d. Whether the inoperative guidance document generated reliance interests, as
indicated by frequent citations of the, when it was operative versions of;
e. Whether the inoperative guidance document is—or, when operative, was—the
subject of attention in the general media or specialized publications relevant to the
agency, or has been cited frequently in other agency documents in regulations,
such as permits, licenses, grants, loans, contracts, or briefs, or news sources, or
substantial public feedback; or:
f. Whether the operative version of an inoperative guidance
document generated a high level of public participation when it was
originally being formulated; and
g. Whether the inoperative guidance document, when it was operative, dealt with
issues of widespread significance or controversial matters, as indicated by
submission, originally being formulated, had been submitted to the Office of

**Commented [TR1]:** Note for Committee: The intention here is not to suggest that an agency consider each of its
inoperative guidance documents against these factors. Rather, the intention is to suggest that an agency consider
these factors in deciding on the categories of inoperative guidance documents to publish online. We welcome the
committee’s input on whether the current wording reflects that intent.
Establishing Written Procedures for Inoperative Guidance Documents

2. 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 Available Online

3. Agencies should organize its inoperative guidance documents on their websites to make it easy for members of the public to find them. The agency should consider one or more of the following approaches:

   a. Assigning a unique guidance identification number to each inoperative guidance document in which they are interested. Among document, if such a number had not already been assigned when the options agencies should consider, alone or in tandem with one another, are document was operative;

   b. Creating a table that is indexed, tagged, or sortable, and is dedicated exclusively to housing displaying entries for inoperative guidance documents, with links to such documents;
c. Providing a search function that uncovers retrieval of inoperative guidance documents; and

d. 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 and see that they are inoperative.

3.4 Agencies. Each agency should label inoperative guidance documents on its website to ensure that the public can readily understand the significance and effect of inoperative status of those guidance documents. Among the following labeling methods agencies should consider adopting one or more of the following labeling methods:

a. Including a watermark that reads "rescinded," "partially rescinded," "superseded," "partially superseded," "not in use," or similar terminology, as appropriate across each page of an inoperative guidance document;

b. Including words such as "rescinded," "partially rescinded," "superseded," "partially superseded," "not in use," or similar terminology as appropriate within a table in which links to inoperative guidance documents appear;

c. Posting a redline version of a guidance document that has been partially rescinded, showing the exact revisions;

d. Including a prominent stamp at the top of an inoperative guidance document noting that the documents are rescinded and indicating the date it became inoperative;

e. Providing cross references, with links, from an inoperative guidance document to any successor versions of the guidance document, and vice versa; and

b. Publishing a notice of rescission;

e. Publishing notices of or partial rescission of a guidance document on agencies' websites and providing links to such notice in 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 Means to Notify the Public of the Rescission and Posting of Inoperative Guidance Documents

5. Agencies At a minimum, an agency should notify the public that a guidance document has become inoperative in the same way that it notified the public that the operative version of the guidance document was issued, or in the same way it would notify the public that an operative version of the guidance document has been issued under the agency’s current policies.

4.6 An agency should consider using the following methods, alone or in conjunction with one another or more of the following methods, to notify the public when they have rescinded guidance documents and document has become inoperative or to notify the public that the inoperative guidance documents are document is available on their website:

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, an agency listserv or to a similar mailing list to which the public can subscribe;

c. Conveying such notifications during virtual meetings, in-person meetings, or webinars involving the public; and
d. Conveying such notifications through a press release; and

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