Public Availability of Inoperative Agency Guidance Documents

Committee on Regulation

Proposed Recommendation for Committee | November 39, 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 Even without being rescinded in whole or in part, a guidance document can be superseded in whole or in part by later statutory, regulatory, or judicial developments, or it can fall into disuse in whole or in part.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

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changed over time.\textsuperscript{4} 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 \textit{Federal Register}, or not as accessible as they should be, in the case of documents that appeared in the \textit{Federal Register}.\textsuperscript{5}

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public.”\textsuperscript{6} FOIA requires agencies to publish notices in the \textit{Federal Register} when they have rescinded or partially rescinded guidance documents that are addressed to the public generally rather than to specific individuals or organizations.\textsuperscript{7} The E-Government Act requires agencies to publish these rescission and partial rescission notices on their websites.\textsuperscript{8} Many agencies have also issued regulations pertaining to the public availability of their inoperative guidance documents.

The Office of Management and Budget’s 2007 \textit{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.\textsuperscript{9} 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.


\footnote{5 See Recommendation 2019-3, supra note 1.}

\footnote{6 See 44 U.S.C. § 3102 (2).}

\footnote{7 See 5 U.S.C. § 552 (a)(1); Nat’l Org. of Veterans’ Advocs., Inc. v. Sec’y of Veterans Affairs, 981 F.3d 1360, 1375 (Fed. Cir. 2020).}


\footnote{9 See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007).}
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. The Recommendation also encourages
agencies to provide clear cross-references or links between inoperative guidance documents and
any operative guidance documents replacing or modifying them.

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.

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

11 See Todd Rubin, Public Availability of Inoperative Agency Guidance Documents (Oct. 15, 2021) (draft report to the
Admin. Conf. of the U.S.); Cary Coglianese, Public Availability of Agency Guidance Documents (May 25, 2019)
(report to the Admin. Conf. of the U.S.).
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.

RECOMMENDATION

Establishing Written Procedures Governing the Public Availability of Inoperative Guidance Documents

1. Each agency should develop and publish on its website written procedures governing the public availability of inoperative guidance documents and should consider doing the following in its procedures:
   a. **Defining** explaining what it considers to be an **term** “inoperative guidance document,” with consideration to mean:
      a-b. **Identifying which one or more** of categories such as the following kinds of inoperative guidance documents are covered by its procedures: rescinded guidance documents, partially rescinded guidance documents, superseded guidance documents, partially superseded guidance documents, and/or guidance documents that have fallen into disuse 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 **within the kinds of inoperative guidance documents covered by its procedures, which categories of inoperative guidance documents are to be published on its website and otherwise made publicly available on its website, taking into consideration the categories articulated in Paragraph 2 below**;
   d. **Explaining how it will include links or cross-references between any related inoperative and operative guidance documents**;

d-e. Specifying how long inoperative guidance documents are to be retained on its website;

e-f. Specifying whether some types of previously unpublished operative guidance documents are to be posted on its website and otherwise made publicly available when they become inoperative and, if so, under what circumstances;

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

g-h. Identifying, as elaborated provided in Paragraph 3 below, what labels and explanations it will use to communicate clearly the inoperative status of guidance documents; and

h-i. Indicating whether any or all of the procedures should be applied retroactively.

Determining Which Kinds of Inoperative Guidance Documents to Publish Online and Otherwise Make Publicly Available

2. In deciding which kinds of inoperative guidance documents to post on its website, each agency should at least consider publishing on its website and otherwise making publicly available one or more of the following factors: categories of inoperative guidance documents:

a. Whether it previously posted the operative version of the inoperative guidance document on its website;

b. Inoperative guidance documents would call for posting such an inoperative guidance document that, if they were operative, would be made publicly available under its current policies;

c. Whether the inoperative guidance documents that have been replaced or amended by currently operative guidance document generates— or, when it was—documents;
d. Inoperative guidance documents that expressed policies or legal interpretations that remain relevant to understanding current law or policy;
e. Inoperative guidance documents that generated reliance interests when they were operative;
e-f. Inoperative guidance documents that generate—or, when they were operative, generated—numerous unique inquiries from the public;
d—Whether the inoperative guidance document generated reliance interests when it was operative;
e-g. Whether the inoperative guidance document is Inoperative guidance documents that are—or, when operative, was were—the subject of attention in the general media or specialized publications relevant to the agency, or have been cited frequently in other agency documents, such as permits, licenses, grants, loans, contracts, or briefs;
f-h. Whether the Inoperative guidance documents whose operative version of an inoperative guidance document generated a high level of public participation when it was originally being formulated; and
g-i. Whether the Inoperative guidance documents that, when it was operative or originally being formulated, had been submitted to the Office of Information and Regulatory Affairs or published in the agency’s Unified Agenda, semiannual agenda of federal regulatory and deregulatory actions.

Organizing and Labeling Inoperative Guidance Documents Available Online

3. Each agency should organize its inoperative guidance documents on its website to make it easy for members of the public to find them, and relate them to any successor guidance documents. The agency should consider one or more of the following approaches:
   a. Assigning a unique guidance identification number to each inoperative guidance document, if such a number had not already been assigned when the document was operative;
b. Creating a table that is indexed, tagged, or sortable and is dedicated exclusively to displaying entries for inoperative guidance documents, with links to such documents; and
c. Providing a search function that enables 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 and see that they are inoperative; and
e. Including links or notations within inoperative guidance documents, pointing to any successor operative guidance documents.

4. Each agency should label inoperative guidance documents on its website to ensure that the public can readily understand the inoperative status of those guidance documents. The agency should consider adopting one or more of the following methods for publicly labeling methods and its guidance documents as inoperative and then using the selected method or methods consistently for all inoperative guidance documents:

a. Including a watermark that displays “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 or lists of changes, to communicate changes made to a guidance document that has been partially rescinded, showing the exact revisions or superseded;
d. Including a prominent stamp at the top of an inoperative guidance document noting that the document is inoperative and indicating the date it became inoperative;
e. Providing cross-references, using links or notations, from an inoperative guidance document to any successor versions of the guidance document, and vice versa; and
f. Publishing a notice of rescission or partial rescission of a guidance document on the agency’s website and providing links to such notice in the inoperative guidance document.

Using Other Means in Addition to Agency Websites to Notify the Public of When a Guidance Document Has Become Inoperative Guidance Documents

5. 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.

6. An agency should consider using one or more of the following methods to notify the public when a guidance document has become inoperative or to notify the public that the inoperative guidance document is available on its website:

   a. Publishing such notification in the Federal Register even when not required to do so by law;
   b. Sending such notification over an agency listserv or to a similar mailing list to which the public can subscribe;
   c. Conveying such notification during virtual meetings, in-person meetings, or webinars involving the public; and
   d. Conveying such notification through a press release.

7. In disseminating notifications as indicated in Paragraph 6, agencies should consider including cross-references to any successor guidance documents.