



Public Availability of Inoperative Agency Guidance Documents

Committee on Regulation

Proposed Recommendation for Committee | November 39, 2021

1 Agencies issue guidance documents to help explain their programs and policies,
2 announce their interpretation of laws, and communicate other important information to regulated
3 entities, regulatory beneficiaries, and the broader public.¹ The Administrative Conference has
4 issued several recent recommendations regarding guidance documents.² Among them was
5 Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, which encourages
6 agencies to facilitate public access to guidance documents on their websites.

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 Even without being rescinded in whole or in part, a guidance document can be
10 superseded in whole or in part by later statutory, regulatory, or judicial developments, or it can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

13 Some inoperative guidance documents will be of interest to the public because they
14 disclose how an agency's legal interpretations have changed³ or how policies or programs have

¹ This Recommendation defines "guidance document" as does Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, to mean "interpretive rules," "general statements of policy," see 5 U.S.C. § 553 (d), -and "other materials considered to be guidance documents under other, separate definitions adopted by government agencies." See Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931, 38931 (Aug. 8, 2019).

² See, e.g., Recommendation 2019-3, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35992 (June 25, 2014).

³ See Blake Emerson & Ronald Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis* (May 28, 2019) (report to the Admin. Conf. of the U.S.).



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15 changed over time.⁴ But if these documents are not posted on an agency’s website, they will be
16 either inaccessible (except through a Freedom of Information Act (FOIA) request), in the case of
17 documents not published in the *Federal Register*, or not as accessible as they should be, in the
18 case of documents that appeared in the *Federal Register*.⁵

19 Three statutes require agencies to make some inoperative guidance documents publicly
20 available. The Federal Records Act requires agencies to post on their websites materials that are
21 of “general interest or use to the public.”⁶ FOIA requires agencies to publish notices in the
22 *Federal Register* when they have rescinded or partially rescinded guidance documents that are
23 addressed to the public generally rather than to specific individuals or organizations.⁷ The E-
24 Government Act requires agencies to publish these rescission and partial rescission notices on
25 their websites.⁸ Many agencies have also issued regulations pertaining to the public availability
26 of their inoperative guidance documents.

27 The Office of Management and Budget’s 2007 *Final Bulletin for Agency Good Guidance*
28 *Practices* imposes additional requirements on agencies relating to inoperative guidance
29 documents. It directs all agencies other than independent regulatory agencies to post notices on
30 their websites whenever they have rescinded or partially rescinded significant guidance
31 documents and to keep those notices in place for a year.⁹ It also states that such agencies should
32 stamp or otherwise prominently identify as “superseded” those significant guidance documents
33 that have become inoperative but which remain available for historical purposes.

⁴ See Nicholas R. Parrillo, Agency Guidance Through Policy Statements: An Institutional Perspective (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.).

⁵ See Recommendation 2019-3, *supra* note 1.

⁶ See 44 U.S.C. § 3102 (2).

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).

⁸ See E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (codified at 44 U.S.C. § 3501 note).

⁹ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007).



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

40 Recommendation 2019-3 reserved the question, however, of which inoperative guidance
41 documents agencies should publish online. This Recommendation takes up that issue, building
42 on the principles Recommendation 2019-3 set forth for operative documents by extending them,
43 as appropriate, to inoperative guidance documents. Specifically, it advises agencies to develop
44 written procedures for publishing inoperative guidance documents, devise effective strategies for
45 labeling and organizing such documents on their websites, and deploy other means of
46 disseminating information about such documents.¹⁰ The Recommendation also encourages
47 agencies to provide clear cross-references or links between inoperative guidance documents and
48 any operative guidance documents replacing or modifying them.

49 This Recommendation, like Recommendation 2019-3, accounts for differences across
50 agencies in terms of the number of guidance documents they issue, how they use guidance
51 documents, and their resources and capacities for managing online access to these documents.¹¹
52 Accordingly, this Recommendation ~~does~~should not ~~advise~~be understood as necessarily advising
53 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 Recommendation 2019-3, ¶ 8; and Paragraph 6 with Recommendation 2019-3, ¶ 11.

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.).



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

RECOMMENDATION

Establishing Written Procedures Governing the Public Availability of Inoperative Guidance Documents

57 1. Each agency should develop and publish on its website written procedures governing the
58 public availability of inoperative guidance documents and should consider doing the
59 following in its procedures:

60 ~~a. Defining~~Explaining what it considers ~~to be an the term~~ “inoperative guidance
61 document,” ~~with consideration~~ to mean;

62 ~~a.b. Identifying which one or more of categories such as the following kinds of~~
63 inoperative guidance documents are covered by its procedures: rescinded
64 guidance documents, partially rescinded guidance documents, superseded
65 guidance documents, partially superseded guidance documents, ~~and/or~~ guidance
66 documents that have fallen into disuse in whole or in part;

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

70 ~~c. Identifying, as elaborated in Paragraph 2 below, which within the~~ kinds of
71 inoperative guidance documents covered by its procedures, which categories of
72 inoperative guidance documents are to be published on its website and otherwise
73 made publicly available ~~on its website, taking into consideration the categories~~
74 articulated in Paragraph 2 below;

75 ~~e.d. Explaining how it will include links or cross-references between any related~~
76 inoperative and operative guidance documents;



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- 77 ~~d.e.~~ Specifying how long inoperative guidance documents are to be retained on its
78 website;
- 79 ~~e.f.~~ Specifying whether some types of previously unpublished operative guidance
80 documents are to be posted on its website and otherwise made publicly available
81 when they become inoperative and, if so, under what circumstances;
- 82 ~~f.g.~~ Providing for how inoperative guidance documents are to be organized on its
83 website to facilitate searching and public access;
- 84 ~~g.h.~~ Identifying, as elaborated provided in Paragraph 3 below, what labels and
85 explanations it will use to communicate clearly the inoperative status of guidance
86 documents; and
- 87 ~~h.i.~~ Indicating whether any or all of the procedures should be applied retroactively.

88

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

- 89 2. ~~In deciding which kinds of inoperative guidance documents to post on its website,~~
90 ~~an~~Each agency should ~~at least~~ consider publishing on its website and otherwise making
91 publicly available one or more of the following ~~factors: categories of inoperative~~
92 guidance documents:
- 93 ~~a. Whether it previously posted the operative version of the inoperative guidance~~
94 ~~document on its website;~~
- 95 ~~a. Whether its current policy for posting operative~~Inoperative guidance documents
96 whose operative versions it made publicly available;
- 97 ~~b. Inoperative~~ guidance documents ~~would call for posting such an inoperative~~
98 ~~guidance document that,~~ if ~~it~~they were operative; would be made publicly
99 available under its current policies;
- 100 ~~c. Whether the inoperative~~Inoperative guidance documents that have been replaced
101 or amended by currently operative guidance ~~document generates—or, when it~~
102 wasdocuments;



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- 103 d. Inoperative guidance documents that expressed policies or legal interpretations
104 that remain relevant to understanding current law or policy;
- 105 e. Inoperative guidance documents that generated reliance interests when they were
106 operative;
- 107 e.f. Inoperative guidance documents that generate—or, when they were operative,
108 generated—numerous unique inquiries from the public;
- 109 ~~d.—Whether the inoperative guidance document generated reliance interests when it~~
110 ~~was operative;~~
- 111 e.g. Whether the inoperative guidance document is Inoperative guidance documents
112 that are—or, when operative, was/were—the subject of attention in the general
113 media or specialized publications relevant to the agency, or ~~has~~have been cited
114 frequently in other agency documents, such as permits, licenses, grants, loans,
115 contracts, or briefs;
- 116 ~~f.h. Whether the~~ Inoperative guidance documents whose operative ~~version of an~~
117 ~~inoperative guidance document~~ versions generated a high level of public
118 participation when ~~it was~~they were originally being formulated; and
- 119 ~~g.i. Whether the inoperative~~ Inoperative guidance ~~document~~ documents that, when ~~it~~
120 ~~was~~ operative or originally being formulated, had been submitted to the Office of
121 Information and Regulatory Affairs or published in the agency's *Unified*
122 *Agenda*. semiannual agenda of federal regulatory and deregulatory actions.

Organizing and Labeling Inoperative Guidance Documents Available Online

- 123 3. Each agency should organize its inoperative guidance documents on its website to make
124 it easy for members of the public to find them. and relate them to any successor guidance
125 documents. The agency should consider one or more of the following approaches:
- 126 a. Assigning a unique guidance identification number to each inoperative guidance
127 document, if such a number had not already been assigned when the document
128 was operative;



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- 129 b. Creating a table that is indexed, tagged, or sortable and is dedicated exclusively to
130 displaying entries for inoperative guidance documents, with links to such
131 documents;
- 132 c. Providing a search function that enables retrieval of inoperative guidance
133 documents; ~~and~~
- 134 d. Using a method, such as a pull-down menu, that allows the public to view
135 inoperative guidance documents and see that they are inoperative; ~~and~~
136 e. Including links or notations within inoperative guidance documents, pointing to
137 any successor operative guidance documents.
- 138 4. Each agency should label inoperative guidance documents on its website to ensure that
139 the public can readily understand the inoperative status of those guidance documents. The
140 agency should consider adopting one or more of the following methods for publicly
141 labeling ~~methods and~~ its guidance documents as inoperative and then using the selected
142 method or methods consistently for all ~~inoperativesuch~~ guidance documents:
- 143 a. Including a watermark that displays “rescinded,” “partially rescinded,”
144 “superseded,” “partially superseded,” “not in use,” or similar terminology as
145 appropriate across each page of an inoperative guidance document;
- 146 b. Including words such as “rescinded,” “partially rescinded,” “superseded,”
147 “partially superseded,” “not in use,” or similar terminology as appropriate within
148 a table in which links to inoperative guidance documents appear;
- 149 c. ~~Posting a~~ Using an appropriate method, including redline ~~version of~~ versions or
150 lists of changes, to communicate changes made to a guidance document that has
151 been partially rescinded, ~~showing the exact revisions or superseded;~~
- 152 d. Including a prominent stamp at the top of an inoperative guidance document
153 noting that the document is inoperative and indicating the date it became
154 inoperative;
- 155 e. Providing cross-~~r~~references, ~~with~~ using links or notations, from an inoperative
156 guidance document to any successor versions of the guidance document, and vice
157 versa; and



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- 158 f. Publishing a notice of rescission or partial rescission of a guidance document on
159 the agency's website and providing links to such notice in the inoperative
160 guidance document.

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

- 161 5. At a minimum, an agency should notify the public that a guidance document has become
162 inoperative in the same way that it notified the public that the operative version of the
163 guidance document was issued, or in the same way it would notify the public that an
164 operative version of the guidance document has been issued under the agency's current
165 policies.
- 166 6. An agency should consider using one or more of the following methods to notify the
167 public when a guidance document has become inoperative ~~or to notify the public that the~~
168 ~~inoperative guidance document is available on its website:~~
- 169 a. Publishing such notification in the *Federal Register* even when not required to do
170 so by law;
 - 171 b. Sending such notification over an agency listserv or to a similar mailing list to
172 which the public can subscribe;
 - 173 c. ~~Conveying~~Providing such notification during virtual meetings, in-person
174 meetings, or webinars involving the public; and
 - 175 d. Conveying~~Publishing~~ such notification ~~through~~in a press release.
- 176 7. In disseminating notifications as indicated in Paragraph 6, agencies should consider
177 including cross-references to any successor guidance documents.