



Administrative Conference Recommendation 2021-7

Public Availability of Inoperative Agency Guidance Documents

Adopted December 16, 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.¹ The Administrative Conference has issued several recent recommendations regarding guidance documents.² 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 Even without being rescinded in whole or in part, a guidance document may be superseded in whole or in part by later statutory, regulatory, or judicial developments, or it may fall into disuse in whole or in part. The present Recommendation terms these documents "inoperative guidance documents."

¹ Guidance documents include what the Administrative Procedure Act calls "interpretive rules" and "general statements of policy." 5 U.S.C. § 553(b). They may also include 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).



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Some inoperative guidance documents will be of interest to the public because they disclose how an agency's legal interpretations have changed³ or how policies or programs have changed over time.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 *Federal Register*, or not as accessible as they should be, in the case of documents that were noticed in the *Federal Register*.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."⁶ FOIA calls upon agencies to publish notices in the *Federal Register* when they have rescinded or partially rescinded certain guidance documents that are addressed to the public generally rather than to specific individuals or organizations.⁷ The E-Government Act requires agencies, in certain circumstances, to publish these rescission and partial rescission notices on their websites.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 *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 maintain a list on their websites identifying significant guidance documents that have been revised or withdrawn in the past year. It also encourages agencies to stamp or otherwise prominently identify as

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.).

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 § 206, 44 U.S.C. § 3501 note (Federal Management and Promotion of Electronic Government Services).



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“superseded” those significant guidance documents that have become inoperative but which remain available for historical purposes.⁹

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 documents.

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 these documents on their websites, and deploy other means of disseminating information about these documents.¹⁰ 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.¹¹

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

¹⁰ Several paragraphs of this Recommendation directly or indirectly apply the paragraphs of Recommendation 2019-3 to inoperative guidance documents. Compare Paragraph 1 of this Recommendation with Recommendation 2019-3, ¶ 1; Paragraph 3 with Recommendation 2019-3, ¶¶ 4, 7, 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 (Nov. 22, 2021) (report to the Admin. Conf. of the U.S.); Cary Coglianese, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.).



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Accordingly, although it is likely that agencies following this Recommendation will make some of their inoperative guidance documents more readily available to the public, this Recommendation should not be understood as necessarily advising agencies to post the full universe of their inoperative guidance documents online.

This Recommendation is limited to guidance documents that agencies determine are inoperative after the date of this Recommendation. Agencies may, of course, choose to apply it retroactively 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. Explaining what it considers to be inoperative guidance documents for purposes of its procedures instituted under this Recommendation;
 - b. Identifying which one or more of 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, or guidance documents that have fallen into disuse in whole or in part;
 - c. Identifying, within the kinds of inoperative guidance documents covered by its procedures, which categories of inoperative guidance documents will be published on its website and otherwise made publicly available, 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;



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- e. Specifying how long inoperative guidance documents will be retained on its website;
- f. Specifying whether some types of previously unpublished operative guidance documents will be posted on its website and otherwise made publicly available when they become inoperative and, if so, under what circumstances;
- g. Providing for how inoperative guidance documents will be organized on its website to facilitate searching and public access;
- h. Identifying, as provided in Paragraph 4 below, what labels and explanations it will use to communicate clearly the inoperative status of guidance documents; and
- i. Indicating whether any of the procedures should be applied retroactively.

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

2. Each agency should consider publishing on its website and otherwise making publicly available one or more of the following categories of inoperative guidance documents:
 - a. Inoperative guidance documents whose operative versions it made publicly available;
 - b. Inoperative guidance documents that, if they were operative, would be made publicly available under its current policies;
 - c. Inoperative guidance documents that have been replaced or amended by currently operative guidance 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;
 - f. Inoperative guidance documents that generate—or, when they were operative, generated—numerous unique inquiries from the public;
 - g. Inoperative guidance documents that are—or, when operative, were—the subject of attention in the general media or specialized publications relevant to the



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agency, or have been cited frequently in other agency documents, such as permits, licenses, grants, loans, contracts, or briefs;

- h. Inoperative guidance documents that, when originally being formulated, generated a high level of public participation; and
- i. Inoperative guidance documents that, when operative or originally being formulated, had been published in the *Unified Agenda of Federal Regulatory and Deregulatory Actions* or were considered “significant guidance documents” under the Office of Management and Budget’s *Final Bulletin for Agency Good Guidance Practices*.

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 this 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 these documents;
 - c. Providing a search function that enables retrieval of inoperative guidance documents;
 - 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



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labeling its guidance documents as inoperative and then using the selected method or methods consistently:

- 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. Using an appropriate method, including redline versions or lists of changes, to communicate changes made to a guidance document that has been partially rescinded 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 this notice in the inoperative guidance document.

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

5. At a minimum, each 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



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an operative version of the guidance document has been issued under the agency's current policies.

6. Each agency should consider using one or more of the following methods to notify the public when a guidance document has become inoperative:
 - a. Publishing this notification in the *Federal Register* even when not required to do so by law;
 - b. Sending this notification over an agency listserv or to a similar mailing list to which the public can subscribe;
 - c. Providing this notification during virtual meetings, in-person meetings, or webinars involving the public; and
 - d. Publishing this notification in a press release.
7. In disseminating notifications as indicated in Paragraph 6, each agency should consider including cross-references to any successor guidance documents.