



## Public Availability of Agency Guidance

### Committee on Regulation

#### Proposed Recommendation from Committee on Regulation | May 6, 2019

1           Among their many activities, government agencies issue guidance documents that help  
2 explain their programs and policies or communicate other important information to regulated  
3 entities and the public. Members of the public should have ready access to these guidance  
4 documents so that they can understand how their government works and how their government  
5 relates to them. Agencies should manage their guidance documents consistent with legal  
6 requirements and the principles of governmental transparency and accountability.

7           Guidance documents can take many forms.<sup>1</sup> They include what the Administrative  
8 Procedure Act (APA) calls “interpretative rules” and “general statements of policy,” which are  
9 two types of rules that are not required to undergo the notice-and-comment procedures  
10 applicable to legislative rules.<sup>2</sup> They may also include other materials considered to be guidance  
11 under other, separate definitions adopted by government agencies.<sup>3</sup> When managing the public

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<sup>1</sup> To allow agencies flexibility to manage their varied and unique types of guidance documents, this Recommendation does not seek to provide an all-encompassing definition of guidance documents. This Recommendation is addressed, at a minimum, to those guidance documents required by law to be published in the *Federal Register* and any other guidance document required by law to be made publicly available. *See infra* notes 4–7 and accompanying text.

<sup>2</sup> Interpretative rules and general statements of policy are “rules” under the APA. *See* 5 U.S.C. §§ 551(4), 553. Although the APA does not define these two terms, the *Attorney General’s Manual on the Administrative Procedure Act* defines “interpretative rules” as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers,” and “general statements of policy” as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

<sup>3</sup> *See* Cary Coglianese, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/consultant-report-public-availability-agency-guidance-documents>.

**Commented [TP1]:** The Committee on Regulation proposes changing the title to “Public Availability of Agency Guidance Documents”



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

12 availability of agency information in implementing this Recommendation, agencies should be  
13 clear about what constitutes guidance and what does not.

14 Several laws require agencies to make at least certain guidance documents available to  
15 the public. The Federal Records Act requires agencies to identify “records of general interest or  
16 use to the public that are appropriate for public disclosure, and . . . post[] such records in a  
17 publicly accessible electronic format.”<sup>4</sup> The Freedom of Information Act (FOIA) requires that  
18 agencies publish “statements of general policy or interpretations of general applicability  
19 formulated and adopted by the agency” in the *Federal Register*.<sup>5</sup> FOIA also requires that  
20 agencies “make available for public inspection in an electronic format . . . statements of policy  
21 and interpretations which have been adopted by the agency and are not published in the *Federal*  
22 *Register*,” as well as “administrative staff manuals and instructions to staff that affect a member  
23 of the public.”<sup>6</sup> Finally, Congress has occasionally enacted agency-specific requirements for  
24 posting guidance documents online. For example, the Food and Drug Administration is required  
25 to “maintain electronically and update and publish periodically in the *Federal Register* a list of  
26 guidance documents,” and to ensure that “[a]ll such documents [are] made available to the  
27 public.”<sup>7</sup>

28 The Administrative Conference has recommended that various types of guidance  
29 documents be made available online. Recommendation 2017-5, *Agency Guidance Through*  
30 *Policy Statements*, provided that “[a]ll written policy statements affecting the interests of  
31 regulated parties, regulatory beneficiaries, or other interested parties should be promptly made

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<sup>4</sup> 44 U.S.C. § 3102.

<sup>5</sup> 5 U.S.C. § 552(a)(1)(D). To the extent that the documents an agency considers guidance would fall within any of the nine FOIA exceptions, such as “records or information compiled for law enforcement purposes,” 5 U.S.C. § 552(b)(7), agencies would not be required to disclose them.

<sup>6</sup> 5 U.S.C. § 552(a)(2); *see also* E-Government Act, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915 (Dec. 17, 2002) (codified at 44 U.S.C. 3501 note) (requiring agencies, to the extent practicable, to publish online documents that FOIA requires be published in the *Federal Register*); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note) (requiring agencies to produce a “small entity compliance guide” for some legislative rules and post those guides “in an easily identified location on the website of the agency”).

<sup>7</sup> 21 U.S.C. § 371(h)(3).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

32 available electronically and indexed, in a manner in which they may readily be found.”<sup>8</sup>  
33 Recommendation 2019-\_\_ includes identical language directing agencies to do the same for  
34 interpretive rules.<sup>9</sup> Similarly, Recommendation 2018-5, *Public Availability of Adjudication*  
35 *Rules*, urged agencies to “provide updated access on their websites to all sources of procedural  
36 rules and related guidance documents and explanatory materials that apply to agency  
37 adjudications.”<sup>10</sup>

38 While many agencies do post guidance documents online, in recent years, concerns have  
39 emerged about how well organized, up to date, and easily accessible these documents are to the  
40 public. At various times, the Office of Management and Budget (OMB) has instructed agencies  
41 on their management of guidance documents.<sup>11</sup> The United States Government Accountability  
42 Office has conducted an audit that highlights the management challenges associated with agency  
43 dissemination of guidance documents online.<sup>12</sup> Several legislative proposals have been  
44 introduced (but not enacted) to create standards for public disclosure of guidance documents.<sup>13</sup>

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<sup>8</sup> Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 12, 82 Fed. Reg. 61,728, 61,737 (Dec. 29, 2017).

<sup>9</sup> Admin. Conf. of the U.S., Proposed Recommendation, *Agency Guidance Through Interpretive Rules* (Apr. 30, 2019).

<sup>10</sup> Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019).

<sup>11</sup> For example, OMB Bulletin 07-02 directs Executive Branch departments and agencies to provide a current list of significant guidance documents in effect on their websites. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007); Office of Mgmt. & Budget, Memorandum No. M-07-07, *Issuance of OMB’s “Final Bulletin for Agency Good Guidance Practices”* (Jan. 18, 2007), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-07.pdf>; see also Office of Mgmt. & Budget, Memorandum No. M-19-14, *Guidance on Compliance with the Congressional Review Act* (Apr. 11, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf> (calling upon both executive and independent regulatory agencies to send certain pre-publication guidance materials to the Office of Information and Regulatory Affairs).

<sup>12</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-368, *REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES* (2015).

<sup>13</sup> The most notable of the pending legislation would require agencies to publish guidance documents on their websites and a centralized website selected by OMB. See *Guidance Out of Darkness Act*, S. 380, 116th Cong. (2019); S. REP. NO. 116-12 (2019); *Guidance Out of Darkness Act*, H.R. 4809, 115th Cong. (2018); H.R. REP. NO. 115-972 (2018); see also H.R. 2142, 116th Cong. (2019) (requiring the creation of a centralized website for small business compliance guides). For other legislation, see Coglianese, *supra* note 3, at 6–7.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

45 Agencies should be cognizant that the primary goal of online publication is to facilitate  
46 access to guidance documents by regulated entities and the public. In deciding how to manage  
47 the availability of their guidance documents, agencies must be mindful of how members of the  
48 public will find the documents they need. Four principles for agencies to consider when  
49 developing and implementing plans to track and disclose their guidance documents to the public  
50 include: (a) comprehensiveness (whether all relevant guidance documents are available), (b)  
51 currency (whether guidance documents are up to date), (c) accessibility (whether guidance  
52 documents can be easily located by website users), and (d) comprehensibility (whether website  
53 users are likely to be able to understand the information they have located).

54 With these principles in mind, this Recommendation calls on agencies to consider  
55 opportunities for improving the public availability of their guidance documents. Each agency  
56 must decide which guidance documents to post online and how to present them in a manner that  
57 will ensure their availability and usefulness for regulated parties and the public. The  
58 Recommendation provides best practices to guide agencies to make their guidance documents  
59 more publicly available. These best practices are intended to be adaptable to fit agency-specific  
60 circumstances.<sup>14</sup> The Administrative Conference notes that each agency is different, and the  
61 practices outlined in this Recommendation may be employed with flexibility as necessary  
62 (perhaps based on an agency's internal structures, the parties it regulates, and its end users) so  
63 that guidance documents are made available to the public in a logical and suitably  
64 comprehensive manner.

### RECOMMENDATION

#### Procedures for Managing Guidance Documents

- 65 1. Agencies should develop written procedures pertaining to their internal management of  
66 guidance documents.

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<sup>14</sup> For example, even the term "agency" as used in the Recommendation can be construed to address either agencies or sub-agencies within larger departments. JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 11 (2d ed. 2018), *available at* <https://www.acus.gov/publication/sourcebook-united-states-executive-agencies-second-edition>.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 67 a. The procedures should include:
- 68 i. a description of relevant categories or types of guidance documents
- 69 subject to the procedures; and
- 70 ii. examples of specific materials not subject to the procedures, as
- 71 appropriate.
- 72 b. The procedures should address steps to be taken for the:
- 73 i. development of guidance documents, including any opportunity for public
- 74 comment;
- 75 ii. publication and dissemination of draft or final guidance documents; and
- 76 iii. periodic review of existing guidance documents.
- 77 c. Agency procedures should indicate the extent to which any of the steps created or
- 78 identified in response to Paragraph 1(b) should vary depending on the type of
- 79 guidance document or its category, as defined by any provisions in agency
- 80 procedures responsive to Paragraph 1(a).
- 81 2. All relevant agency staff should receive training in agencies' guidance document
- 82 management procedures.
- 83 3. Agencies should develop and apply appropriate internal controls to ensure adherence to
- 84 guidance document management procedures.
- 85 4. To facilitate internal tracking of guidance documents, as well as to help members of the
- 86 public more easily identify relevant guidance documents, agencies should consider
- 87 assigning unique identification numbers to guidance documents covered by their written
- 88 guidance procedures. Once a guidance identification number has been assigned to a
- 89 guidance document, it should appear on that document and be used to refer to the
- 90 document whenever it is listed or referenced on the agency's website, in public
- 91 announcements, or in the *Federal Register* or the *Code of Federal Regulations*.
- 92 5. Using appropriate metrics, agencies should periodically review their guidance document
- 93 management procedures and their implementation in order to assess their performance in
- 94 making guidance documents available as well as to identify opportunities for
- 95 improvement.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 96 6. Agencies should provide opportunities for public feedback on their efforts to promote the  
97 public availability of their guidance documents.

### **Guidance on Agency Websites**

- 98 7. Agencies should maintain a page on their websites dedicated to informing the public  
99 about the availability of guidance documents and facilitating access to those documents.  
100 Such guidance document webpages should include:
- 101 a. Agencies' written guidance document management procedures pursuant to  
102 Paragraph 1, if developed;
  - 103 b. Plain language explanations (sometimes known as "explainers") that define  
104 guidance documents, explain their legal effects, or give examples of different  
105 types of guidance documents;
  - 106 c. A method for users to find relevant guidance documents, which might include:
    - 107 i. Comprehensively listing agency guidance documents;
    - 108 ii. Displaying links to pages where guidance documents are located, which  
109 could be organized by topic, type of guidance document, agency sub-  
110 division, or some other rubric; or
    - 111 iii. A search engine; and
  - 112 d. Contact information or a comment form to facilitate public feedback related to  
113 potentially broken links, missing documents, or other errors or issues related to  
114 the agency's procedures for the development, publication, or disclosure of its  
115 guidance documents.
- 116 8. Agencies should provide the public with access to a comprehensive set of its guidance  
117 documents—either on the dedicated guidance document webpage or other webpages—in  
118 accordance with its written procedures.
- 119 a. Agency websites should include, at minimum, (1) all guidance documents  
120 required by law to be published in the *Federal Register* and (2) all other guidance  
121 documents required by law to otherwise be made publicly available.
  - 122 b. Guidance documents should generally be made available in downloadable form.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 123 c. Links to downloadable copies of agencies' Small Entity Compliance Guides—  
124 issued in accordance with the Small Business Regulatory Enforcement Fairness  
125 Act<sup>15</sup>—should be provided.
- 126 d. Agency websites should include relevant information for each guidance  
127 document, such as its title, any corresponding regulatory or statutory provision  
128 that the guidance relates to or interprets (if applicable), the date of issuance, and  
129 any assigned identifying number.
- 130 e. Agencies should keep guidance documents on their websites current. To the  
131 extent a website contains obsolete or modified guidance, it should include  
132 notations indicating that such guidance documents have been revised or  
133 withdrawn. To the extent feasible, each guidance document should be clearly  
134 marked within the document to show whether it is current and identify its  
135 effective date, and, if appropriate, its rescission date. If a guidance document has  
136 been rescinded, agencies should provide a link to any successor guidance.
- 137 9. Although not every agency website will have the same population of users, agency  
138 websites should be designed to ensure that they are as helpful to the end user as possible.  
139 In particular, agencies should ensure:
- 140 a. Simple words, such as “guidance,” are used in describing webpages that discuss  
141 or list guidance documents;
- 142 b. Agency guidance document webpages are easy to find from their website’s home  
143 page, through such techniques as a linked tab or entry in a pull-down menu;
- 144 c. The search engine on agency websites works effectively for finding relevant  
145 guidance information;
- 146 d. Guidance documents, when listed on webpages, are displayed in a manner that  
147 helps the public find a particular document, by using such techniques as indexing,  
148 tagging, or sortable tables; and

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<sup>15</sup> Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 149 e. Websites displaying guidance documents are kept up to date, with any broken  
150 links fixed and any amended or withdrawn documents clearly labeled as such.
- 151 10. To make guidance documents accessible to users who are searching for information  
152 elsewhere on agency websites, agencies should strive to ensure that clearly labeled links  
153 to all guidance documents related to specific rules, issues, or programs are easily found in  
154 the corresponding section of the website where users are likely to find that information  
155 especially helpful.

### **Public Notice of Guidance Documents**

- 156 11. Agencies should undertake affirmative steps to alert interested members of the public to  
157 new and revised guidance documents. Such steps could include, among other things,  
158 establishing public email distribution lists to disseminate alerts about new or revised  
159 guidance; using social media to disseminate guidance documents and related information;  
160 having agency staff speak about guidance documents at relevant conferences or meetings;  
161 or preparing printed pamphlets or other hard-copy documents. Even when not required to  
162 do so by law, agencies should consider publishing information about new or revised  
163 guidance documents in the *Federal Register*.
- 164 12. Agencies should consider providing descriptive references (such as links, if possible) to  
165 relevant guidance documents in appropriate sections of the *Code of Federal Regulations*,  
166 stating where the public can access the documents.