



## Public Availability of Inoperative Agency Guidance Documents

### Committee on Regulation

#### Proposed Recommendation for Committee | November 3, 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.<sup>1</sup> The Administrative Conference has  
4 issued several recent recommendations regarding guidance documents.<sup>2</sup> 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 Even without being rescinded in whole or in part, a guidance document can be  
10 superseded in whole or in part by later statutory, regulatory, or judicial developments, or it can  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 changed<sup>3</sup> or how policies or programs have

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<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 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.).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

15 changed over time.<sup>4</sup> 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*.<sup>5</sup>

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.”<sup>6</sup> 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.<sup>7</sup> The E-  
24 Government Act requires agencies to publish these rescission and partial rescission notices on  
25 their websites.<sup>8</sup> 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.<sup>9</sup> 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.

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

<sup>5</sup> See Recommendation 2019-3, *supra* note 1.

<sup>6</sup> See 44 U.S.C. § 3102 (2).

<sup>7</sup> 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).

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

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.<sup>10</sup>

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

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

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<sup>10</sup> 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**

**Establishing Written Procedures Governing the Public Availability of Inoperative Guidance Documents**

- 55 1. Each agency should develop and publish on its website written procedures governing the  
56 public availability of inoperative guidance documents and should consider doing the  
57 following in its procedures:
- 58 a. Defining what it considers to be an “inoperative guidance document,” with  
59 consideration of categories such as rescinded guidance documents, partially  
60 rescinded guidance documents, superseded guidance documents, partially  
61 superseded guidance documents, and guidance documents that have fallen into  
62 disuse in whole or in part;
  - 63 b. Specifying how it will notify the public when a guidance document has been  
64 rescinded, partially rescinded, superseded, partially superseded, or has fallen into  
65 disuse in whole or in part;
  - 66 c. Identifying, as elaborated in Paragraph 2 below, which kinds of inoperative  
67 guidance documents are to be made publicly available on its website;
  - 68 d. Specifying how long inoperative guidance documents are to be retained on its  
69 website;
  - 70 e. Specifying whether some types of previously unpublished operative documents  
71 are to be posted on its website when they become inoperative and, if so, under  
72 what circumstances;
  - 73 f. Providing for how inoperative guidance documents are to be organized on its  
74 website to facilitate searching and public access;
  - 75 g. Identifying, as elaborated in Paragraph 3 below, what labels and explanations it  
76 will use to communicate clearly the inoperative status of guidance documents;  
77 and
  - 78 h. Indicating whether any or all of the procedures should be applied retroactively.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

- 79 2. In deciding which kinds of inoperative guidance documents to post on its website, an  
80 agency should at least consider the following factors:
- 81 a. Whether it previously posted the operative version of the inoperative guidance  
82 document on its website;
  - 83 b. Whether its current policy for posting operative guidance documents would call  
84 for posting such an inoperative guidance document if it were operative;
  - 85 c. Whether the inoperative guidance document generates—or, when it was  
86 operative, generated—numerous unique inquiries from the public;
  - 87 d. Whether the inoperative guidance document generated reliance interests when it  
88 was operative;
  - 89 e. Whether the inoperative guidance document is—or, when operative, was—the  
90 subject of attention in the general media or specialized publications relevant to the  
91 agency, or has been cited frequently in other agency documents, such as permits,  
92 licenses, grants, loans, contracts, or briefs;
  - 93 f. Whether the operative version of an inoperative guidance document generated a  
94 high level of public participation when it was originally being formulated; and
  - 95 g. Whether the inoperative guidance document, when it was operative or originally  
96 being formulated, had been submitted to the Office of Information and Regulatory  
97 Affairs or published in the agency's *Unified Agenda*.

**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.

### Organizing and Labeling Inoperative Guidance Documents Available Online

- 98 3. Each agency should organize its inoperative guidance documents on its website to make  
99 it easy for members of the public to find them. The agency should consider one or more  
100 of the following approaches:
- 101 a. Assigning a unique guidance identification number to each inoperative guidance  
102 document, if such a number had not already been assigned when the document  
103 was operative;



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 104           b. Creating a table that is indexed, tagged, or sortable and is dedicated exclusively to  
105           displaying entries for inoperative guidance documents, with links to such  
106           documents;
- 107           c. Providing a search function that enables retrieval of inoperative guidance  
108           documents; and
- 109           d. Using a method, such as a pull-down menu, that allows the public to view  
110           inoperative guidance documents and see that they are inoperative.
- 111   4. Each agency should label inoperative guidance documents on its website to ensure that  
112   the public can readily understand the inoperative status of those guidance documents. The  
113   agency should consider adopting one or more of the following labeling methods and  
114   using the selected method or methods consistently for all inoperative guidance  
115   documents:
- 116           a. Including a watermark that displays “rescinded,” “partially rescinded,”  
117           “superseded,” “partially superseded,” “not in use,” or similar terminology as  
118           appropriate across each page of an inoperative guidance document;
- 119           b. Including words such as “rescinded,” “partially rescinded,” “superseded,”  
120           “partially superseded,” “not in use,” or similar terminology as appropriate within  
121           a table in which links to inoperative guidance documents appear;
- 122           c. Posting a redline version of a guidance document that has been partially  
123           rescinded, showing the exact revisions;
- 124           d. Including a prominent stamp at the top of an inoperative guidance document  
125           noting that the document is inoperative and indicating the date it became  
126           inoperative;
- 127           e. Providing cross references, with links, from an inoperative guidance document to  
128           any successor versions of the guidance document, and vice versa; and
- 129           f. Publishing a notice of rescission or partial rescission of a guidance document on  
130           the agency’s website and providing links to such notice in the inoperative  
131           guidance document.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Using Other Means to Notify the Public of Inoperative Guidance Documents

- 132 5. At a minimum, an agency should notify the public that a guidance document has become  
133 inoperative in the same way that it notified the public that the operative version of the  
134 guidance document was issued, or in the same way it would notify the public that an  
135 operative version of the guidance document has been issued under the agency's current  
136 policies.
- 137 6. An agency should consider using one or more of the following methods to notify the  
138 public when a guidance document has become inoperative or to notify the public that the  
139 inoperative guidance document is available on its website:
- 140 a. Publishing such notification in the *Federal Register* even when not required to do  
141 so by law;
  - 142 b. Sending such notification over an agency listserv or to a similar mailing list to  
143 which the public can subscribe;
  - 144 c. Conveying such notification during virtual meetings, in-person meetings, or  
145 webinars involving the public; and
  - 146 d. Conveying such notification through a press release.