

REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**PUBLIC AVAILABILITY OF INOPERATIVE AGENCY
GUIDANCE DOCUMENTS**

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This report was prepared for the consideration of the Administrative Conference of the United States. It does not necessarily reflect the views of the Conference (including its Council, committees, or members).

Note: Professor Coglianese and I both served as project consultants and worked together to shape the research. The report itself is authored solely by me.

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Public Availability of Inoperative Agency Guidance Documents

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I. INTRODUCTION

Building off the Administrative Conference of the United States' (hereafter the Administrative Conference's) 2019 project and Recommendation titled *Public Availability of Guidance Documents*, which focuses on the public availability of guidance documents in general,¹ this report explores the public availability of *inoperative* guidance documents.

Although definitions of guidance documents vary, for the purposes of this report the term “guidance document” means an interpretive rule, a policy statement, and any other document that an agency labels or refers to as a “guidance document.”² *Inoperative* guidance documents are those guidance documents, or portions of guidance documents, that no longer reflect the agency's position.

My research does not lend support to the conclusion that *all* inoperative guidance documents should be posted on agency websites. Rather, the report identifies a subset of inoperative guidance documents—*priority* inoperative guidance documents—and explains why it can be valuable for the public to have access to these documents on agency websites. *Priority inoperative guidance documents* are those inoperative guidance documents that: (1) appear to be of interest to the public; (2) generated reliance interests while they were operative; or (3) expressed the agency's position on controversial issues or issues of national importance while they were operative. This report examines agencies' practices for posting, organizing, and labeling priority inoperative guidance documents both on their websites and outside of their websites, including in the *Federal Register*.

With some notable exceptions, agencies are currently afforded a great degree of discretion in posting, labeling, and organizing inoperative guidance documents on their websites and in other venues. Overall, the report's findings are encouraging for public transparency and accessibility of inoperative guidance documents because it appears that agencies have used this discretion

* First and foremost, I thank Professor Cary Coglianese. Professor Coglianese's 2019 report for the project *Public Availability of Agency Guidance Documents*, the predecessor to this project, not only led to Administrative Conference Recommendation 2019-3 and profoundly shaped national policy on the topic of guidance availability, but also inspired the Administrative Conference's project *Public Availability of Inoperative Agency Guidance Documents*, with which this report is affiliated. As anyone who knows Professor Coglianese can attest, his towering intellect and knack for resolving seemingly intractable public policy challenges is matched only by his patience and kindness towards those who are fortunate enough to be taken under his wing. I consider myself to be one of those lucky few. Additionally, I thank the members of the staff of the Administrative Conference's Office of the Chairman, especially Acting Chair Matt Wiener, Research Director Reeve Bull, and Deputy Research Director Mark Thomson, who provided valuable input on drafts. I also thank the Administrative Conference members and others who contributed their limited time to this endeavor. This work would not have been possible without them.

¹ Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931 (Aug. 8, 2019).

² See Cary Coglianese, *Public Availability of Agency Guidance Documents 3–9* (May 15, 2019) (report to the Admin. Conf. of the U.S.); see also Recommendation 2019-3, *supra* note 1.

productively. Agencies have done a good job posting and organizing inoperative guidance documents on their websites: nearly 80% of priority inoperative guidance documents that I identified were posted on agencies' websites and 95% of these posted documents were organized on these websites using methods such as indexing, tagging, and sortable tables. Using concrete examples from several agencies, the report identifies some promising practices for organizing inoperative guidance documents on agency websites.

Moreover, agencies have used methods outside of their websites to inform the public of the inoperativeness of guidance documents. About 80% of the priority inoperative guidance documents that I identified were noticed as inoperative in the *Federal Register*. The research conducted for this report also identified innovative practices agencies have adopted for notifying the public of the inoperativeness of guidance documents outside of agency websites, such as subscription services, webinars, and hosting virtual conferences with interested parties.

Yet there is some room for improvement, specifically in the realm of labeling. Only about 60% of inoperative guidance documents on agency websites were labeled as inoperative, and agencies posted a notice of inoperativeness—usually in the form of a press release—for only about 60%. Posting an inoperative guidance document on an agency website can only be helpful to the public if it is labeled as inoperative. The fact that about 40% of posted inoperative guidance documents were not labeled as such indicates that members of the public could become easily confused as to whether posted guidance documents are inoperative. The report identifies and highlights some concrete practices that contribute to confusion over whether a posted inoperative guidance document is inoperative, as well as some promising labeling practices that can make clear the status of an inoperative guidance document.

Building off these promising practices and the areas identified for improvement, the report proposes recommendations for agencies to improve public access to priority inoperative guidance documents. Improving such access will help make it easier and fairer for the public to understand agency policies and how agencies interpret the legal obligations imposed on the regulated community.

II. BACKGROUND

Reasons for the Study

Several years ago, the Administrative Conference began a well-received initiative to encourage the public disclosure of important legal materials through publication on agency websites. Many recommendations followed.³ Among these was Recommendation 2019-3, *Public Availability of Agency Guidance Documents*,⁴ which followed from a report prepared for the Administrative

³ See, e.g., Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021); Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Recommendation 2019-8, *Public Identification of Agency Officials*, 84 Fed. Reg. 71354 (Dec. 27, 2019); Recommendation 2019-3, *supra* note 1; Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31039 (July 5, 2017); Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012).

⁴ Recommendation 2019-3, *supra* note 1.

Conference by Professor Cary Coglianese.⁵ Shortly after Recommendation 2019-3 was adopted, the now-revoked⁶ Executive Order 13,891, *Promoting the Rule of Law Through Improved Agency Guidance Documents* (Oct. 19, 2019) was issued, a key provision of which addressed website publication of agency guidance documents.⁷

At the Plenary session at which Recommendation 2019-3 was debated, some discussion occurred about whether and how agencies should provide public access to inoperative guidance documents. One point that emerged from the discussion was that most agencies provide no official, comprehensive compendium or repository of their inoperative guidance documents.

Consequently, when an agency removes a guidance document from its website—whether because it has been replaced, revised, rescinded, rendered obsolete, or otherwise made inoperative—the guidance document may, or the deleted portion of the guidance document, may, in effect, be lost forever to the public or become difficult to discover or obtain except by an individualized Freedom of Information Act (FOIA) request. That is a problem for persons who may wish to understand how an agency’s position has changed over time.

Inoperative guidance documents may assist lawyers, judges, and others in understanding or interpreting the law by comparing alternative (albeit abandoned) views that such documents express. As several scholars have noted, guidance development is often an iterative process.⁸ An agency issues a guidance document; the public responds to that guidance document by giving input to the agency; the agency changes the guidance document incrementally in response to public input, and so on. That kind of frequent evolution will be much easier for stakeholders to follow and understand if they can see the baseline from which the most recent incremental departures were made. In this context, preservation and public availability of the prior guidance document is key. It clarifies what the agency is doing in each step of the evolution of that guidance document, assuring stakeholders that flexibility is being balanced with consistency and that special favors are not being given. It also helps educate stakeholders in how the agency thinks about changes to guidance documents and the processing of requests for such change, which would help stakeholders in making constructive proposals for individual departures or general modifications from agency guidance documents in the future.⁹

Yet another reason the subject is important is because of a concern that Professor Coglianese raised in his 2019 study: the currency of guidance documents on agency websites. Professor Coglianese noted that it is imperative for the public to know that if an agency has posted an inoperative guidance document that such a document is, in fact, inoperative.¹⁰ There are real

⁵ See Coglianese, *supra* note 2, at 59.

⁶ See Exec. Order. 13992, *Revocation of Certain Executive Orders Concerning Federal Regulation*, 86 Fed. Reg. 7049 (Jan. 20, 2021).

⁷ See also Exec. Order 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, 84 Fed. Reg. 55239 (Oct. 15, 2019).

⁸ See Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.); E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L. J. 1490 (1992).

⁹ Full credit for this rationale, and for the way it is phrased here, goes to Nick Parrillo, who, among others, shaped key aspects of this report.

¹⁰ See Coglianese, *supra* note 2, at 38.

dangers to the public if an agency posts an inoperative guidance document that is not labeled as such. Members of the public can rely on such a document to their detriment.

When it adopted Recommendation 2019-3, the Administrative Conference decided that the subject of public access to inoperative guidance documents was outside the project's general scope. It appeared to be the case, though, that the subject could usefully be taken up in a successor project. This report is written in support of that successor project.

Scope of Research

The goal of my research was to develop solid evidence to support potential recommendations to agencies for maintaining public access to priority inoperative guidance documents. In doing so, the report: (1) identifies factors that agency officials and members of the public consider to be useful in helping agencies decide which kinds of inoperative guidance documents they should retain on their websites; (2) uncovers ways that agencies organize inoperative guidance documents on their websites to facilitate public access; and (3) uncovers particular labels agencies use to help the public understand the meaning and effect of publicly available inoperative guidance documents.

There are many questions that, although important, fell outside the scope of my research. For example, it was outside the scope of my research to derive a comprehensive taxonomy of “inoperative guidance documents” and it was outside the scope of my research to advise agencies on how to decide whether a given guidance document is rescinded, superseded, or has fallen into disuse.

There are many other important questions to examine regarding agencies' management of their guidance documents—and their material more broadly—that were outside the scope of my research but are being addressed concurrently by the Administrative Conference.

For example, the Administrative Conference has an ongoing project called *Classification of Agency Guidance*, which will develop a classification system to catalog the wide array of guidance agencies issue, which can range from policy manuals to phone calls. It will also identify considerations and circumstances that lead agencies to use one type of guidance instead of another. That project will produce a guide that sets forth a classification scheme and examines how agencies use the many different forms of guidance available to them.

The Administrative Conference also has an ongoing project called *Improving Notice of Regulatory Changes*, which studies the extent to which agencies' current practices for providing public notice of relevant changes in law or policy (“regulatory changes”) might not provide some interested persons with actual notice of those changes. The project surveys agencies' current practices for providing interested persons with notice of regulatory changes; explores and compares the effectiveness of different approaches to providing interested persons with notice of regulatory changes; and identifies factors for agencies to consider in assessing the effectiveness of their current practices for providing interested persons with notice of regulatory changes. Although there is some overlap between this report and the project titled *Improving Notice of Regulatory Changes*, this report is narrower in scope in that it focuses only on inoperative guidance documents rather than the broader set of materials at issue in that project.

Finally, the Administrative Conference is considering initiating a new project that would bear on federal agency publication requirements. Part of the project would synthesize existing Administrative Conference recommendations about publishing certain types of agency materials. Another part of the project would make recommendations about harmonizing and modernizing existing statutes bearing on disclosure, including FOIA, the Federal Records Act, and the E-Government Act, focusing on providing a more comprehensive overview of what legal materials agencies should disclose and how they should do so.

Types of Inoperative Guidance Documents

For the purposes of this report, inoperative guidance documents fall into three broad categories: rescinded guidance documents, superseded guidance documents, and disused guidance documents. A guidance document can be operative in part and inoperative in part.

Rescinded Guidance Documents

The first type of inoperative guidance documents are those guidance documents, or portions of guidance documents, that an agency has rescinded, withdrawn, repealed, or taken similar action. (For the sake of simplicity, the report will just use the term “rescinded.”) By “rescinded,” the report means that an agency has affirmatively announced, in some way, that a particular guidance document or portion of a guidance document is no longer operative. An agency can rescind a guidance document or portion of a guidance document in different ways, but this report is not focused on examining these different ways. The key point for purposes of this report is that, for inoperative guidance documents in this first category, an agency has announced that a specific guidance document or a specific portion of a guidance document no longer reflects the agency’s position.

Superseded Guidance Documents

The second type of inoperative guidance documents are those guidance documents, or portions of guidance documents, that an agency has *not* rescinded (as described above), but that have been superseded by a later-in-time regulatory, statutory, or judicial action. For example, if the agency has issued an interpretive rule that interprets a rule (or statute), but that rule (or statute) is then repealed, the interpretive rule becomes mooted, and is therefore superseded. Another example would be if an agency issues a policy statement, but then issues a legislative rule that flatly contradicts the policy statement (the policy statement says “x” and the later-in-time legislative rule says “-x”). That earlier policy statement would therefore be superseded. This is not an exhaustive list of ways a guidance document, or a portion of a guidance document, can become superseded. Of course, if an agency *knows* that a guidance document, or a portion of a guidance document, has been superseded, it likely would rescind it. But agencies sometimes possess tens of thousands of guidance documents. If an agency has not kept track of such supersessions in real time, these documents can quickly accumulate, at which point it could become difficult for an agency to go back and decide which documents have been superseded in whole or in part, and which ones have not. As noted above, it was outside the scope of my

research to advise agencies on how to identify whether a particular document has become superseded.

Disused Guidance Documents

The third type of inoperative guidance documents are those guidance documents, or portions of guidance documents, that do not fit into the two categories above but have fallen into disuse. For example, an agency may have simply distanced itself from a guidance document or portion of a guidance document. Perhaps at one point in time, the agency frequently cited the guidance document in briefs and prominently highlighted it on its website but then later, either suddenly or gradually, the agency stopped doing so. Even if the agency did not rescind the guidance document, or even if the document has not been flatly contradicted or mooted by a later-in-time statutory or regulatory action, it is still possible for the guidance document to become inoperative if the agency has just drifted away from it or stopped using it. This could sometimes occur simply because the guidance document is antiquated, such as by referring to outmoded technologies.

One can sensibly ask: How long of a period does it take for an agency ceasing to cite a guidance document before it can be said to fall into disuse? This report does not attempt to answer that question; delineating exactly when a guidance document has fallen into disuse was outside the scope of my research. This category is noted simply to give the readers a general understanding of a major type of inoperative guidance document.

Administrative Conference Recommendation 2019-3

Recommendation 2019-3 formed the backbone of my research and so it is useful to summarize here what that Recommendation covered and, just as importantly, what it did not cover with respect to inoperative guidance documents.

Recommendation 2019-3 is reprinted in its entirety in Appendix A of this report. Among other things, Recommendation 2019-3 stated the following with respect to inoperative guidance documents:

Agencies should keep guidance documents on their websites current. To the extent a website contains obsolete or modified guidance documents, it should include notations indicating that such guidance documents have been revised or withdrawn. To the extent feasible, each guidance document should be clearly marked within the document to show whether it is current and identify its effective date, and, if appropriate, its rescission date. If a guidance document has been rescinded, agencies should provide a link to any successor guidance document.

Recommendation 2019-3 is divided into three main sections: the first urges agencies to establish written policies for the internal management of guidance documents (see Appendix A ¶¶ 1–6); the second urges agencies to organize guidance documents on websites (see Appendix A ¶¶ 7–10); and the third urges agencies to notify the public of new or revised guidance documents (see

Appendix A ¶¶ 11 and 12).¹¹ Whether these sections speak at all to inoperative guidance—and, if so, how—is summarized here.

Posting/Removing Inoperative Guidance Documents

Recommendation 2019-3 does not specifically suggest that agencies post inoperative guidance documents on their websites, nor does it suggest that they remove them either.

Organizing Inoperative Guidance Documents on Agency Websites

Recommendation 2019-3 does not expressly address how agencies should organize inoperative guidance documents on their websites. It does, however, contain a suite of suggestions for agencies on how to organize operative guidance documents on their websites (see Appendix A ¶¶ 7–10). The principles of the Recommendation, though, apply to inoperative guidance documents if agencies choose to post them on their websites.

For example, agencies are encouraged to establish dedicated guidance webpages (see Appendix A ¶ 7). Agencies are given different ways to organize their guidance documents, including using lists of guidance documents that are tagged, indexed, or put into sortable tables; including links to guidance documents that are organized by type of guidance document, topic, component, or other criteria; and creating a dedicated search engine for guidance documents (see Appendix A ¶ 7(c)).

Notifying the Public of the Inoperativeness of Guidance Documents

Recommendation 2019-3 advises agencies that, for inoperative guidance documents posted on their websites, they should include the date such documents were rescinded, as well as a prominent notification that such documents are rescinded (see Appendix A ¶ 8(e)). It also advises agencies to link from the inoperative guidance document to the updated version of the document (see Appendix A ¶ 8(e)).

III. EXISTING LEGAL REQUIREMENTS AND GENERAL GUIDANCE WITH RESPECT TO INOPERATIVE GUIDANCE DOCUMENTS

This section highlights the key sources of law and general guidance that bear on inoperative guidance documents. No claims are made about whether lack of compliance with any of these provisions can occasion legal or other consequences for agencies. When this section uses

¹¹ Recommendation 2019-3, *supra* note 1.

mandatory language such as “must” or “requires,” it does so merely to reflect the language that is contained within these sources of law or guidance.

With some notable exceptions, agencies are given wide latitude to decide whether to post, remove, organize, and label inoperative guidance documents. The table below and the analysis that follows illustrate the contours of this latitude.

Please see Appendix B for excerpts from key statutes.

Table 1: Summary of Relevant Governmentwide Provisions

Type of Inoperative	Requirement to post on website?	Requirement to remove from website?	If posted on website, requirement to organize in any particular way?	If posted on website, requirement to label the document in any particular way?	Requirement to publish notice of inoperativeness on website?	Requirement to publish notice of inoperativeness in Fed. Reg.?
Rescinded	Only if agency deems “of general interest or use to the public.” <i>See</i> 44 U.S.C. § 3102(2).	N	Agencies must establish a search function to help people locate document. <i>See</i> OMB M-06-02 § 1 (2005).	N	Only: (1) if agency is not an “independent regulatory agency” as defined in 44 U.S.C. § 3502(5); and (2) if the document is a “significant guidance document”; and (3) for one year after rescission. <i>See</i> OMB BULL. No. 07-02, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).	Only if it is a “statement of general policy or interpretation of general applicability formulated and adopted by the agency.” <i>See</i> 5 U.S.C. § 552(a)(1).
Superseded	Only if agency deems “of general interest or use to the public.” <i>See</i> 44 U.S.C. § 3102(2).	N	Agencies must establish a search function to help people locate document. <i>See</i> OMB M-06-02 § 1 (2005).	N, but agencies aside from “independent regulatory agencies” as defined in 44 U.S.C. § 3502(5) are encouraged to stamp or otherwise prominently	N	N

				identify as “superseded” those superseded guidance documents that remain available for historical purposes. <i>See</i> OMB BULL. NO. 07-02, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).		
Disuse	Only if agency deems “of general interest or use to the public.” <i>See</i> 44 U.S.C. § 3102(2).	N	Agencies must establish a search function to help people locate document. <i>See</i> OMB M-06-02 § 1 (2005).	N	N	N

FOIA

FOIA applies to nearly all agencies. Section 552(a)(1) of Title 5 of the U.S. Code establishes certain requirements for, among other materials, “general statements of policy” and “general interpretations formulated and adopted by the agency” (hereafter “(a)(1) guidance documents”). Section 552(a)(2) establishes certain requirements for, among other materials, “statements of policy and interpretations adopted by the agency but not published in the *Federal Register*” (hereafter “(a)(2) guidance documents”).¹² As will be discussed below, (a)(1) materials, which are guidance documents that are addressed to the public generally rather than to specific individuals or organizations,¹³ are required to be published in the *Federal Register*,¹⁴ whereas (a)(2) materials are required to be published on agency websites.¹⁵

Posting or Removing Inoperative Guidance Documents

FOIA generally requires agencies to post *operative* (a)(1) guidance documents in the *Federal Register* and *operative* (a)(2) guidance documents on their websites. FOIA does not require agencies to post or to remove *inoperative* guidance documents.

¹² Freedom of Information Act, 5 U.S.C. § 552 (2018).

¹³ Nat’l Org. of Veterans’ Advocs. v. Sec’y of Veterans Affairs, 981 F.3d 1360, 1375 (Fed. Cir. 2020).

¹⁴ 5 U.S.C. § 552(a)(1)(D).

¹⁵ *Id.* § 552(a)(2)(B).

Organizing Inoperative Guidance Documents on Agency Websites

There are no provisions in FOIA with respect to organizing materials on agency websites.

Notifying the Public of the Inoperativeness of Guidance Documents

FOIA requires agencies to publish “repeals” of (a)(1) guidance documents in the *Federal Register*.¹⁶

FOIA does not require agencies to publish a notice when they have merely stopped relying on a guidance document (disuse). FOIA also does not require agencies to publish a notice when a guidance document has been superseded, assuming the agency has not repealed it. As noted above, agencies may not realize that a guidance document has been superseded or that it has fallen into disuse; FOIA does not require them to make such a determination.

FOIA does not require agencies to publish repeals of (a)(2) guidance documents. FOIA also does not require agencies to affix any sort of label of inoperativeness within *any* inoperative guidance documents, whether (a)(1) or (a)(2).

The Federal Records Act

Posting or Removing Inoperative Guidance Documents

The Act imposes the following general responsibility on each agency: “The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for ... procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.”¹⁷

There have been no published judicial opinions to date that interpret the phrase “general interest or use to the public” nor does there appear to be any published governmentwide guidance that interprets this phrase. Agencies therefore appear to have wide latitude to determine which of their documents—including their inoperative guidance documents—are of “general interest or use to the public” and therefore to be posted online.

As the discussion above under “Reasons for the Study” (Section II) makes clear, some inoperative guidance documents are of interest or use to at least some people. For example, there are some inoperative guidance documents that help the public understand how an agency’s position has changed over time. Some inoperative guidance documents help the public make constructive proposals for individual departures or general modifications from guidance documents and clarify what the agency is doing in each step of the evolution of guidance documents. Some inoperative guidance documents may therefore qualify as being of “general

¹⁶ *Id.* § 552(a)(1)(E).

¹⁷ 44 U.S.C. § 3102(2).

interest or use to the public.” But ultimately, agencies are left with discretion to decide which documents are of “general interest or use to the public.”

Organizing Inoperative Guidance Documents on Agency Websites

There are no requirements under the Federal Records Act with respect to organizing materials on agency websites.

Notifying the Public of the Inoperativeness of Guidance Documents

There are no requirements under the Federal Records Act with respect to notifying the public of the inoperativeness of guidance documents.

The E-Government Act

The E-Government Act of 2002 was enacted to promote the use of the internet and other technologies to improve citizen access to government information and services, improve government decision making, and enhance accountability and transparency. The Act requires agencies, to the extent practicable, to “ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register.”¹⁸ Since FOIA requires agencies to publish repeals of (a)(1) guidance documents in the *Federal Register*, the E-Government Act applies to those repeal notices.

Posting or Removing Inoperative Guidance Documents

The Act imposes no obligations for posting or removing inoperative guidance documents.

Organizing Inoperative Guidance Documents on Agency Websites

The Act authorizes the Office of Management and Budget (OMB) to issue binding policies upon agencies to implement the Act. One such policy, M-06-02, requires agencies to organize materials on their websites and to establish a search function to allow members of the public to search for these materials. It does *not* specify particular organizational choices. It does say, however, that agencies “should” consult with users on selecting a design choice.¹⁹ If an agency chooses to post *any* document on its website, whether an inoperative guidance document or any other kind of document, it would be subject to these requirements.

¹⁸ See E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (codified at 44 U.S.C. § 3501 note).

¹⁹ Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum M-06-02, Improving Public Access to and Dissemination of Government Information and Using the Federal Enterprise Architecture Data Reference Model § 1 (2005), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2006/m06-02.pdf>.

Notifying the Public of the Inoperativeness of Guidance Documents

The E-Government Act requires each document that agencies publish in the *Federal Register* to be made available online. The Act does not specify where online such documents must appear, but, in practice, such documents appear on Federalregister.gov. As discussed above, agencies must publish a rescission notice in the *Federal Register* when they rescind (a)(1) guidance documents. Therefore, notices of rescission of (a)(1) guidance documents must appear online. As soon as such notices are published on Federalregister.gov, this obligation is satisfied.

Agency-Specific Legal Requirements

In addition to the above requirements that apply to most or all federal agencies, individual agencies can sometimes be subject to their own specific requirements for making guidance materials available to the public.

I used the following sample of agencies to search for agency-specific legal provisions related to whether an agency must post or remove inoperative guidance documents and to notify the public if a guidance document is inoperative: U.S. Department of Education (ED); U.S. Department of Transportation-main (DOT-main); the Federal Trade Commission (FTC); the Consumer Financial Protection Bureau (CFPB); the U.S. Department of Labor (DOL); the Environmental Protection Agency (EPA); the U.S. Department of Health and Human Services (HHS); the U.S. Department of Housing and Urban Development (HUD); the Internal Revenue Service (IRS); the National Highway and Traffic Safety Administration (NHTSA); the Securities and Exchange Commission (SEC); the U.S. Department of Agriculture (USDA); the Food and Drug Administration (FDA); and the Department of Defense (DOD). This is the same sample that Professor Coglianesse used in his report to search for agency-specific legal provisions for *operative* guidance documents.²⁰ Although the sample is not representative, it does cover a wide swath of agencies, including independent regulatory agencies, as well as parent agencies and sub-agencies.

I searched the U.S. Code for requirements to post inoperative guidance documents and to notify the public of them, and I found nothing for any of these agencies.²¹ And then I looked for possible agency-imposed requirements in the *Code of Federal Regulations* (CFR). I found no requirements to post inoperative guidance documents, but I did find that five agencies have adopted procedures for notifying relevant parties of guidance rescissions.²²

²⁰ See Coglianesse, *supra* note 2, at 27.

²¹ I used the following search: (guidance interp! policy!) /150 (withdraw! cancel! supersed! archiv! rescind! rescission repeal! inoperative historic! revoke! modify! amend!).

²² As of September 22, 2021, those five agencies are: CFPB, 12 C.F.R. § 1070.12 (rescission notice in Fed. Reg.); FDA, 21 C.F.R. § 10.85 (rescission notice in Fed. Reg. or via other means, and placed on public display in Division of Docket Management); ED, 34 C.F.R. § 9.16 (rescission notice in Fed. Reg.); DOT-main, 49 C.F.R. § 7.11 (rescission notice in Fed. Reg.); IRS, 26 C.F.R. § 601.702 (rescission notice in Fed. Reg.).

OMB's 2007 Good Guidance Bulletin

The OMB Bulletin has been described as “generally applicable guidance on guidance.”²³ It applies to all agencies aside from those that are considered independent regulatory agencies as the term is used in 44 U.S.C. § 3502(5). Some parts of the Bulletin are couched in mandatory terms, and some parts in precatory terms.²⁴

Posting or Removing Inoperative Guidance Documents

The Bulletin generally calls for covered agencies to establish dedicated guidance web pages on which they post *operative* significant guidance documents. It does not call for agencies to post or remove *inoperative* guidance documents.

Organizing Inoperative Guidance Documents on Agency Websites

There are no provisions in the Bulletin with respect to organizing inoperative guidance documents.

Notifying the Public of the Inoperativeness of Guidance Documents

The Bulletin calls for agencies to publish a list of guidance documents on their guidance webpages and to identify within this list all significant guidance documents that have been “withdrawn” in the past year. Note that the Bulletin does not call for agencies to keep the inoperative document up on their websites for one year, just that they need to “identify” the withdrawn document on their website for one year. For example, an agency could fulfill the provision to “identify” such documents by posting a simple statement on its website, such as: “The following significant guidance documents were withdrawn in the past year: Document 662; Document 674.”

The Bulletin also calls for agencies to note, within the text of a newly published significant guidance document, whether it is a revision to a previously issued guidance document and, if so, identify the document that it replaces. The Bulletin *encourages* agencies, when issuing a new significant guidance document, to clarify for the public whether the new document entirely supersedes the old one and, if not, to specify what provisions in the old guidance document remain in effect. The Bulletin also *encourages* agencies to stamp or otherwise prominently identify as “superseded” those superseded guidance documents that remain available for historical purposes.

²³ See Coglianese, *supra* note 2, at 29.

²⁴ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007).

IV. CURRENT STATE OF AVAILABILITY OF INOPERATIVE GUIDANCE DOCUMENTS

Given that agencies largely have discretion about when and how to make inoperative guidance documents available online, it may be wondered whether agencies are in fact currently making inoperative guidance documents available on their websites—and, if so, how they are making them available. To find out, I conducted interviews with officials across a range of agencies, met with varied members of the public, and collected a sample of guidance documents that had recently been rescinded by agencies and looked to see whether they could be found on the agencies' websites. Specifically, the aim of my research was to address the following seven questions:

What kinds of inoperative guidance documents do agency officials and members of the public think are important for the public to access via an agency website?

Summary of Findings:

1. Agency officials and members of the public seem to think that these considerations may be helpful in determining if inoperative guidance documents should be made a priority for retaining online: (1) whether the inoperative guidance document generates a large number of unique inquiries, page views, or downloads; (2) whether the inoperative guidance document is one for which its operative version was frequently cited in regulations, briefs, or news sources, or received a high volume of public input while operative; or (3) whether the inoperative guidance document is one for which the operative version had been submitted to the Office of Information and Regulatory Affairs (OIRA) or was published in the *Unified Agenda*.

What problems have people faced trying to access these kinds of inoperative guidance documents and trying to understand whether a posted guidance document is inoperative?

Summary of Findings:

1. In general, agencies appear to have done well in posting and organizing priority inoperative guidance documents on their websites, with nearly 80% of priority inoperative guidance documents I identified posted on agency websites and 95% of such documents organized using methods such as tagging, indexing, and sortable tables.
2. In general, agencies have done less well in labeling inoperative guidance documents as inoperative on their websites, with only about 60% of inoperative guidance documents labeled as inoperative and only about 60% having a notice of rescission on the agency website.

3. Certain agency practices, such as the use of ambiguous language to describe inoperative guidance documents may contribute to confusion over whether a posted document is inoperative.

What resource constraints do agencies face in posting and organizing inoperative guidance documents on their websites?

Summary of Findings:

1. I identified minimal resource constraints agencies face in posting inoperative guidance documents on their websites.
2. Organizing inoperative guidance documents entails the use of staff time but is generally accomplished effectively.

What resource constraints do agencies face in labeling publicly posted inoperative guidance documents as inoperative or otherwise explaining their inoperativeness to the public?

Summary of Findings:

1. Those agencies that have already established an internal system for tracking guidance documents from creation to rescission, in general, face minimal resource constraints in effectively labeling publicly posted inoperative guidance documents as inoperative or otherwise explaining their inoperativeness to the public.
2. Agencies that have not established such an internal tracking system could face immense challenges, including large amounts of staff time, in doing so.

What are some examples of ways to organize inoperative guidance documents on agency websites?

Summary of Findings:

1. Agency practices vary but there are several promising approaches identified, including establishing a dedicated table of inoperative guidance documents and creating a search engine that finds inoperative guidance documents.

What are some examples of ways to label inoperative guidance documents on agency websites?

Summary of Findings:

1. Agency practices vary but there are several promising approaches identified, including affixing a watermark that reads “rescinded” across

each page of an inoperative guidance document or affixing a label at the top of the document indicating the date it was rescinded.

How have agencies labeled and explained inoperative guidance documents to the public aside from using agency websites?

Summary of Findings:

1. Agencies have developed a variety of innovative approaches, and generally do a good job informing the public of the inoperativeness of guidance documents. For example, 80% of the priority inoperative guidance documents I identified were noticed as rescinded in the *Federal Register*.
2. Innovative approaches include developing a subscription service that allows members of the public to subscribe to developments of interest, including being informed of when a guidance document becomes inoperative.

To answer the above questions, I spoke with agency officials, academics, representatives of public interest organizations, and representatives of regulated entities. Altogether, I spoke with eleven agency officials across six agencies, in addition to eighteen people who are not agency officials. I also reviewed relevant literature and analyzed agency websites.

I reached out to officials from all agencies whose websites I reviewed, and I was able to conduct interviews with officials from the following: DOT-main; DOL; NHTSA; FTC; DOD; and ED.

What Kinds of Inoperative Guidance Documents Are Important for the Public to Access via an Agency Website?

There appeared to be general agreement from interviewees that it is *not* important for the public to be able to view on an agency website every inoperative guidance document an agency has ever issued. Rather, the priority inoperative guidance documents (as defined above in Section I) are the ones that the public should be able to readily access.

If priority inoperative guidance documents are not available on agency websites (and are only available via, say, a FOIA request), then less resourced parties are at a disadvantage relative to parties able to afford to hire lawyers who know how to file FOIA requests. That is why, according to the people with whom I spoke, access to priority inoperative guidance documents on agency websites is critical: it assures equal access.

There appeared to be general agreement that the following factors may indicate whether a given inoperative guidance document is a priority inoperative guidance document:

- i. A large number of unique inquiries, page views, or downloads of the inoperative guidance document (may indicate public interest in the inoperative guidance document) (note that page views or downloads

- would only apply while the guidance was operative or to inoperative guidance documents that agencies have already made available);
- ii. Frequent citations of the operative version of the document in regulations, briefs, or news sources, or a high volume of public input on the operative version of the document (may indicate reliance interests); or
 - iii. Submission to OIRA of the initial (now inoperative) guidance document or publication in the *Unified Agenda* of the same (may indicate national significance/controversy)²⁵

There appeared to be general agreement that it can be helpful for the public to access priority inoperative guidance documents on agency websites *regardless of whether these documents were made inoperative by a rescission, supersession, or disuse*, as long as agencies make clear that they are inoperative.

By contrast, there appeared to be general agreement that it is not as important for the public to be able to access, on agency websites, inoperative guidance documents to which none of the factors above apply. Indeed, it would actually be problematic to list too many documents, as that would increase the risk of public confusion over which documents are operative and which are inoperative.

What Problems Have People Faced Trying to Access Priority Inoperative Guidance Documents and Understand Whether Publicly Posted Inoperative Guidance Documents Are Inoperative?

To get a rough understanding of the degree to which agencies post priority inoperative guidance documents, I focused on ten agencies: ED; EPA; FDA; DOL; DOT-main; NHTSA; DOD; CFPB; the U.S. Patent and Trade Office (USPTO); and FTC. For each of these agencies, I used other sources to identify recently rescinded guidance documents—a total of nineteen in all—and then I went to the agency websites to see whether the rescinded documents could be found and, if so, whether they were labeled as being inoperative. This allowed me to calculate a percentage of priority inoperative guidance documents found on agency websites.

There is, of course, no way to perfectly know the denominator—that is, the number of priority inoperative guidance documents in existence. For example, Agency A may have 200 priority inoperative guidance documents on its website, and Agency B has only ten. But if Agency A has 10,000 priority inoperative guidance documents in existence and Agency B has only twenty in existence, Agency B posts its priority inoperative guidance documents to a far greater degree than Agency A, even though it has far fewer priority inoperative guidance documents on its website. Therefore, I could not determine with certainty to what degree these agencies posted their inoperative guidance documents.

Nonetheless, to at least get a rough sense of the percentage of guidance documents made available, I identified as many priority inoperative guidance documents from each of these agencies as I could. In total, I discovered nineteen priority inoperative guidance documents from these agencies. Please see Appendix C for the complete list of these guidance documents.

²⁵ Especially significant guidance documents are typically submitted to OIRA or identified in the *Unified Agenda*.

I determined that a guidance document was “inoperative” if a reputable news source reported that the Biden Administration rescinded a guidance document, or if a *Federal Register* entry during the Biden Administration announced the rescission of a guidance document. I limited my analysis to the Biden Administration for the following reason: if a document was rescinded during the Biden Administration, I could be confident that the document remained rescinded. If a document was rescinded during a previous administration, I could not be certain that the document still remains rescinded without further digging, which time did not allow.

I determined that a guidance document was a “priority” inoperative guidance document if, while operative, it was mentioned in at least one major national news source or was published in the *Federal Register*. Of the nineteen inoperative guidance documents I found, four were identified only in the media and were not available on agency websites and fifteen were available on agency websites.²⁶

Obviously, this is an imperfect count of the denominator, for many reasons. To name a few: first, because there are undoubtedly guidance documents that previous administrations have withdrawn that are still withdrawn; for example, just because the Trump Administration withdrew a guidance document issued during the Obama Administration, that does not mean that the Biden Administration has revived that guidance document. Second, because agencies may have withdrawn guidance documents during this administration without announcing it in the *Federal Register* or a news source picking it up. Third, news sources and *Federal Register* entries only pick up when agencies rescind guidance documents, not when guidance documents become inoperative *sans* rescission.

Nonetheless, Table 2 reports the results of what I found.

²⁶ To search for news sources that mentioned a rescission of a guidance document, I Googled the terms “[agency] withdraws guidance” plus variants of “withdraws” including “rescinds,” “cancels,” “revokes,” and “amends”; and variants of “guidance” including “policy,” “policy statements,” “interpretation,” “interpretive rule,” and “interpretive ruling.” To search for indications in the *Federal Register* that an agency withdrew a guidance document, I selected the relevant agency under the *Federal Register*’s “Advanced Search,” and entered the term “guidance” along with the variants of “guidance” mentioned above and scrolled through all the entries from the Biden Administration.

Table 2: Summary of Findings for Nineteen Priority Inoperative Guidance Documents Across Ten Agencies

Row A: Percentage of inoperative guidance documents posted on agency websites	79
Row B: Percentage of guidance documents removed from agency websites once they became inoperative	21
Row C: Percentage of inoperative guidance documents organized in a particular way on website (e.g., indexed, tagged, or in sortable table)	95
Row D: Percentage of inoperative guidance documents labeled as inoperative on agency website	58
Row E: Percentage of inoperative guidance documents for which a notice of inoperativeness was published on agency website	63
Row F: Percentage of inoperative guidance documents for which a notice of inoperativeness was published in Fed. Reg.	79

The percentage in Row A of the table above is quite promising: about 80% of priority inoperative guidance documents have been posted on agency websites. It suggests that priority inoperative guidance documents may well be widely available on agency websites.

Row C's statistic, which shows that about 95% of such documents have been organized in a logical fashion, such as through indexing, tagging, or in a sortable table, is even more promising, as it suggests that not only are the documents generally available on websites, but they can be readily found. Conversations and interviews lent anecdotal support for what these statistics suggest is a widespread availability of priority inoperative guidance documents on agency websites. Although one person with whom I spoke reported that he could not find inoperative guidance documents at least some of the time, the remainder of the respondents either reported having no difficulty finding them or at least did not report difficulties finding them.

The statistics in Rows D and E illustrate ample room for improvement with respect to the labeling of inoperative guidance documents. Only about 60% of the inoperative guidance documents I identified were labeled as inoperative, and about the same percentage had an affiliated notice of rescission on the agency website. Conversations and interviews lent anecdotal support for what these statistics suggest is an area for improvement. There appeared to be general agreement among the people with whom I spoke that, at least some of the time, they are unsure whether a publicly posted guidance document is inoperative. Professor Coglianese's 2019 report

also highlights examples of agencies not labeling publicly posted inoperative guidance documents as inoperative.²⁷

Based on my interviews with agency officials and conversations with experts who interact with these agencies, it appears that, for the most part, there is a simple explanation for the lack of labeling on some of these documents: prioritization. Sometimes the lack of labeling is a policy decision, but sometimes it is just a resource issue. The agency intends to label the document as inoperative but has not gotten around to doing so.

I also observed practices that may contribute to confusing the public as to whether a posted guidance document is inoperative. Three examples are worth noting:

Using Language that Gives Mixed Signals as to Whether a Document Is Operative or Inoperative

One agency has a link on one of its guidance pages that is roughly titled, “Archives of Key Guidance Documents Signed by the Agency Head or a Designee from Prior Administrations.” When the user clicks on that link, the user is taken to a page that is titled “Archived Information,” which contains links to various guidance documents. This labeling generates confusion. Is the agency saying that because the guidance document was issued during a previous administration, it is now inoperative? Or is it just using this page to “deprioritize” some documents? In other words, are the documents still operative, but less important than ones issued during the current administration? This ambiguity could be resolved by indicating which of the specific documents are operative and which are not.

This same agency has a document that contains a linked list of guidance documents titled roughly, “Guidance Documents Promulgated Before 1999.” An explanatory paragraph under this title reads something to the following effect: “In addition to the guidance documents that appear on the [agency’s] website, the [agency] has identified a stock of older guidance documents in which some members of the public have expressed interest.” This explanation does not help the reader identify which of the listed documents are operative and which are inoperative. The term “older” does not resolve this ambiguity. A document can be “older” but still be “operative.” Again, this ambiguity could be resolved by the agency noting which of the specific documents are operative and which are not.

Of course, the approach the agency has adopted, as described here, could achieve the aim of letting the public know all the ways an agency has construed the law over the years. It therefore could be considered a viable practice to adopt, but only if the agency makes clear which documents (or portions of documents) are inoperative.

Using a “Page Not Found” to Indicate that a Guidance Document Is Inoperative

Another agency’s website has a table that includes links to inoperative guidance documents. The inoperative documents are not labeled as inoperative. (I was only able to determine they were inoperative through performing the aforementioned news and *Federal Register* searches.) When

²⁷ See Coglianese, *supra* note 2, at 39–40.

one clicks on the link to an inoperative guidance document, rather than being taken to the document itself or to some description of the document, one is instead taken to a page with the message, “Page Not Found,” indicating that the agency left up the link but removed the webpage. This approach generates ambiguity. A person who does not know that this document was inoperative would not know if the agency removed the webpage in error or if it intentionally did so to signal that the document is inoperative. The agency could avoid this ambiguity by using some version of the labeling methods identified on pages 25–27 below.

Posting Rescission Statements with No Linkage from the Inoperative Guidance Document to the Rescission Statement

Three agencies in the sample adopted an approach whereby they posted guidance rescission notices on their websites, in the form of news releases, memoranda, and statements within guidance documents (e.g., “This guidance document hereby rescinds that guidance document”), but these rescission notices were not located anywhere near the inoperative guidance document, nor was there any link or reference to the rescission notice from the inoperative guidance document. If a user happened upon the inoperative guidance document, the user would have no way of knowing that the document was inoperative unless the user also happened upon the rescission notice: the agencies did not provide a link to the rescission notice from the inoperative guidance document nor did they provide any other indication, within proximity to the rescinded document, that the rescission notice existed.

What Resource Constraints Do Agencies Face in Retaining and Organizing Priority Inoperative Guidance Documents on Their Websites?

Storage Costs

Agencies do not face significant resource constraints in retaining inoperative guidance documents on their websites. The only conceivable constraints are the costs of storage space on their servers for hosting documents. The agency officials I interviewed informed me that these costs are not an issue.

Maintenance Costs

Organizing inoperative guidance documents is more challenging but, considering the statistic I identified above in Row C, which indicates that about 95% of priority inoperative guidance documents are organized in some logical fashion, this appears to be an overall manageable task. Several agencies reported during interviews that they have become accustomed to indexing inoperative guidance documents, tagging them, creating search engines that uncover them, and putting them in tables.

What is more challenging, however, is *identifying* inoperative guidance documents, especially those that have been superseded and disused, rather than rescinded. This task is particularly onerous if performed as a retroactive exercise: that is, if an agency were to be asked to review its entire existing stock of guidance documents and identify those that have been superseded and

disused, such a task would entail the expenditure of numerous staff hours and would take substantial time away from the agency's other priorities.

What Resource Constraints Do Agencies Face in Labeling Publicly Posted Priority Inoperative Guidance Documents as Inoperative or Otherwise Explaining Their Inoperativeness to the Public?

As noted in Rows D and E above, about 40% of the inoperative guidance documents posted on agency websites were not labeled as inoperative, and about 40% had no accompanying rescission notice on the agency website. Also as noted above, this is not because agencies lack awareness of the fact that these documents were inoperative. Rather, as revealed through interviews, agencies have numerous priorities, and the labeling of inoperative guidance document as “inoperative” does not always rise to the top.

As revealed by interviews, each of the agencies in my sample had internal management systems for tracking their guidance documents from creation to rescission. Each assigns their guidance documents unique identification numbers or some other label, thus allowing them to keep track of what is rescinded and what is not. Therefore, the task of identifying inoperative guidance documents and labeling them in real time is, in general, manageable, as long as the agency makes some time to do this.

However, as noted above, I cannot claim that my sample is representative of agencies throughout government. It is possible that there are agencies that do not have internal management systems for tracking their guidance documents. For such agencies, the task of identifying which documents are inoperative and which documents are operative would be tremendously challenging.

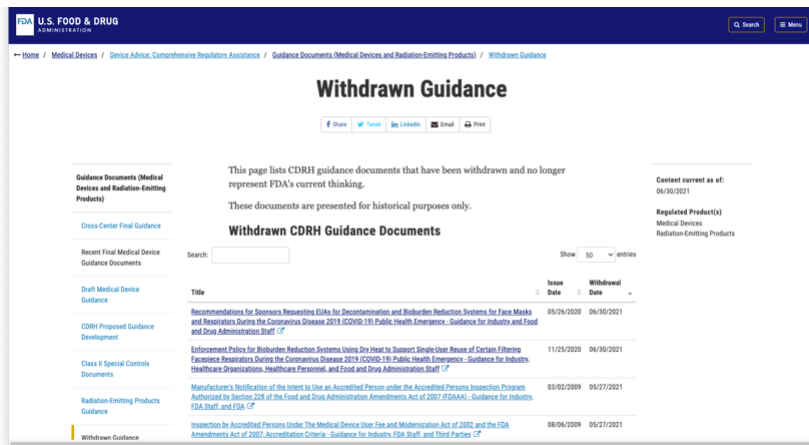
The task for such agencies is greater still with respect to those documents that are operative in part and inoperative in part. Such agencies would do well to heed the advice dispensed in Recommendation 2019-3 to develop “guidance identification numbers” to help them track their guidance documents internally. Such a system would allow them to keep track of what is operative and what is inoperative at any given moment.

Examples of Ways to Organize Priority Inoperative Guidance Documents on Agency Websites

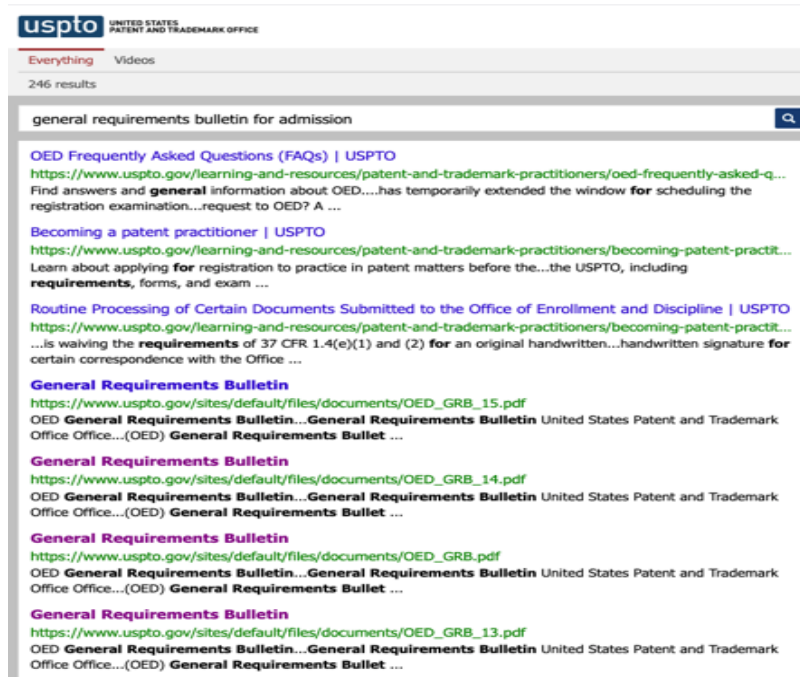
From my review of agency websites, I found several examples of useful and clear ways to organize priority inoperative guidance documents on agency websites. From them, it appears that agencies have at least three main options for how to organize their inoperative documents. These three organizational options, noted below, are not mutually exclusive. Indeed, agencies may wish to combine these various choices to optimally display their inoperative guidance documents:

Organizational Choice A (FDA): A table or tables dedicated exclusively to inoperative guidance documents, with links to such documents

The FDA has multiple such “withdrawn guidance” tables, each dedicated to a particular topic of withdrawn guidance (e.g., withdrawn food-related guidance, withdrawn veterinary-related guidance, withdrawn biologics-related guidance, etc.)



Organizational Choice B (USPTO): Search function that uncovers inoperative guidance documents



The USPTO does not provide access to these inoperative guidance documents in a table or list, but a user who knows they exist can find them by entering the relevant search term on USPTO’s search engine.

Organizational Choice C: A method (e.g., a pull-down menu) that allows the user to view an inoperative guidance document as it existed at different points in time, with clear notations that it is inoperative.

The USPTO offers readers access to the text of the inoperative guidance document at different points in time by allowing the reader to click on a month and date in a pull-down menu at the top of the document. For example, in the image below, if the user selects “October 2017,” the user will be taken to the version of the document as it appeared in October 2017, with a clear notation on the document that it is inoperative.

The screenshot shows the USPTO's Trademark Manual of Examining Procedure (TMEP) website. At the top, there is a header for the 'Trademark Manual of Examining Procedure July 2021'. A dropdown menu is open, showing a list of dates: Apr2016, Oct2016, Jan2017, Apr2017, Oct2017, Oct2018, and July2021 (Current). The 'Oct2018' option is selected. Below the dropdown, there is a 'Change Summary' section titled 'CHANGES: INDEX TO CHANGES IN TMEP October 2018'. The text below the title states: 'Attention is directed to the following changes in the October 2018 TMEP.' A table follows with two columns: 'SECTION' and 'CHANGE'. The table contains two rows of data.

SECTION	CHANGE
TMEP	Incorporated changes in accordance with final rules issued at 82 FR 56887 and 83 FR 33129, relevant precedential decisions reported prior to Sept. 15, 2018, and Exam Guides 1-18 and 3-18.
103	Reworded first paragraph for clarity.

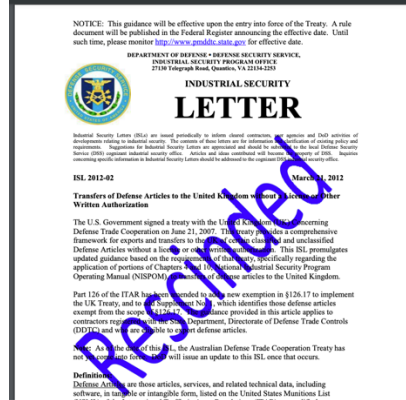
There is no single approach discussed above that is necessarily the “best practice.” Rather, each of these practices can be helpful for users to find inoperative guidance documents. Combining two or more of these approaches (e.g., a table of withdrawn guidance documents along with a search feature) may be better still.

Examples of Ways to Label Priority Inoperative Guidance Documents on Agency Websites

My review of agency websites revealed two main options for labeling guidance documents as inoperative. These options are not mutually exclusive. Indeed, agencies may wish to use both to optimally label their inoperative guidance documents.

Labeling Choice A: Notations of inoperativeness that appear within inoperative guidance documents

Labeling Choice A(1): Watermark across every page (DOD)



Labeling Choice A(2): Prominent stamp at the top of inoperative guidance documents with information about when the document was rescinded (CFPB)

! This material is for reference only.

As of April 1, 2021, the Bureau rescinded the statement entitled, "Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic" (Statement), regarding the Bureau's exercise of its supervisory and enforcement discretion during the pandemic. [See more information about the Bureau's rescission of the Statement.](#) The materials relating to the Statement on the Bureau's website are for reference only.

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

March 26, 2020

**Statement on Bureau Supervisory and Enforcement Response to COVID-19
Pandemic**

Labeling Choice B: Notations of inoperativeness that appear on the agency website, outside of the document itself

Labeling Choice B(1): Publishing a notice of rescission on agency website (CFPB)



Labeling Choice B(2): Including the word “rescinded” within a table in which a link to the inoperative guidance document appears (DOD)

Industrial Security Letter (ISL) 2011-01 (01/18/11) RESCINDED	DOD-UIS-00117	Rescinded; National Industrial Security Operating Manual (NISPOM) paragraph 5-303 prohibits contractors from using non-GSA approved security containers for storage of classified material after October 1, 2012.	Industrial Security Letter (ISL), National Industrial Security Operating Manual (NISPOM), Contractors, Security Containers, Classified Material, Defense Security Service (DSS), Inspections, Requirement, Non-GSA, Storage Methods, Disposing, Classified Information, Rescinded	18-JAN-2011
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Labels and Explanations of Inoperativeness Outside of Agency Websites

In addition to labeling inoperative guidance documents that appear on agency websites, agencies have other options for communicating the status of inoperative documents.

As noted in Row F of Table 2 above, agencies published rescission notices for about 80% of the priority inoperative guidance documents I identified. Although some rescissions are legally required to be published in the *Federal Register* (as described above in Section III), agencies may also choose to use *Federal Register* publication in cases in which it is not legally required.

Agencies indicated that they publish rescissions in the *Federal Register* when they are especially eager to inform regulated entities that a guidance document has been rescinded. Agencies informed me that they believe regulated entities see the *Federal Register* as a more authoritative statement of the agency's intent to rescind than mere publication on an agency website. Agencies noted that when they receive a high volume of feedback or questions from regulated entities about a guidance document, they are more likely to publish its rescission in the *Federal Register*.

In addition to the *Federal Register*, five of the six agencies in the sample of interviewees indicated that they use means such as listservs and virtual meetings to announce to members of the public when they have revoked or changed guidance documents.

One agency official informed me that when the agency changes or rescinds a guidance document that it believes has had an impact on many people, it holds a webinar to alert trade associations and public interest organizations that the guidance is now inoperative. It posts a notice of this webinar on its website several weeks in advance to give the public the opportunity to plan to attend and to prepare questions in advance.

Another agency official informed me that it is in the process of developing a subscription service. Once unveiled, members of the public will be able to subscribe to developments of interest and the agency will send those subscribers alerts, including alerts that a guidance document has been rescinded or modified.

Another agency official informed me that when the agency rescinds guidance documents, the agency's press office issues a press release informing the public of the rescission. The agency then affirmatively notifies affected members of the public of the rescission by speaking before various groups that frequently interact with the agency (e.g., trade groups and public interest organizations).

V. ISSUES IDENTIFIED FOR FURTHER RESEARCH

There are three issues that emerged during the research conducted for this report but for which time did not allow the opportunity to address in depth. Nevertheless, these three issues are raised here for the benefit of the committee's deliberations and for the benefit of readers who are not on the committee. The three issues are: (1) partially inoperative guidance documents; (2) the amount of time that agencies should keep inoperative guidance documents online; and (3) retroactive applications of the report's findings.

Partially Inoperative Guidance Documents

Although partially inoperative guidance documents are mentioned in passing in various parts of the report, there are special challenges associated with these documents that deserve careful, dedicated attention. For example, if an agency has formally rescinded only part of a document, might it be appropriate for the agency to rescind the entire old document but reissue as a new guidance document just the parts not rescinded? Or should the agency strike through the portions that have been rescinded and post only the struck-through version online? These are real questions for agencies to contemplate. Furthermore, how exactly should agencies deal with

guidance documents that become partially inoperative because only part has been superseded or only part has gone into disuse?

The Amount of Time that Agencies Should Keep Inoperative Guidance Documents Online

How long should agencies keep inoperative guidance documents online? Forever? If so, could that itself create a potential problem of confusion for the public? To some extent, the agency the report mentions as having a section for “archived guidance documents” and “guidance documents issued before 1999” might be moving in a positive direction, although the agency would still need to be clear about whether these documents are inoperative. It might be appropriate for agencies to adopt policies that they keep and properly label inoperative guidance documents in their usual index or database of guidance documents for only a few years, but then create online archives for purely historical purposes (albeit ones that are more clearly labeled than the agency referenced above).

Retroactive Applications

The final theme unaddressed by the report is retroactivity. That is, should agencies seek to find those inoperative guidance documents already on their websites that are not appropriately organized or labeled and apply the recommendations below to such documents? Should agencies seek to find those inoperative guidance documents currently in their internal files, outside of public view, and decide whether to post them online? Or should agencies just be thinking prospectively: that is, applying the below recommendations to guidance documents that become inoperative in the future, without worrying about those that are already inoperative?

VI. RECOMMENDATIONS

The recommendations below do not necessarily reflect anyone’s views aside from my own; they are intended only to catalyze discussion.

Agencies should consider all the provisions in Administrative Conference Recommendation 2019-3 when considering how to manage their inoperative guidance documents. The below provisions, distilled from Recommendation 2019-3 and modified in certain respects, speak most directly to inoperative guidance documents.

Deciding Which Types of Inoperative Guidance Documents to Make Publicly Available on Agency Websites

1. Agencies should affirmatively determine which types of guidance documents that have been rescinded, superseded, or have fallen into disuse (hereafter “inoperative guidance documents”) should be made publicly available on their websites.
2. In making the determination referred to in Paragraph 1, agencies should consider factors such as the following:
 - a. Whether the inoperative guidance document appears to be of interest to the public, as indicated by many unique page views or downloads of the document

- (either while the document was operative or while it was inoperative but already made available), or by many unique inquiries about the document;
- b. Whether the inoperative guidance document, while operative, generated reliance interests, as indicated by frequent citations of the operative version of the document in regulations, briefs, or news sources, or substantial public feedback on the operative version of the document; or
 - c. Whether the inoperative guidance document dealt with an issue of national significance or a controversial matter, as indicated by submission to the Office of Information and Regulatory Affairs (OIRA) of the operative version of the guidance document or publication in the *Unified Agenda* of the same.

Establishing Written Procedures for Priority Inoperative Guidance Documents

3. Agencies should develop and publish, on their websites, written procedures governing the storage and display of those inoperative guidance documents the agencies have affirmatively determined should be made publicly available on their websites (hereafter “priority inoperative guidance documents”). These procedures can either be part of their procedures governing storage and display of guidance documents writ-large or can be stand-alone procedures. At a minimum, these procedures should:
 - a. Provide for how priority inoperative guidance documents are to be compiled and organized on agency websites to make it easy for people to find the priority inoperative guidance documents in which they are interested; and
 - b. Specify the labels and explanations the agency will use to ensure the public can readily understand the significance and effect of priority inoperative guidance documents.

Organizing and Labeling Priority Inoperative Guidance Documents on Agency Websites

4. Agencies should organize priority inoperative guidance documents on their websites to make it easy for people to find the priority inoperative guidance document in which they are interested. Among the options to consider, alone or in tandem with one another, are:
 - a. Creating a table that is indexed, tagged, or sortable, and is dedicated exclusively to housing priority inoperative guidance documents, with links to such documents;
 - b. Providing a search function that uncovers priority inoperative guidance documents; and
 - c. Using a method, such as a pull-down menu, that allows the user to view a priority inoperative guidance document at different points in time, with an indication on each version of the document that the document is inoperative.
5. Agencies should label priority inoperative guidance documents on their websites to ensure the public can readily understand the significance and effect of those guidance documents. Among the labeling methods to consider, alone or in tandem with one another, are:
 - a. Including a watermark that reads “rescinded,” or uses similar terminology, across each page of the document;

- b. Including a prominent stamp at the top of the document that notes it is rescinded and indicates the date of rescission;
- c. Publishing a notice of rescission on the agency website and providing a link from the document to the notice; and
- d. Including the word “rescinded” (or similar terminology) within a table in which a link to the inoperative guidance document appears.

Using Means Other than Agency Websites to Notify the Public of the Availability of Priority Inoperative Guidance Documents

6. Agencies should consider using any combination of or all the following methods, among others, to alert interested members of the public to the availability of priority inoperative guidance documents:
 - a. Publishing notices of rescission of priority inoperative guidance documents in the *Federal Register*, even when not required to do so by law;
 - b. Sending announcements of the availability of priority inoperative guidance documents over listservs that consist of interested members of the public;
 - c. Announcing the availability of priority inoperative guidance documents through virtual or in-person meetings;
 - d. Announcing the availability of priority inoperative guidance documents through webinars;
 - e. Using or developing a subscription service to allow members of the public to subscribe to developments of interest, including the availability of priority inoperative guidance documents; and
 - f. Issuing press releases to announce the availability of priority inoperative guidance documents.

VII. CONCLUSION

Overall, the research conducted for this report suggests that the current state of public availability of inoperative guidance documents is promising but has ample room for improvement. On the one hand, agencies appear to be comprehensively posting priority inoperative guidance documents on their websites and organizing them logically. They also generally appear to publish notices of rescission of priority inoperative guidance documents in the *Federal Register* and have developed or are developing innovative tools, such as subscription services and webinars, to alert members of the public as to the inoperativeness of priority inoperative guidance documents.

On the other hand, there is a minority but still substantial proportion of publicly posted inoperative guidance documents not labeled as such on agencies’ websites. Confusing labeling practices such as the use of ambiguous language and the failure to link rescinded guidance documents to notices of rescission can hinder public understanding of the significance and effect of publicly posted inoperative guidance documents. And even on the points mentioned in the paragraph above (i.e., with respect to posting and organizing inoperative guidance documents), there is still some room for improvement, even if most agencies are doing a good job. Agencies

should continue to take deliberate and systematic management steps to improve public access to and understanding of priority inoperative guidance documents.

VIII. APPENDICES

APPENDIX A: RECOMMENDATION 2019-3, *PUBLIC AVAILABILITY OF AGENCY GUIDANCE DOCUMENTS*

Administrative Conference Recommendation 2019-3

Public Availability of Agency Guidance Documents

Adopted June 13, 2019

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

Guidance documents can take many forms.²⁸ They include what the Administrative Procedure Act (APA) calls “interpretative rules” and “general statements of policy,” which are two types of rules that are not required to undergo the notice-and-comment procedures applicable to legislative rules.²⁹ They may also include other materials considered to be guidance documents under other, separate definitions adopted by government agencies.³⁰ When managing

²⁸ 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.

²⁹ 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). In accordance with standard parlance, this Recommendation uses the term “interpretive” in place of the APA’s word “interpretative.”

³⁰ *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>.

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

Several laws require agencies to make at least certain guidance documents available to the public. The Federal Records Act requires agencies to identify “records of general interest or use to the public that are appropriate for public disclosure, and . . . post[] such records in a publicly accessible electronic format.”³¹ The Freedom of Information Act (FOIA) requires that agencies publish “statements of *general* policy or interpretations of *general* applicability formulated and adopted by the agency” in the *Federal Register*.³² FOIA also requires that agencies “make available for public inspection in an electronic format . . . [specific] statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*,” as well as “administrative staff manuals and instructions to staff that affect a member of the public.”³³ Finally, Congress has occasionally enacted agency-specific requirements for posting guidance documents online. For example, the Food and Drug Administration is required to “maintain electronically and update and publish periodically in the *Federal Register* a list of guidance documents” and to ensure that “[a]ll such documents [are] made available to the public.”³⁴

The Administrative Conference has recommended that various types of guidance documents be made available online. Recommendation 2017-5, *Agency Guidance Through Policy Statements*, provided that “[a]ll written policy statements affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found.”³⁵

³¹ 44 U.S.C. § 3102.

³² 5 U.S.C. § 552(a)(1)(D) (emphasis added). 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.

³³ 5 U.S.C. § 552(a)(2). “Agencies often accomplish this electronic availability requirement by posting records on their FOIA websites in a designated area known as a ‘FOIA Library.’” U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 6 (2019 ed.), available at https://www.justice.gov/oip/foia-guide/proactive_disclosures/download; 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”).

³⁴ 21 U.S.C. § 371(h)(3).

³⁵ 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).

Recommendation 2019-1 includes identical language directing agencies to do the same for interpretive rules.³⁶ Similarly, Recommendation 2018-5, *Public Availability of Adjudication Rules*, urged agencies to “provide updated access on their websites to all sources of procedural rules and related guidance documents and explanatory materials that apply to agency adjudications.”³⁷

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

Agencies should be cognizant that the primary goal of online publication is to facilitate access to guidance documents by regulated entities and the public. In deciding how to manage the availability of their guidance documents, agencies must be mindful of how members of the public will find the documents they need. Four principles for agencies to consider when developing and implementing plans to track and disclose their guidance documents to the public include: (a) comprehensiveness (whether all relevant guidance documents are available), (b)

³⁶ Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, __ Fed. Reg.

³⁷ Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019).

³⁸ 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).

³⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (2015).

⁴⁰ 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.

currency (whether guidance documents are up to date), (c) accessibility (whether guidance documents can be easily located by website users), and (d) comprehensibility (whether website users are likely to be able to understand the information they have located).

With these principles in mind, this Recommendation calls on agencies to consider opportunities for improving the public availability of their guidance documents. Each agency must decide which guidance documents to post online and how to present them in a manner that will ensure their availability and usefulness for regulated parties and the public. The Recommendation provides best practices to guide agencies to make their guidance documents more publicly available. These best practices are intended to be adaptable to fit agency-specific circumstances.⁴¹ The Administrative Conference notes that each agency is different, and the practices outlined in this Recommendation may be employed with flexibility as necessary (perhaps based on factors such as an agency’s internal structures, available resources, types and volume of documents, the parties it regulates, and its end users) so that guidance documents are made available to the public in a logical and suitably comprehensive manner.

RECOMMENDATION

Procedures for Managing Guidance Documents

1. Agencies should develop written procedures pertaining to their internal management of guidance documents.
 - a. The procedures should include:
 - i. a description of relevant categories or types of guidance documents subject to the procedures; and
 - ii. examples of specific materials not subject to the procedures, as appropriate.
 - b. The procedures should address measures to be taken for the:

⁴¹ 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>.

- i. development of guidance documents, including any opportunity for public comment;
 - ii. publication and dissemination of draft or final guidance documents; and
 - iii. periodic review of existing guidance documents.
 - c. Agency procedures should indicate the extent to which any of the measures created or identified in response to Paragraph 1(b) should vary depending on the type of guidance document or its category, as defined by any provisions in agency procedures responsive to Paragraph 1(a).
2. All relevant agency staff should receive training in agencies' guidance document management procedures.
3. Agencies should develop and apply appropriate internal controls to ensure adherence to guidance document management procedures.
4. To facilitate internal tracking of guidance documents, as well as to help members of the public more easily identify relevant guidance documents, agencies should consider assigning unique identification numbers to guidance documents covered by their written guidance procedures. Once a guidance identification number has been assigned to a guidance document, it should appear on that document and be used to refer to the document whenever it is listed or referenced on the agency's website, in public announcements, or in the *Federal Register* or the *Code of Federal Regulations*.
5. Using appropriate metrics, agencies should periodically review their guidance document management procedures and their implementation in order to assess their performance in making guidance documents available as well as to identify opportunities for improvement.
6. Agencies should provide opportunities for public feedback on their efforts to promote the public availability of their guidance documents.

Guidance Documents on Agency Websites

7. Agencies should maintain a page on their websites dedicated to informing the public about the availability of guidance documents and facilitating access to those documents. Such guidance document webpages should include:

- a. Agencies' written guidance document management procedures pursuant to Paragraph 1, if developed;
 - b. Plain language explanations (sometimes known as "explainers") that define guidance documents, explain their legal effects, or give examples of different types of guidance documents;
 - c. A method for users to find relevant guidance documents, which might include:
 - i. Comprehensively listing and indexing agency guidance documents;
 - ii. Displaying links to pages where guidance documents are located, which could be organized by topic, type of guidance document, agency subdivision, or some other rubric; or
 - iii. A dedicated search engine; and
 - d. Contact information or a comment form to facilitate public feedback related to potentially broken links, missing documents, or other errors or issues related to the agency's procedures for the development, publication, or disclosure of its guidance documents.
8. Agencies should provide the public with access to a comprehensive set of its guidance documents—either on the dedicated guidance document webpage or other webpages—in accordance with its written procedures.
- a. Agency websites should include, at minimum, (1) all guidance documents required by law to be published in the *Federal Register* and (2) all other guidance documents required by law to otherwise be made publicly available.
 - b. Guidance documents should generally be made available in downloadable form.
 - c. Links to downloadable copies of agencies' Small Entity Compliance Guides—issued in accordance with the Small Business Regulatory Enforcement Fairness Act⁴²—should be provided.
 - d. Agency websites should include relevant information for each guidance document, such as its title, any corresponding regulatory or statutory provision that the guidance document relates to or interprets (if applicable), the date of issuance, and any assigned identifying number.

⁴² Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note).

- e. Agencies should keep guidance documents on their websites current. To the extent a website contains obsolete or modified guidance documents, it should include notations indicating that such guidance documents have been revised or withdrawn. To the extent feasible, each guidance document should be clearly marked within the document to show whether it is current and identify its effective date, and, if appropriate, its rescission date. If a guidance document has been rescinded, agencies should provide a link to any successor guidance document.
9. Although not every agency website will have the same population of users, agency websites should be designed to ensure that they are as helpful to the end user as possible. In particular, agencies should ensure:
- a. Simple words, such as “guidance,” are used in describing webpages that discuss or list guidance documents;
 - b. Agency guidance document webpages are easy to find from their website’s home page, through such techniques as a linked tab or entry in a pull-down menu;
 - c. The search engine on agency websites works effectively for finding relevant guidance information;
 - d. Guidance documents, when listed on webpages, are displayed in a manner that helps the public find a particular document, by using such techniques as indexing, tagging, or sortable tables; and
 - e. Websites displaying guidance documents are kept up to date, with any broken links fixed and any amended or withdrawn documents clearly labeled as such.
10. To make guidance documents accessible to users who are searching for information elsewhere on agency websites, agencies should strive to ensure that clearly labeled links to all guidance documents related to specific rules, issues, or programs are easily found in the corresponding section of the website where users are likely to find that information especially helpful.

Public Notice of Guidance Documents

11. Agencies should undertake affirmative measures to alert interested members of the public to new and revised guidance documents. Such measures could include, among other

things, establishing public email distribution lists to disseminate alerts about new or revised guidance documents, using social media to disseminate guidance documents and related information, having agency staff speak about guidance documents at relevant conferences or meetings, or preparing printed pamphlets or other hard-copy documents. Even when not required to do so by law, agencies should consider publishing information about new or revised guidance documents in the *Federal Register*.

12. Agencies should consider providing descriptive references (such as links, if possible) to relevant guidance documents in appropriate sections of the *Code of Federal Regulations*, stating where the public can access the documents.

APPENDIX B: EXCERPTS OF KEY STATUTORY PROVISIONS REFERENCED IN SECTION III

5 U.S.C. Section 552(a)(1) (FOIA)

“Each agency shall make available to the public information as follows:

Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . statements of general policy or interpretations of general applicability formulated and adopted by the agency; and . . . each amendment, revision, or repeal of the foregoing.”

5 U.S.C. Section 552 (a)(2) (FOIA)

“Each agency, in accordance with published rules, shall make available for public inspection in an electronic format . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register”

44 U.S.C. Section 3102 (The Federal Records Act)

“The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for . . . procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format”

44 U.S.C. Section 3501 note (E-Government Act of 2002)

“Not later than 2 years after the effective date of this title, the Director (of OMB) shall promulgate guidance for agency websites that includes . . . information made available to the public under subsections (a)(1) and (b) of section 552 of title 5 . . . (commonly referred to as the ‘Freedom of Information Act’).”

APPENDIX C: LIST OF SPECIFIC INOPERATIVE GUIDANCE DOCUMENTS REFERENCED IN TABLE 2

CFPB

Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic (issued 3/26/2020; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding Quarterly Reporting Under the Home Mortgage Disclosure Act (issued 3/26/2020; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding Bureau Information Collections for Credit Card and Prepaid Account Issuers (issued 3/26/2021; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the Cares Act (issued 4/1/2020; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding Certain Filing Requirements Under the Interstate Land Sales Full Disclosure Act and Regulation J (issued 4/27/2020; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding Regulation Z Billing Error Resolution Timeframes in Light of the COVID-19 Pandemic (issued 5/13/2020; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding Electronic Credit Card Disclosures in Light of the COVID-19 Pandemic (issued 6/3/2020; rescinded 4/1/2021)

BCFP Bulletin 2018-01 (issued 9/25/2018; rescinded 4/1/2021)

USPTO

General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office (revised 9/22/2021)

FDA

Questions and Answers on Biosimilar Development and the BPCI Act (issued 12/12/2018; revised 9/20/2021)

Third edition of the final guidance on Submission of Plans for Cigarette Packages and Cigarette Advertisements (issued 2/2021; revised 7/12/2021)

Second edition of the final guidance on Submission of Plans for Cigarette Advertisements; Guidance for Industry (issued 5/2020; revised 2/16/2021)

DOL

Secretary's Order 10-2020, Statement of Policy Regarding Independence of Advisory Committee Members (issued 11/6/2020; rescinded 7/26/2021)

EPA

Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program (issued 1/21/2021; rescinded 9/16/2021)

DOD

Deputy Secretary of Defense Memorandum, Updated Mask Guidelines for Vaccinated Persons (issued 5/13/2021; rescinded 7/28/2021)

FTC

Statement of Enforcement Principles Regarding Unfair Methods of Competition Under Section 5 of the FTC Act (issued 8/13/2021; rescinded 7/1/2021)

Vertical Merger Guidelines (issued 6/30/2020; rescinded 9/15/2021)

DOT

Memorandum for Secretarial Officers and Heads of Operating Administrations from Steven G. Bradbury, Subject: Review and Clearance of Guidance Documents (issued 12/20/2018; rescinded on or around 3/2021)

NHTSA

Untitled letter to Chris Urmson, Director, Self-Driving Car Project from Paul A. Hemmersbaugh, Chief Counsel, NHTSA (issued 2/4/2016; rescinded 12/21/2020)