President Gerald Ford signed the Government in the Sunshine Act into law on September 13, 1976. It was the last in a quartet of “open government” statutes that included the Freedom of Information Act in 1966, the Federal Advisory Committee Act in 1972, and the Privacy Act in 1974. The Act is based on the policy that “the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.” Pub. L. No. 94-409, 90 Stat. 1241, § 2. The purpose of the Act is “to provide the public with such information, while protecting the rights of individuals and the ability of the government to carry out its responsibilities.” Id. The statute is codified at 5 U.S.C § 552b. See also Appendix A for a copy of the law, as amended.

Subsection (g) of the Act provided for the issuance of agency rules to implement the statute. Agencies subject to the Act had a statutory responsibility to consult with the former Administrative Conference of the United States (ACUS) before issuance of their regulations. Building on its consultative role, and contemporaneously with initial implementation of the statute, ACUS in 1978 published a book on the Sunshine Act, An Interpretive Guide to the Government in the Sunshine Act. That book analyzed the statutory provisions and brought together in a concise fashion the materials drawn from the consultative process and from agency proposed and final regulations. Since its issuance in 1978, several court decisions, including the Supreme Court’s only Sunshine Act opinion, FCC v. ITT World Communications, 466 U.S. 463, 471 (1984), have cited to, or relied on, the 1978 Guide.1 Many of the more than 60 federal agencies covered by the Sunshine Act or voluntarily complying with its provisions have also relied on the 1978 Guide for statutory interpretation and administrative procedural guidance.

1. See Table of Cases, infra.
Between 1978 and its abolition by Congress in 1995, ACUS served as a clearinghouse for information about the Sunshine Act. Even agencies created after 1978 consulted with ACUS when drafting their Sunshine Act rules, although they were under no legal obligation to do so. Since the demise of ACUS, no other government agency has taken over these Sunshine Act responsibilities. Therefore, we believed that there was a genuine need for a reasonably concise and reliable source of current information about the Act.

As a current tool, the obvious deficiency of the 1978 Guide is that it has not been revised in nearly 30 years. Because the 1978 Guide appeared as agencies were issuing their initial regulations, it fails to reflect any case law interpreting the Act, agency experience under the statute, or problems that have arisen with the Act’s implementation. We hope that this edition fills that void and will remain current for a considerable period of time.

We have set out to reexamine the Sunshine Act thoroughly in light of its history. We have analyzed court decisions\(^2\) issued since 1977 that have interpreted or mentioned the Act, and we have carefully reviewed the legal literature over the past 28 years.\(^3\) We have also examined other sources that address Sunshine Act issues, such as the 1984 ACUS recommendation, *Improvements in the Administration of the Government in the Sunshine Act*, Recommendation 84-3 of the Administrative Conference of the United States, 49 Fed. Reg. 29,937 (1984), and its underlying consultant report; a 1986 critique of the ACUS Report by the Congressional Research Service; the proposals advanced by the American Bar Association in 1987; the 1989 Report of the Senate Governmental Affairs Committee; numerous presentations to the ACUS Special Committee to Review the Government in the Sunshine Act and its report and recommendations in 1995; congressional testimony on June 13, 1996, before the House Subcommittee on Government Management, Information and Technology, the last congressional committee to receive testimony about implementation of the Sunshine Act; and the annual reports filed by Sunshine agencies between 1999 and 2004 with the Senate Committee on Governmental Affairs.\(^4\)

\(^2\) *Id.*
\(^3\) See Selected Bibliography, *infra.*
\(^4\) See, *e.g.*, Appendices F-I, *infra.*
In addition, we sent a letter/questionnaire to the 67 Sunshine agencies soliciting their views on how they have implemented the statute and what problems they have encountered. See Appendix B, infra. These agencies fall into three categories. Most, including the traditional independent regulatory agencies, such as the Federal Communications Commission and the Securities and Exchange Commission, have a majority of members appointed by the President and confirmed by the Senate and satisfy the Sunshine Act definition of “agency” in 5 U.S.C. § 552b(a)(1). Others, like the Neighborhood Reinvestment Corporation and the Rural Telephone Bank, which do not qualify under section 552b(a)(1), are nevertheless required by their enabling statutes to adhere to the requirements of the Sunshine Act. Some, like the Civil Rights Commission and the Foreign Service Labor Relations Board, simply follow Sunshine Act procedures voluntarily. We reviewed their responses to determine (i) what changes agencies have made to their Sunshine regulations since their original promulgation; (ii) what procedures agencies actually employ; (iii) what problems the agencies have experienced or perceived in their implementation of the Act; and (iv) how they have responded to such problems. These agency responses informed our analysis of how the statute is administered in practice and assisted in the preparation of our recommendations in Chapter 11, as well as the list of Sunshine Act agencies and their Sunshine regulations included as Appendix C.

As an editorial matter, we decided to retain the format of the 1978 Guide, which contained 10 chapters based on the 10 subsections of the statute, plus appendices, a bibliography, and the list of Sunshine Act agencies with a citation to their regulations in the Code of Federal Regulations. We have revised and expanded all these materials. We have also added an eleventh chapter to assess the impact of the Sunshine Act, pose some issues for further study, and make a few recommendations. We also use the same abbreviations for the various legislative documents that were used in the 1978 Guide. Citations to the Code of Federal Regulations are current through 2004. Finally, we have added a table of cases and a text index to facilitate both easier use of the Guide and further legal research.

We wish to thank the numerous individuals who have either reviewed portions of this second edition in draft form and offered con-
They include: Marilyn R. Abbott, secretary, United States International Trade Commission (USITC); Paul R. Bardos, assistant general counsel, USITC; Ron Battocchi, general counsel, National Transportation Safety Board; Robert Brock, associate general counsel, Federal Emergency Management Agency; Stephen Burns, deputy general counsel, Nuclear Regulatory Commission; William F. Caton, deputy secretary, Federal Communications Commission; Thomas Eisenger, former archivist, Senate Committee on Governmental Affairs; Professor William Funk, Lewis & Clark Law School; Roger Garcia, former analyst in American National Government, Congressional Research Service; Andrew Glickman, senior special counsel, Securities and Exchange Commission; Eric Glitzenstein, Meyer & Glitzenstein; Frank Herch, former director of the library, Federal Communications Commission; Maryanne Kane, chief of staff, Federal Trade Commission; Joel Kaufman, associate general counsel, Federal Communications Commission; Professor Jeffrey Lubbers, Washington College of Law, American University; Joy Medley, congressional liaison specialist, Federal Communications Commission; Meredith Mitchell, principal associate general counsel, Securities and Exchange Commission; Professor James O’Reilly, University of Cincinnati School of Law, and former chairman, Publications Committee, ABA Section of Administrative Law and Regulatory Practice; Michael O’Rourke, counsel, Federal Reserve Board, Office of General Counsel; Matthew Powell, assistant general counsel, National Science Foundation; Harold Relyea, specialist in American National Government, Congressional Research Service; Sonja Rifken, attorney-adviser, Office of General Counsel, Federal Communications Commission; Trip Rothschild, assistant general counsel, Nuclear Regulatory Commission; Professor Anna Shavers, University of Nebraska School of Law and chair, Publications Committee, ABA Section of Administrative Law and Regulatory Practice; Barbara Suhre, former supervisor, Scheduling Unit, Office of the Federal Register; Susan Steiman, former associate general counsel, Federal Communications Commission; Thomas Susman, Ropes & Gray; Professor Robert Vaughn, Washington College of Law, American University; and Michael White, general counsel, Federal Register. We have revised the text in response to their comments but they bear no responsibility for our errors.
We also express our gratitude to the numerous lawyers and other staff members at the 67 Sunshine Act agencies who were kind enough to answer questions or respond to our letter/questionnaire. We were very pleased to have received replies from nearly all the agencies we contacted, many with quite detailed responses. We very much appreciate such excellent cooperation, without which this book would have been far less comprehensive and informative.

We further want to thank the American Bar Association, Section of Administrative Law and Regulatory Practice, and especially Randolph J. May, former chairman of the Section and former chairman of the Section’s Publications Committee, for recognizing the need for a comprehensive reexamination of the Sunshine Act that has led to publication of this second edition of the Interpretive Guide. We further want to acknowledge our ABA editor, Rick Paszkiet, for his excellent editorial assistance and guidance, as well as Leanne Pfautz, Kim Knight, and Nicole Emard, of the administrative staff of the ABA’s Washington, D.C., office, for their cooperation and good cheer throughout this project. We also thank for their highly professional work Kim Schmidt, computer training specialist, Federal Communications Commission; Edit/Pro typesetting; and Yvette Brown, Patrick Petit, and Steve Young, reference librarians, the Columbus School of Law, Catholic University of America.

Finally, we thank our spouses and families for their patience, support, and encouragement throughout the more than four years we worked to produce this publication.

We intend this second edition of the Interpretive Guide, like its predecessor, to be an objective compilation of legal authority and administrative practice. We hope it will be of valuable assistance to the agencies, the courts, private-sector attorneys, the public, and the media. Although we have sought information from Sunshine Act agencies, the Guide does not reflect the official views of the agencies that provided us with information. In a handful of situations, the final version of the text reflects a consensus compromise among the authors in areas where our opinions initially differed. Indeed, despite nearly 30 years of history, we recognize that there still remain uncharted areas and room for differences of opinion regarding several aspects of statutory interpretation or implementation. Nonetheless, this second edition of the Guide reflects our best collaborative
effort to reach agreement on disputed Sunshine Act issues. In the end, however, the views expressed in this Guide are entirely the personal responsibility of the authors, who are fully accountable for any errors or omissions, which we encourage readers to bring to our attention for possible future reference and revision.

Richard K. Berg, Arlington, Virginia
Stephen H. Klitzman, Bethesda, Maryland
Gary J. Edles, Washington, D.C.
October 2005