Preface

When the Administrative Conference of the United States (ACUS) was forced to close its doors in 1995 (as it turned out, for 15 years), the American Bar Association’s (ABA’s) Section of Administrative Law and Regulatory Practice and Government and Public Sector Lawyers Division jointly determined to continue updating and publishing *A Guide to Federal Agency Rulemaking*. The hope was that the loss of ACUS would not mean the end of one of ACUS’s most popular and valuable resource guides. As a former officer of ACUS who assisted in the preparation of the first two editions of the *Guide*, I was asked to prepare the third edition in 1998, and then the fourth edition in 2006. This fifth edition continues the tradition, and brings the *Guide* up to date with respect to recent cases and changes introduced during the second term of the Bush II Administration and the first three years of the Obama Administration.

The Foreword to the 1991 edition by then-ACUS Chair Marshall Breger well stated the purpose of the *Guide*, and many of its observations are as valid today as they were then:

The Administrative Procedure Act established a simple procedure for informal, as opposed to “formal,” rulemaking. Agencies are required to publish a notice of proposed rulemaking that includes “either the terms or substance of the proposed rule or a description of the subjects and issues involved,” and interested persons are to be given an “opportunity to participate in the rulemaking through submission of written data, views, or arguments.” The APA afforded agencies great latitude in deciding whether or not to employ additional procedures beyond bare notice and comment.

In the decade or two after the Administrative Procedure Act was enacted, licensing and rulemaking proceedings, formal adjudications, as well as formal rulemaking dominated the administrative law landscape. These processes, however, proved to be too cumbersome for implementing the

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3. Where “formal rulemaking” is required, the trial-type procedures of 5 U.S.C. §§ 556–557 must be followed.
5. Id. § 553(c).
flood of new legislation passed in the late 1960s and early 1970s by which
the government sought to remedy newly perceived health, safety, and envi-
ronmental problems. In a short time, informal rulemaking supplanted the
APA’s formal processes as the preferred means of formulating major gov-
ernmental policies. Indeed, a leading commentator proclaimed such notice
and comment procedures to be “one of the greatest inventions of modern
government.”

The increasing use of informal rulemaking to resolve complex, high-
stakes issues led by the mid- and late-1970s to new statutes and court deci-
sions that placed additional procedural hurdles before agencies seeking to
promulgate rules. In addition, the late 1970s and 1980s saw an increased
Presidential involvement in the development of regulatory policies. These
developments are seen by one observer as having “taken the bloom off the
rulemaking rose.”

Rulemaking’s effectiveness for establishing standards and norms has
been called into question, and some have perceived an increase in agency
use of “non-rule rulemaking,” i.e., the setting of standards through memo-
randa or guidelines intended to have the functional effect of rules. Despite
criticism, however, informal rulemaking continues to be central to the main-
tenance of the administrative state, and according to the Office of Manage-
ment and Budget, over 5,000 final rule documents were published in the

Given the extensive use of rulemaking in federal agencies, it is impor-
tant that agency rulemakers have available as clear guidance as possible. As
procedures governing the rulemaking process have proliferated since the
Administrative Procedure Act was enacted, the potential procedural pitfalls
have multiplied. And while some agencies are immersed in the rulemaking
process, other agencies only infrequently extend their toes into it.

at the Creation: Regulatory Reform Before 1946, 36 ADMIN. L. REV. 511, 520 (1986) (inter-
viewing Kenneth Culp Davis and Walter Gellhorn).
8. See Richard J. Pierce, Jr., Unruly Judicial Review of Rulemaking, 5 NAT. RESOURCE & ENV’T 23
(1990) (“In 1990, this ingenious device for policymaking [rulemaking] is in danger of being
relegated to a chapter in a legal history book.”); JERRY L. MASNOW & DAVID L. HARFST, THE
STRUGGLE FOR AUTO SAFETY (1990).
9. See Robert A. Anthony, Project on “Non-Rule Rulemaking” (Preliminary Outline to the Ad-
ministrative Conference, Dec. 1990), reprinted as Interpretive Rules, Policy Statements, Guid-
ances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41
This Guide to Federal Agency Rulemaking has been prepared to fulfill the Administrative Conference’s function of encouraging the exchange of information among agencies.

This fifth edition retains the basic organization of the previous four. Like its predecessors, this edition of the Guide has four parts. Part I is an overview of federal agency rulemaking and describes the major institutional “players” and historical development of rulemaking. Part II describes the statutory structure of rulemaking, including the relevant sections of the Administrative Procedure Act (APA) and other statutes that have an impact on present-day rulemaking. Part III contains a step-by-step description of the informal rulemaking process, from the preliminary considerations to the final rule. Part IV discusses judicial review of rulemaking. Appendices include some key rulemaking documents.

While the transitions from the Clinton Administration to the Bush Administration and then to the Obama Administration did not result in a major shift in the rulemaking process—both Presidents Bush and Obama retained the Clinton Executive Order pertaining to White House review of rules—there were some important new initiatives by the Office of Management and Budget. Since 2006, the Supreme Court has issued some significant decisions concerning rulemaking petitions (Massachusetts v. EPA) and the “logical outgrowth test” concerning adequate notice in rulemaking (the Long Island Care at Home case). It continued the development of the law concerning judicial review of legal interpretations made in rulemaking (so-called Chevron, Skidmore, and Auer deference) and also of agency fact finding and policy choice under the arbitrary and capricious test (Fox TV Stations v. FCC).

Moreover, the rise of “e-rulemaking” has continued to be dramatic since 2006, with the large majority of public comments now being filed electronically—with many ramifications that were absent in the era of “paper” rulemaking. And there have been numerous new significant lower court decisions as well. This edition also continues to emphasize court decisions concerning rulemaking procedure and the judicial review of rules, although, as before, the Guide is not intended to be a complete catalog of relevant cases, nor should it be considered the definitive word on their significance. Rather, it should be used as a starting point for discussion or further research on administrative law issues pertaining to agency rulemaking.

I wish to again recognize those who helped out with earlier editions, such as Dan Cohen, Neil Eisner, Fred and Andrew Emery, Ron Levin, Randy May, and David Vladeck. I would also again like to thank those who worked on previous editions, including all my colleagues at ACUS, but especially Michael Bowers, Nancy Miller, and Professor Benjamin Mintz of Catholic University’s Columbus School of Law. Over the years, of course, the Guide had the benefit of support from ACUS Chairs Loren Smith and Marshall Breger, who wrote Forewords for previous editions; the late Ernest Gellhorn, the longtime chair of ACUS’s Committee on Rulemaking; and the many people in various federal agencies and elsewhere who made suggestions on earlier editions and helped make them a success.
For this edition I also received able research and editing assistance from my two research assistants, Emily Baver and Aaron M. Moore, class of 2012, Washington College of Law, American University, and senior editors of the *Administrative Law Review*.

Any errors, of course, are my own.

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