PREFACE

When the Administrative Conference of the United States (ACUS) was forced to close its doors in 1995 (as it turns 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, the fourth edition in 2006, and the fifth edition in 2012. This sixth edition continues the tradition, and brings the Guide up to date with respect to recent cases, new ACUS recommendations, and changes introduced during the second term of the Obama Administration and the first 500 days of the Trump 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 flood of new legislation passed in the late 1960s and early 1970s by which the government

3. Where “formal rulemaking” is required, the trial-type procedures of 5 U.S.C. §§ 556-57 must be followed.
5. Id. § 553(c).
sought to remedy newly perceived health, safety, and environmental problems. In a short time, informal rulemaking supplanted the APA’s formal processes as the preferred means of formulating major governmental 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 decisions 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 memoranda or guidelines intended to have the functional effect of rules. Despite criticism, however, informal rulemaking continues to be central to the maintenance of the administrative state, and according to the Office of Management and Budget, over 5,000 final rule documents were published in the Federal Register in 1989.

Given the extensive use of rulemaking in federal agencies, it is important 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.

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 sixth edition retains the basic organization of the previous five. 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.

The transitions from the Clinton Administration through Obama Administration did not result in a major shift in the rulemaking process. The Clinton Executive Order 12,866 pertaining to White House review of rules has been in place since 1993 and no significant statutory amendments were enacted that have affected the rulemaking process. There have, however, been other significant Executive Orders issued by President Obama, and especially President Trump. The Congressional Review Act was aggressively used by the 115th Congress to disapprove rules issued at the end of the Obama Administration, and bills to modify the rulemaking process have passed the House of Representatives and gained some support in the Senate. Deregulatory initiatives by the Trump Administration have raised the stakes on issues relating to rescinding existing rules and on the scope of judicial review of such actions. The Supreme Court and the courts of appeals have issued some significant decisions concerning access to the courts (reviewability, standing, ripeness, finality, exhaustion) to challenge agency regulations, and judicial review of legal interpretations made in rulemaking (so-called Chevron, Skidmore, and Auer deference) and of agency fact finding and policy choice under the arbitrary-and-capricious test (Fox TV Stations v. FCC). But many of these doctrines remain in a state of flux, and the distinctions between binding regulations and non-binding guidance (interpretive rules and policy statements) have been left unsettled.

We are now firmly in the age of “e-rulemaking; nearly all public comments are now filed electronically—with many ramifications that were absent in the era of “paper” rulemaking. A separate chapter is now devoted to this development. This edition also continues to emphasize court decisions concerning rulemaking procedure and the judicial review of rules, though, 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.

Finally, I should acknowledge that since ACUS (and I) began working on this Guide, rulemaking, like many of our other institutions, have been affected by the political polarization in our country. Professor McGarity has referred to administrative law as a “blood sport,” and for the most part he was talking about rulemaking.

Perhaps even more troubling for authors of Guides, Professor Pierce has suggested there is a “large and growing disconnect between the way we have long understood the process of agency decisionmaking and reality.”11 Nevertheless, I am trying to comply with his advice to administrative law professors about what to do about that: “First, we should continue to teach the basics, including doctrines that many of us believe to be obsolete and practices that are frequently honored in the breach. Second, we should describe the ways in which those practices and doctrines have been modified or compromised in recent years.”12

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 chair’s 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, Thomas Scott, class of 2018, and Amy Lin, class of 2019, Washington College of Law, American University.

Any errors, of course, are my own.

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