

Lars Noah

*Doubt About Direct Final Rulemaking*

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Abstract by Christine Parsadaian

This article examines the struggle agencies face regarding the heavy procedural requirements associated with rulemaking and suggests that the contemporary shortcuts employed by agencies will not be completely effective until Congress amends the Administrative Procedure Act (APA) to expressly authorize these shortcuts. The article explains that the numerous difficulties agencies have faced through the years have forced them to switch from formal rule-making procedures to more informal notice-and-comment procedures. As these informal procedures have also become burdensome due to intense judicial scrutiny, the author explains how agencies have shifted to “direct final ruling” as a way to more expediently employ regulations.

After analyzing the manner by which various agencies have employed direct final ruling, the author critiques the efficacy of this informal system. The author specifically discusses several key problems associated with “direct final ruling.” He notes that the APA does not formally authorize it. Though proponents suggest that either the “good cause exception” of the APA or the concept of “substantial compliance” with the APA should not void direct final rules on procedural grounds, courts have generally not excused violations based on these arguments. Second, courts may intuitively dismiss direct final rulings as attempts to avoid inherent, necessary judicial scrutiny. Moreover, the article suggests that direct rulemaking provides no advantage over formal APA approved systems since direct final ruling employs only non-controversial rules which the judiciary would not likely second-guess under the formal systems in the first place.