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*The APA and the Back-End of Regulation:
Procedures for Informal Adjudication*

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Abstract by Raymond R. Janairo

Congress has permitted agencies to use back-end processes to make incremental adjustments to regulation by utilizing exceptions, time extensions, variances, and waivers. These adjustments would relieve agencies from some of the “unavoidable and significant guess work used in front-end analysis.” Commentators have concluded that these processes should lead to more rational public policy. There are, however, concerns that agencies may misuse these processes. Moreover, a survey of the use of such back-end procedures found no uniformity in their usage. Often, Congress did not require procedures for making back-end adjustments. If Congress did provide some guidance, the one uniform factor was the use of notice and an opportunity for comment; in some instances, Congress required formal adjudications or rulemaking.

The authors recommend that Congress amend the APA in order to bring agency back-end procedures into uniformity and to allow for greater transparency. These amendments would be limited to notice-and-comment procedures, creating agency-specific electronic dockets, and agency annual reports on the use of back-end procedures and their outcomes. The amendments would allow the interested public to monitor whether “an agency relied too heavily on back-end adjustments, failed to consider the cumulative impact of adjustments, or simply used the adjustment process to water down regulations while maintaining an illusion that strict regulation remained in place.” Taking into account the limited resources of citizen groups and the dispersed nature of these back-end adjustments across the country, the authors posit that an electronic docket with adequate search engine capacity would balance the cost and transparency issues inherent in monitoring agencies. Moreover, for those without sufficient access to electronic media, the public could turn to annual agency reports to evaluate agency action.