

Agency Avoidance of Rulemaking Procedures

Connor Raso of the Securities and Exchange Commission has published a 67-page **article** that analyzes when and why administrative agencies avoid rulemaking procedural requirements such as the Administrative Procedure Act's notice-and-comment process.

The summary of the article states that "original empirical analysis shows that agencies invoke statutory exemptions to avoid such rulemaking procedures more frequently as the threat of a lawsuit challenging that avoidance declines. In situations with a low threat of suit, agencies have avoided rulemaking procedures for more than 90 percent of rules. Such avoidance falls when the threat of suit increases. But even when litigation ensues, courts do not consistently require agencies to comply with rulemaking procedures. This spotty judicial enforcement, along with significant agency avoidance, casts doubt on the claim that rulemaking procedures have significantly burdened the rulemaking process."

But agency avoidance suggests that rulemaking procedures do less than commonly thought to promote public deliberation in the rulemaking process, foster agency expertise, guard against agency arbitrariness, and make agencies accountable to Congress and to the public. "This suggests that agency avoidance of rulemaking procedures has some benefits, but also many costs," Raso writes.

Read the white paper.