

The APA

The Administrative Procedure Act (APA) governs the process by which federal agencies develop and issue regulations. It includes requirements for publishing notices of proposed and final rulemaking in the *Federal Register*, and provides opportunities for the public to comment on notices of proposed rulemaking. The APA requires most rules to have a 30-day delayed effective date. In addition to setting forth rulemaking procedures, the APA addresses other agency actions such as issuance of policy statements, licenses, and permits. It also provides standards for judicial review if a person has been adversely affected or aggrieved by an agency action.

The Administrative Procedure Act, sometimes called the “Magna Carta of administrative law,” is a 1946 statute that governs hundreds of federal agencies, including the Department of Homeland Security. It requires that agencies go through a process known as “notice and comment” before issuing, amending or repealing “substantive rules.” As part of that process, the agency must publish proposed actions in the Federal Register and then give the public at least 30 days to submit feedback. When it finalizes its proposal, the agency must respond to issues raised by the public comments and must explain why it settled upon the course of action that it chose. The explanation must show why the agency’s action is reasonable and not “arbitrary” or “capricious.”

In hundreds of cases, the federal courts have had to decide what counts as a “substantive rule” to which the notice-and-comment requirement applies. In a nutshell, a substantive rule is an agency action that alters the rights or interests of parties, changes the background regulatory regime and has a present and binding effect. Sometimes, agencies will take actions that do all of these things but are labeled as “policy statements” rather than “substantive rules.” In those cases, federal courts will block the agency from carrying through on its policy until it goes through the notice-and-comment process.