

APA: Informal Rulemaking

Step #1: Notice of Proposed Rulemaking

Step #2: Public Comments

Step #3: Final Rule

Chevron 2-Step Analysis

- (1) Has Congress spoken directly on the precise issue in question?
- (2) If not, is the agency's interpretation a permissible and reasonable reading of the statute?

APA – Section 706(2)(A)

The reviewing court shall . . . set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

APA – Section 704

Actions reviewable-- Agency action made reviewable by statute and final agency action . . . in a court are subject to judicial review.

Arbitrary and Capricious Standard

- Did agency examine relevant data?
- Did agency articulate satisfactory explanation that connects facts/conclusions to policy choice?
- Did agency rely on factors Congress did not intend agency to consider?
- Did agency fail to consider important aspects of the problem?
- Is agency's explanation counter to the evidence?
- Is agency's rationale so implausible could not be ascribed to difference in agency's view?
- **Did agency consider all regulatory alternatives?*
- **Did agency adequately explain any "flip flops"?*