

## Notice & Comment

---

### How Agencies Use Advance Notices of Proposed Rulemaking

#### Advance Notices: A Practical Solution?

On June 4, 2015, Susan E. Dudley appeared before a Roundtable Discussion of the [Senate Subcommittee on Regulatory Affairs and Federal Management](#) and gave [testimony](#) on practical solutions for improving the federal regulatory process. During the discussion, members of the subcommittee mentioned the possibility of using advance notices of proposed rulemaking (ANPRMs) to improve public participation in the rulemaking process.<sup>1</sup> For example, Congress is considering legislation that would require ANPRMs for all major regulations and rules that raise novel legal and policy issues.<sup>2</sup>

The Administrative Procedure Act does not require, or even mention, ANPRMs. ANPRMs are different from proposed rules in that they don't typically present a particular policy proposal on which the public can comment. Instead, they might seek comments from the public on more general topics, such as what type of information hydraulic fracturing operations should report<sup>3</sup> or how to subject grocery stores to implementation of the FDA Food Safety Modernization Act.<sup>4</sup> These ANPRMs are intended to gather data or perspectives from the public before the agency has settled on a specific policy solution or group of specific policy solutions.

Eventually, agencies can use public input to develop a proposed rule, which is open for public comment again. Because ANPRMs invite public comments on general regulatory frameworks before the agency has identified specific policy options, they make public input a more instrumental part of the rulemaking process.

Agencies already use ANPRMs to gather public input, and have for many years. However, our analysis sought to answer these questions: How frequently do agencies use ANPRMs? Which agencies use ANPRMs most frequently? Do agencies use ANPRMs to solicit public input on minor regulatory issues, or for bigger policy questions? The below analysis provides answers to each of these questions for use by policymakers, agencies, and the public alike as we contemplate practical solutions for improving the regulatory process.

---

<sup>1</sup> Watch a video of the subcommittee exchange on advance notices [here](#), beginning at 44:32

<sup>2</sup> For more information about the Regulatory Accountability Act, visit Congress.gov:

<https://www.congress.gov/bill/114th-congress/house-bill/185>

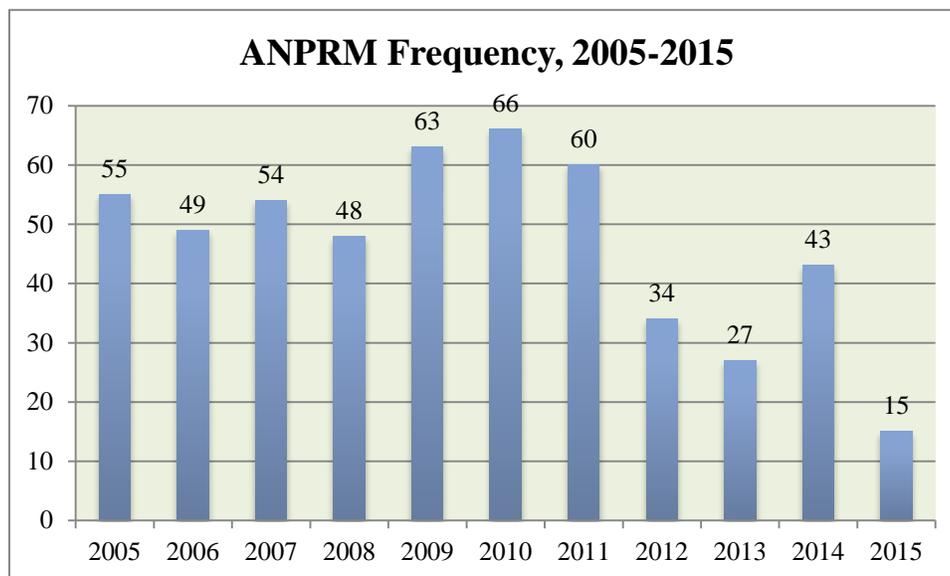
<sup>3</sup> 79 FR 28664

<sup>4</sup> 79 FR 16698

## How frequently do agencies issue ANPRMs?

As noted above, agencies already use ANPRMs to seek comment from the public on regulatory issues. Rather than being a completely new reform, asking agencies to use ANPRMs for more regulatory matters would instead ramp up a currently existing practice.

To answer the question of how frequently agencies issue ANPRMs, we conducted an analysis of the Federal Register from January 2005 – June 2015. To generate an accurate count, we excluded publications entitled “Advance Notice of Proposed Rulemaking” which were actually extensions of comment periods or corrections to previously published ANPRMs.



Between 2005 and 2011 all agencies combined issued on average about 54 ANPRMs per year. This is a small fraction of the average number of total proposed rules issued per year during the same period: 2,403.

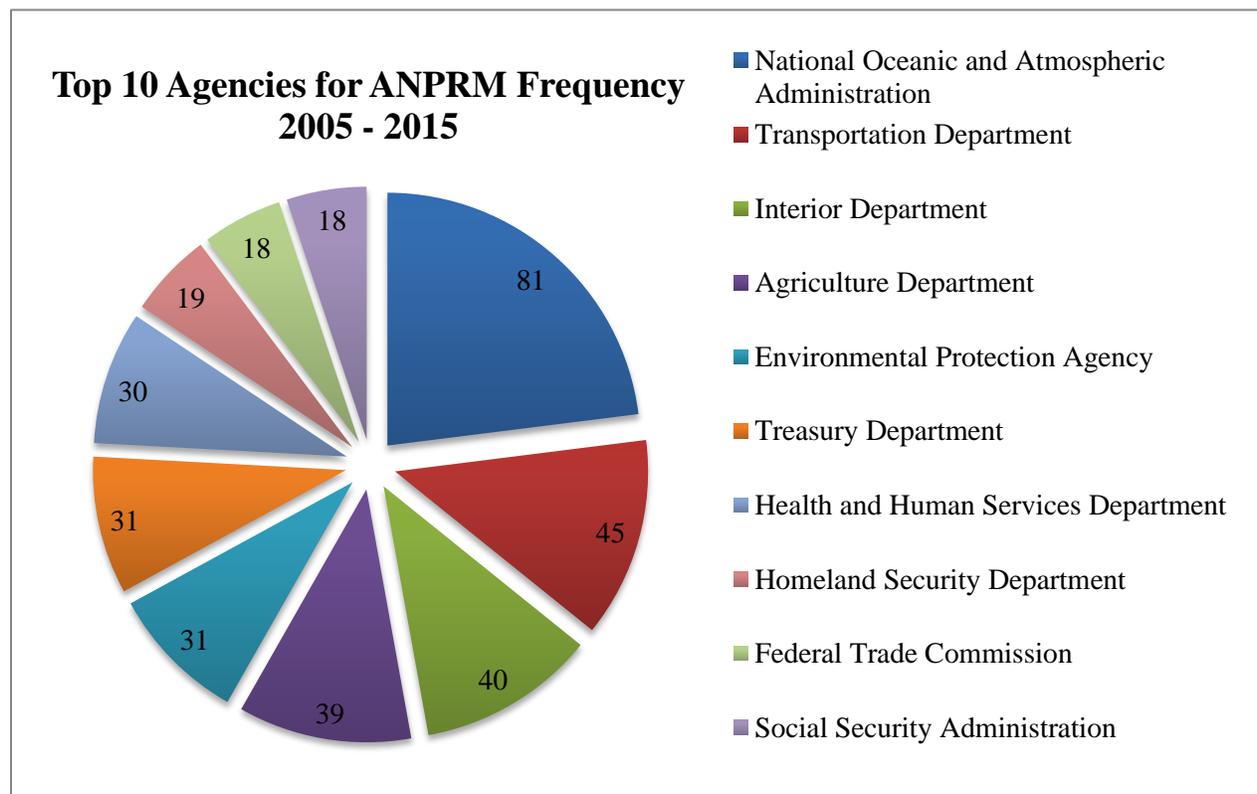
Agencies issued fewer after 2011, with average ANPRMs issued per year falling to 35 for the period 2012 – 2014. This excludes data from 2015 from annual averages because this analysis was conducted in June 2015.

While this informs us of how frequently all agencies combined use ANPRMs to seek input from the public, it doesn't tell us if some agencies seek this input more often than others do.

## Which agencies issue ANPRMs?

Some agencies make more frequent use of ANPRMs than others. During the Roundtable Discussion on June 4, Chairman James Lankford expressed interest in examining differences in ANPRM practices between agencies to identify which agencies do a good job of including the public at the early stages of the rulemaking process.

Over the entire 10-year period analyzed, the National Oceanic and Atmospheric Administration (NOAA) issued 81 ANPRMs, the most advance notices of any agency. This total is nearly twice the number issued by the Department of Transportation, which at 45 was the second most prolific issuer of advance notices. Other agencies that issued a notable number of advance notices include the Interior Department, Agriculture Department, and the Environmental Protection Agency.



Almost all NOAA advance notices are substantive, non-significant regulatory actions related to fisheries. Correspondence with NOAA staff reveals that its heavy use of ANPRMs may be unique to the circumstances of its statutory mandate to limit access to fisheries threatened by overfishing. ANPRMs are used to establish “control dates” to inform the public that NOAA will be limiting the right to fish in a particular water in order to discourage speculative entry into and/or investment in the fishery.

NOAA notes further that it opts to use ANPRMs for complex issues that are not subject to stringent deadlines or time pressures. This suggests that ambitious statutory deadlines for rulemaking likely discourage the use of advance notices, limiting the public's opportunity to shape regulatory policy.<sup>5</sup>

## What type of rules are ANPRMs?

Some rulemakings establish standards that have wide-ranging effects, while others only govern internal agency procedures. If the goal of increasing the use of advance notices is to increase the role of the public in regulatory policy, we are more interested in the former rules than the latter.<sup>6</sup>

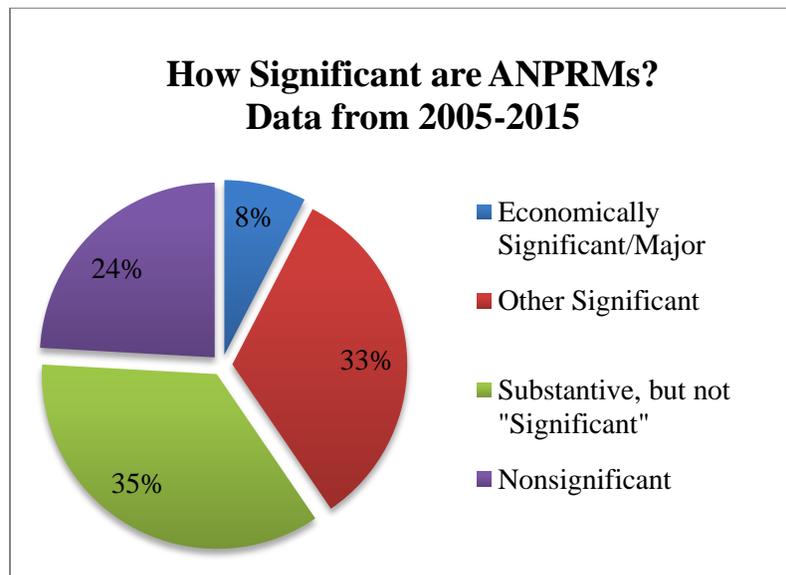
To better understand the type of rules for which agencies issue advance notice, we analyzed the proportion of ANPRMs that fell into each of four categories:

1. **Economically significant or major rules** – these are rules that incur at least \$100 million in annual costs or benefits, or that may result in major increases in costs or prices.
2. **“Other” significant rules** – these are rules that meet other criteria of “significance” outlined in Executive Order 12866 (such as a rule that raises novel legal or policy issues), but that incur less than \$100 million in annual costs or benefits.
3. **Substantive, but not significant** – these are substantive rules that do not meet the criteria of a significant rule.
4. **Nonsignificant rules** – these rules are neither substantive nor significant.

---

<sup>5</sup> In a three-part series, Christopher Conover and Jerry Ellig identify some of the problems with statutory deadlines in implementation of the Patient Protection and Affordable Care Act. See Beware the Rush to Presumption, Parts A, B, and C: <http://mercatus.org/reportcards/projects/patient-protection-and-affordable-care-act>

<sup>6</sup> Note that the Regulatory Accountability Act of 2015, which passed the House and was received in the Senate on January 16, 2015, would require agencies to issue advance notices for all major regulations and rules that raise novel legal and policy issues.



Our analysis finds that the majority of advance notices were for rules that are not significant. In fact, only 8% of advance notices were associated with economically significant or major regulatory actions, demonstrating much room for improvement in this area. A third of ANPRMs were for “other significant” rules, such as those that introduce novel legal or policy issues but which don’t meet the \$100 million threshold for economically significant.

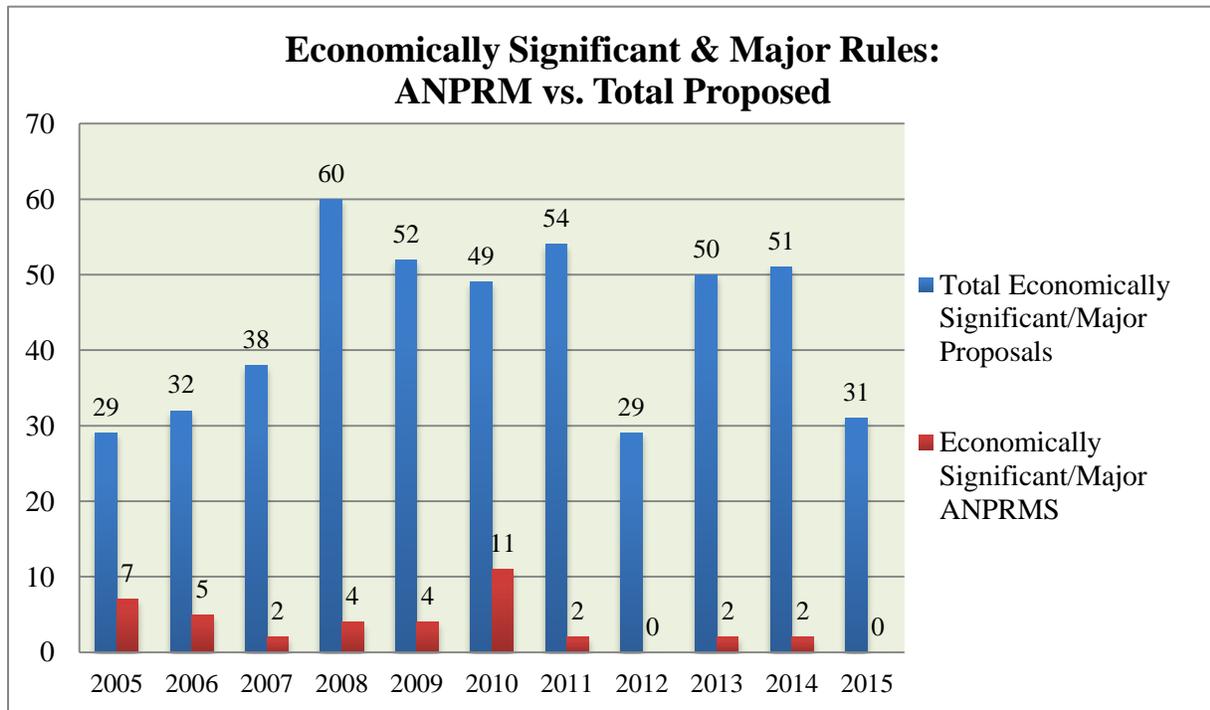
Still, a majority (59%) of advance notices were for regulatory actions that are not significant, including “substantive” and “nonsignificant” rules. These findings indicate that agencies are generally not using ANPRMs to get input on rules materially affecting the general public.

These statistics raise the question: why do rules of less significance receive greater advance consideration? One possibility is that agencies may issue ANPRMs when regulations disproportionately affect concentrated interests (as may be the case with the NOAA fishery rules). These less significant rules may impose lower aggregate costs, but these costs are borne by concentrated groups (e.g. fishermen). In contrast, economically significant rules often disperse large costs across the public, dampening individual burden. As such, agencies may be less proactive seeking comment for economically significant rules despite their greater overall economic effect.

Today, agencies effectively employ advance notices to collect technical, local, and context-specific knowledge for less significant rules affecting salient groups. This is a best practice that can be adopted for economically significant and major rules affecting the general public.

While economically significant and major regulatory actions are a small portion of overall advance notices, they are also a small portion of general regulatory activity. Recognizing this point, we also analyzed the number of economically significant and major ANPRMs as a

proportion of total economically significant and major proposed rules. Our results are displayed below.



Our analysis indicates that the vast majority of economically significant and major proposed rules do not get advance comments from the public before policy recommendations are formulated. If regulatory reform proposals seek to increase opportunities for the public to influence important regulatory decisions, agency use of advance notices has room for improvement.