



Mass, Computer-Generated, and Fraudulent Comments

Committee on Rulemaking

Proposed Recommendation for Committee | April 16, 2021

1 The Administrative Procedure Act (APA) requires agencies to give members of the
2 public notice of proposed rules and the opportunity to comment on them.¹ The public comment
3 process is not a vote or referendum on the rulemaking. Rather, it is thought to improve the
4 quality of rules by enabling agencies to get information from a wide audience and by allowing
5 public scrutiny of rules before they take effect. Accordingly, the notice-and-comment
6 rulemaking process is less about the sheer volume of comments or their sources than it is about
7 their informational content.

8 Technological advances have made it easier for the public to comment on proposed rules
9 and review comments submitted by other people. For each proposed rule subject to notice-and-
10 comment procedures, agencies create and maintain an online public rulemaking docket where
11 they collect and publish the comments they receive about the proposed rule, along with other
12 information about the rulemaking the agencies have made available for public viewing.² The
13 Administrative Conference has previously recommended that agencies manage their public
14 rulemaking dockets to achieve maximum disclosure to the public but has also acknowledged that
15 legal and prudential concerns may limit agencies from displaying certain information, including
16 certain public comments.³

¹ 5 U.S.C. § 553.

² See E-Government Act § 206, 44 U.S.C. § 3501 note (establishing the e-Rulemaking program to create an online system for conducting the notice-and-comment process).

³ Admin. Conf. of the U.S., Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*, 86 Fed. Reg. 6614 (Jan. 22, 2021).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

17 In addition to making it easier for people to comment on proposed rules and review
18 others' comments on proposed rules, however, technological advances have magnified the
19 impact of three forms of potentially problematic commenting: mass comment campaigns,
20 computer-generated comments, and a type of fraudulent comment called a "malattributed
21 comment." A mass comment campaign is characterized by organizations orchestrating the online
22 submission of a large number of identical or nearly identical comments. Computer-generated
23 comments are comments that are generated by software algorithms rather than humans.
24 Malattributed comments are comments falsely attributed to persons who did not, in fact, submit
25 them, a task made much easier by online datasets of personal information and simple software
26 applications that can automate malattribution.⁴ These "technology-enabled comments"
27 potentially pose problems for notice-and-comment rulemaking. The Administrative Conference
28 has previously called attention to some of these potential problems,⁵ as has Congress.⁶

29 Some of these potential problems apply to each type of technology-enabled comment.
30 For example, technology-enabled comments can make it difficult for agencies to extract and
31 synthesize useful information during the comment process. They can tax agencies' resources,
32 adding processing costs and potential delays. They can also harm public perceptions about the
33 legitimacy of particular rules and the rulemaking process as a whole.

34 There are also potential problems associated with particular types of technology-enabled
35 comments. Some of the challenges involving mass comment campaigns stem from agencies'
36 having to process large numbers of comments that are only slightly different. Computer-

⁴ See Steve Balla, Reeve Bull, Bridget Dooling, Emily Hammond, Michael Herz, Michael Livermore & Beth Simone Noveck, *Mass, Computer-Generated, and Fraudulent Comments 11* (Apr. 2, 2021) (draft report to the Admin. Conf. of the U.S.).

⁵ Admin. Conf. of the U.S., *Symposium on Mass and Fake Comments in Agency Rulemaking* (Oct. 5, 2018), <https://www.acus.gov/sites/default/files/documents/10-5-18%20Mass%20and%20Fake%20Comments%20in%20Agency%20Rulemaking%20Transcript.pdf>.

⁶ PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS, *STAFF REPORT, ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS* (2019), <https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

37 generated comments may present legal issues in light of the APA’s stipulation that only
38 “interested persons” are due an opportunity to comment on proposed rules.⁷ As a practical
39 matter, it can also be difficult for agencies to distinguish computer-generated comments from
40 comments submitted by humans without the use of software algorithms. And malattributed
41 comments may mislead agencies, harm the people whose identities are misappropriated, and
42 thereby raise issues under the APA and state and federal criminal laws.

43 For now, there is still not much evidence that technology-enabled comments have
44 seriously harmed the integrity of particular rulemakings or the rulemaking system as a whole.
45 But there is considerable evidence that technology-enabled comments can pose immediate
46 administrative and procedural problems for agencies conducting rulemakings. Fortunately for
47 agencies, there are tools available to help them surmount or mitigate many of these problems. As
48 part of its eRulemaking Program, for example, the General Services Administration has
49 implemented identity validation technologies on the Regulations.gov platform that make it easier
50 for agencies to identify computer-generated or malattributed comments. Many federal agencies
51 utilize de-duplication software that enables them to identify and group duplicate or near-
52 duplicate comments. And governments in the United States and around the world are innovating
53 new technologies, platforms, and processes to obtain useful public input in the rulemaking
54 process.

55 This Recommendation identifies current best practices for agencies to use in dealing with
56 some of the documented problems associated with technology-enabled comments. Agencies
57 should tailor the suggestions in this Recommendation to their particular rulemaking programs
58 and the types of comments they receive.

RECOMMENDATION

Technology

⁷ 5 U.S.C. § 553(b).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 59 1. Agencies should continue to (or, if they have not already, begin to) utilize de-duplication
60 software to identify the unique content in submitted comments.
- 61 2. Agencies should publish policies regarding the posting of duplicate and near-identical
62 comments. These policies should balance concerns including user-friendliness,
63 transparency, and informational completeness. Agencies should consider including
64 different approaches in their duplication policies, including the option to:
- 65 a. Post a single representative example with the count of the duplicates received and
66 an option to view all comments;
- 67 b. Break out and post non-identical content;
- 68 c. Ask people and entities orchestrating mass comment campaigns to submit a single
69 comment with multiple signatures rather than duplicate comments; and
- 70 d. Provide enhanced search options based on the unique information content of
71 comments.
- 72 3. Agencies, both those that use Regulations.gov and those that do not, should consider
73 using identity validation or other similar identity proofing tools in their comment
74 submission processes.
- 75 4. Agencies and relevant coordinating bodies (which could include the eRulemaking
76 Program, the Office of Information and Regulatory Affairs, and any governmental bodies
77 or informal working groups formed by agencies that address common rulemaking issues)
78 should encourage the development of technology for identifying malattributed and
79 computer-generated comments in the docket.
- 80 5. Agencies and relevant coordinating bodies should stay abreast of developments in the
81 submission of mass, malattributed, and computer-generated comments so that approaches
82 to combating difficulties arising from such developments can be implemented as needed.

Coordination and Training

- 83 6. Agencies and relevant coordinating bodies should share best practices and relevant
84 innovations for addressing challenges and opportunities connected with mass,
85 malattributed, and computer-generated comments, and technologies related to



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 86 supplemental public participation processes.
- 87 7. Agencies should work closely with relevant coordinating bodies to improve existing
88 technologies and develop new technologies to address issues associated with mass,
89 malattributed, and computer-generated comments. The eRulemaking Program should
90 provide a common de-duplication platform for agencies to use, though agencies should
91 be free to modify it or use another platform as appropriate. The eRulemaking Program
92 and other relevant coordinating bodies should also work with agencies and private sector
93 experts and vendors to develop technologies that respond to common issues associated
94 with mass, malattributed, and computer-generated comments.
- 95 8. Agencies should offer opportunities for ongoing training and staff development to
96 respond to the rapidly evolving nature of technologies related to mass, malattributed, and
97 computer-generated comments, and supplemental public participation processes.

Docket Management

- 98 9. If an agency decides to exclude or remove some or all duplicate, malattributed, or
99 computer-generated comments from the docket, it should articulate such a policy in
100 advance, or at least provide a reasoned explanation after excluding the comment or
101 comments.
- 102 10. An agency policy against submission of malattributed comments should provide that if
103 the agency is aware that it has received such a comment, it either retain the comment in
104 the docket but remove the malattribution (i.e., render it an anonymous submission) or
105 remove the comment from the docket altogether. While agencies do not have an
106 obligation to affirmatively search the docket for malattributed comments, they are free to
107 set reasonable policies concerning the public comment process and reject comments that
108 violate their policies. Agencies may also rely on comments that violated their
109 commenting policies (e.g. late comments) in some circumstances. If an agency
110 determines that a malattributed comment will remain in the docket, anonymization should
111 be used to protect the person whose identity has been used.
- 112 11. Agencies should not discard the computer-generated comments they receive unless those



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 113 comments contain no informational value. When storing the comments, agencies may
114 segregate computer-generated comments or treat them separately.
- 115 12. Any duplicative, malattributed, or computer-generated comment on which an agency
116 actually relies should be placed and retained in the rulemaking docket. Agencies may
117 choose to anonymize malattributed comments, and to segregate or flag computer-
118 generated comments, that are retained in the docket.
- 119 13. Agencies should provide opportunities (including potentially after the comment deadline)
120 for individuals whose names have been attached to comments they did not submit to
121 identify and request removal of such comments from the docket.
- 122 14. Agencies should consider taking affirmative steps to identify comments that are
123 malattributed or computer-generated. Such steps may include the consideration and
124 adoption of software programs that assist in identifying these types of comments.
- 125 15. If an agency flags a comment as malattributed or computer-generated, or removes such a
126 comment from the docket, and the submitter provided electronic contact information, the
127 agency should notify the submitter of the agency's action.
- 128 16. When publishing a final rule, agencies should state whether they removed from the
129 docket any malattributed or computer-generated comments.

Transparency

- 130 17. Agencies and relevant coordinating bodies should consider providing materials that
131 explain to prospective commenters what information is useful to an agency in a public
132 comment. This could include various formats to reach different audiences, such as videos
133 and FAQs.
- 134 18. In notices of proposed rulemaking, notices of inquiry, and advanced notices of proposed
135 rulemaking, agencies should ask specific questions and identify particular information
136 that would be useful in developing the proposal.

Public Participation Beyond the Comment Process

- 137 19. Agencies and relevant coordinating bodies should stay abreast of platforms and processes



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

138 for facilitating public participation outside the notice-and-comment process, particularly
139 to the extent public use of such platforms and processes might reduce the burdens
140 agencies face from technology-enabled comments. Agencies should consider new
141 technologies that can be used to structure meaningful dialogue between agencies and
142 relevant publics that may present such alternatives.