



Mass, Computer-Generated, and Fraudulent Comments

Committee on Rulemaking

Proposed Recommendation for Committee | May 11, 2021

1 Under the Administrative Procedure Act (APA), agencies must give members of the
2 public notice of proposed rules and the opportunity to offer their “data, views, or arguments” for
3 the agencies’ consideration.¹ For each proposed rule subject to notice-and-comment procedures,
4 agencies create and maintain an online public rulemaking docket in which they collect and
5 publish the comments they receive about the proposed rule, along with other publicly available
6 information about the rulemaking.² Agencies must then process, read, and analyze the comments
7 received. The APA requires agencies to consider the “relevant matter presented” in the
8 comments received and to provide a “concise general statement of [the rule’s] basis and
9 purpose.”³ When a rule is challenged on judicial review, courts have required agencies to
10 demonstrate that they have considered and responded to any comment that raises a significant
11 issue.⁴ The notice-and-comment process is an important opportunity for the public to provide
12 input on a proposed rule and for the agency to “avoid errors and make a more informed decision”
13 on its rulemaking.⁵

14 Technological advances have expanded the public’s access to agency rulemaking dockets
15 and made it easier for the public to comment on proposed rules in ways that the Administrative

Commented [DS1]: For Committee Discussion: At the last meeting, the Committee discussed the possibility of changing the title. If the Committee decides to recommend a title change, it will be offered as a proposed amendment at the Plenary Session.

¹ 5 U.S.C. § 553. This requirement is subject to a number of exceptions. *See id.*

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); *see also* Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013) (distinguishing between “the administrative record for judicial review,” “rulemaking record,” and the “public rulemaking docket”).

³ 5 U.S.C. § 553(c).

⁴ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (“An agency must consider and respond to significant comments received during the period for public comment.”).

⁵ *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1816 (2019).



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16 Conference has encouraged.⁶ At the same time, in recent high-profile rulemakings, members of
17 the public have submitted comments in new ways or at new scales that can challenge agencies’
18 current approaches to processing these comments or managing their public rulemaking dockets.

19 Agencies have confronted three types of comments that present distinctive management
20 challenges: (1) mass comments, (2) computer-generated comments, and (3) a type of fraudulent
21 comment called a “malattributed comment.” For the purposes of this Recommendation, mass
22 comments are defined as comments submitted by members of the public organizing the
23 submission of a large number of identical or nearly identical comments. Computer-generated
24 comments are comments generated by a software algorithm rather than a human. And
25 malattributed comments are comments falsely attributed to people who did not submit them.

26 These three types of comments, which have been the subject of recent reports by both
27 federal⁷ and state⁸ authorities, can strain how agencies currently process, read, and analyze the
28 comments they receive in some rulemakings. If not managed well, these comments can
29 contribute to rulemaking delays and raise other legal issues for agencies to consider during the
30 rulemaking process. In addressing the three types of comments in a single recommendation, the
31 Conference does not mean to suggest that these comments are to be addressed in the same way.
32 Rather, the Conference is addressing these comments in the same Recommendation because,

⁶ See Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48791 (Aug. 9, 2011).

⁷ See 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); U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-413T, SELECTED AGENCIES SHOULD CLEARLY COMMUNICATE HOW THEY POST PUBLIC COMMENTS AND ASSOCIATED IDENTITY INFORMATION (2020); U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-483, SELECTED AGENCIES SHOULD CLEARLY COMMUNICATE PRACTICES ASSOCIATED WITH IDENTITY INFORMATION IN THE PUBLIC COMMENT PROCESS (2019).

⁸ NEW YORK STATE OFFICE OF THE ATT’Y GEN LETITIA JAMES, FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE (2021).



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33 despite their differences, they present similar and often overlapping management concerns
34 during the rulemaking process. In some cases, agencies may also confront all three types of
35 comments in the same rulemaking.

36 The challenges presented by these three types of comments are by no means identical but
37 may at times be somewhat overlapping or similar. For mass comments, agencies may encounter
38 processing or cataloging challenges simply as a result of the volume and identical or nearly
39 identical content of the comments they receive. Without the requisite tools, agencies may also
40 find it difficult or time-consuming to digest and analyze the overall content of all comments
41 received.

42 In contrast with mass comments, computer-generated comments and malattributed
43 comments may mislead an agency or raise potential issues under the APA and other relevant
44 statutes. One particular problem that agencies may find difficult is distinguishing computer-
45 generated comments from comments written by humans. Computer-generated comments may
46 also raise potential issues for agencies based on the APA's intention to allow only "interested
47 persons" the opportunity to comment on proposed rules. Malattributed comments can harm
48 people whose identities are stolen and may create the possibility of prosecution under state or
49 federal criminal law. Malattributed comments may also diminish the informational value of a
50 comment, particularly in cases in which the commenter claims to have situational knowledge or
51 the identity of the commenter is otherwise relevant. The informational value that both of these
52 types of comments provide to the agency may be limited, or at least different.

53 This Recommendation is limited to how agencies can better manage the processing
54 challenges associated with these types of comments.⁹ By addressing these processing challenges,
55 the Recommendation does not intend to imply that widespread participation in the rulemaking

⁹ This Recommendation does not address what role particular types of comments should play in agency decision makings or what consideration, if any, an agency should give to the number of comments in support of a particular position.



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56 process, including via mass comments, is problematic. Indeed, the Administrative Conference
57 has explicitly spoken in favor of widespread public participation on multiple occasions,¹⁰ and the
58 current recommendations should help agencies cast a wide net when seeking input from all
59 individuals and groups affected by a rule. The Recommendation aims to enhance agencies'
60 ability to process comments they receive in the most efficient way possible and to ensure that the
61 rulemaking process is transparent to prospective commenters and the public more broadly.

62 Agencies' ability to process comments can be enhanced by digital technologies. As part
63 of its eRulemaking Program, for example, the General Services Administration (GSA) has
64 implemented technologies on the Regulations.gov platform that make it easier for agencies to
65 verify that a commenter is a human being.¹¹ GSA's Regulations.gov platform also includes an
66 application programming interface to facilitate mass comment submission.¹² This technology
67 platform allows partner agencies to better manage comments from identifiable entities that
68 submit large volumes of comments. Some federal agencies also use de-duplication software to
69 identify and group duplicate or near-duplicate comments.

70 New software and technologies will likely emerge in the future, and agencies will need to
71 keep apprised of innovations in managing public comments. Agencies might consider
72 innovations that augment the notice-and-comment process with alternative methods for
73 encouraging public participation, particularly to the extent that these innovations can address

¹⁰ See Recommendation 2018-7, *supra* note 6; Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75117 (Dec. 17, 2014); Recommendation 2013-5, *supra* note 6; Recommendation 2011-8, *supra* note 6; Admin. Conf. of the U.S., Recommendation 2011-7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 Fed. Reg. 2261 (Jan. 17, 2012); Recommendation 2011-2, *supra* note 6.

¹¹ This software is distinct from identity validation technologies that force a commenter to prove their identity.

¹² See *Regulations.gov API*, REGULATIONS.GOV, <https://open.gsa.gov/api/regulationsgov/> (last visited Apr. 22, 2021).



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74 some of the management challenges described above.¹³ Because technology is rapidly changing,
75 agencies will need to be aware of new developments that could enhance and promote meaningful
76 public participation in rulemaking.

77 Not all agencies will encounter mass, computer-generated, or malattributed comments.
78 But some agencies have confronted all three, sometimes in the same rulemaking. In offering the
79 best practices that follow, the Administrative Conference recognizes that agency needs and
80 resources will vary. As such, agencies should tailor the suggestions in this Recommendation to
81 their particular rulemaking programs and the types of comments they receive or expect to
82 receive.

RECOMMENDATION

Managing Mass Comments

- 83 1. The eRulemaking program that the General Services Administration (GSA) runs should
84 provide a common de-duplication platform for agencies to use, although GSA should
85 allow agencies to modify the platform or use another platform as appropriate. When
86 agencies find it helpful to process a large number of comments, they should use reliable
87 and appropriate software to identify the unique content in submitted comments and to
88 extract meaningful information from comments. This software should provide agencies
89 with enhanced search options to identify the unique content of comments, such as the
90 technologies used by commercial legal databases like Westlaw or LexisNexis.
- 91 2. If agencies decide to reduce the burdens associated with posting large volumes of
92 identical or nearly identical comments to the docket, they may consider inviting people
93 and entities organizing mass comments to submit a single comment with multiple

¹³ See Steve Balla, Reeve Bull, Bridget Dooling, Emily Hammond, Michael Herz, Michael Livermore & Beth Simone Noveck, *Mass, Computer-Generated, and Fraudulent Comments* 43–48 (Apr. 2, 2021) (draft report to the Admin. Conf. of the U.S.).



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94 signatures rather than separate but identical comments. Alternatively, they may wish to
95 consider approaches to managing the display of comments online, such as by posting
96 only a single representative example of identical comments in the agency docket or by
97 breaking out and posting only non-identical content in the agency docket. When agencies
98 decide not to display all identical comments online, they should provide clear notice to
99 the public.

100 3. When an agency decides not to include all identical or nearly identical comments in its
101 public rulemaking docket due to management concerns, it should ensure that any reported
102 total number of comments (such as in Regulations.gov or in the preambles to final rules)
103 accounts for the number of identical or nearly identical comments and that the agency
104 provides an opportunity for interested members of the public to obtain or access all the
105 comments received.

Managing Computer-Generated Comments

106 4. Agencies should not discard the computer-generated comments they receive unless those
107 comments contain no informational value. When storing these comments, agencies may
108 store computer-generated comments in a separate folder or other location.

109 5. If an agency flags a comment as computer-generated, or removes such a comment from
110 the docket, and the submitter provided electronic contact information, the agency should
111 notify the submitter of the agency's action either by noting the removal in the docket or
112 by notifying the submitter directly.

113 6. Agencies that operate their own commenting platforms should consider using technology
114 that verifies that a commenter is a human being, such as reCAPTCHA or other similar
115 identity proofing tools, in their comment submission processes. The eRulemaking
116 platform should continue to retain such functionality.

117 7. When an agency relies on a computer-generated comment, it should be certain to include
118 that comment on its rulemaking docket and note that it was computer-generated. When
119 publishing a final rule, agencies should state whether they removed from the docket any



120 computer-generated comments.

Managing Malattributed Comments

- 121 8. Agencies should provide opportunities (including potentially after the comment deadline)
122 for individuals whose names or identifying information have been attached to comments
123 they did not submit to identify such comments and to request that the comment be
124 anonymized and removed from the docket.
- 125 9. If an agency flags a comment as malattributed, or removes such a comment from the
126 docket, and the submitter provided electronic contact information, the agency should
127 notify the submitter of the agency's action either by noting the removal in the docket or
128 by notifying the submitter directly.
- 129 10. When an agency relies on a comment it knows is malattributed, it should be certain to
130 include that comment on its rulemaking docket and note that it was malattributed. When
131 publishing a final rule, agencies should state whether they removed from the docket any
132 malattributed comments.

Enhancing Agency Transparency in the Comment Process

- 133 11. Agencies should inform the public about their policies concerning the posting and use of
134 mass, computer-generated, and malattributed comments. These policies should take into
135 account the meaningfulness of the public's opportunity to participate in the rulemaking
136 process and should balance concerns such as user-friendliness, transparency, and
137 informational completeness. In their policies, agencies may provide for exceptions in
138 appropriate circumstances.
- 139 12. Agencies and relevant coordinating bodies (such as the eRulemaking Program, the Office
140 of Information and Regulatory Affairs, and any governmental bodies or informal working
141 groups that address common rulemaking issues) should consider providing publicly
142 available materials that explain to prospective commenters what types of responses the
143 agency thinks would be most useful. These materials could include various formats to



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144 reach different audiences, such as videos or FAQs. These materials may also be
145 statements within an agency's notice of proposed rulemaking or on an agency's website
146 that explain the purpose of the comment process and explain that agencies seriously
147 consider any relevant public comment from a person or organization.
148 13. To encourage the most relevant submissions, agencies should, to the extent they have
149 specific questions or are aware of specific information that may be useful, identify those
150 questions or such information in the notice of proposed rulemaking.

Additional Opportunities for Public Participation

151 14. Agencies and relevant coordinating bodies should stay abreast of new technologies,
152 platforms, and processes for facilitating informative public participation in rulemaking.
153 These technologies may help agencies to process mass comments or they may help
154 agencies identify and process computer-generated and malattributed comments. Finally,
155 new technologies may offer new opportunities to engage the public, both as part of or as
156 a supplement to the notice-and-comment process. Such opportunities may help ensure
157 that agencies receive input from communities that may not otherwise have an opportunity
158 to participate in the conventional comment process.

Coordination and Training

159 15. Agencies should work closely with relevant coordinating bodies to improve existing
160 technologies and develop new technologies to address issues associated with mass,
161 computer-generated, and malattributed comments. Agencies and relevant coordinating
162 bodies should share best practices and relevant innovations for addressing challenges
163 related to these comments.
164 16. Agencies should develop and offer opportunities for ongoing training and staff
165 development to respond to the rapidly evolving nature of technologies related to mass,
166 computer-generated, and malattributed comments and public participation more
167 generally.



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168 17. As authorized by 5 U.S.C. § 594(2), the Office of the Chairman of the Administrative
169 Conference should provide for the “interchange among administrative agencies of
170 information potentially useful in improving” agency comment processing systems. The
171 subjects of interchange might include technological and procedural innovations, common
172 management challenges, and legal concerns under the APA and other relevant statutes.