

May 21, 2021

Administrative Conference of the United States  
1120 20th St NW, Suite 706 South  
Washington, DC 20036

**Comments of Free Press on *Mass, Computer-Generated and Fraudulent Comments* (draft circulated May 11, 2021)**

Free Press welcomes this opportunity to comment on the Committee's draft recommendations. We again encourage the Committee to focus on expanding public participation in administrative proceedings, which is especially important for people of color and members of the public in communities impacted by agency rules but so often excluded from their proceedings. We also agree with the need to ensure that agencies have the proper tools to review their respective dockets.

The following edits and comments reflects our concerns raised during the ACUS Committee meeting on May 11, 2021:

Lines 30-32: As currently written these lines suggest that all three types of comments (mass, computer-generated, and fraudulent) can contribute to "rulemaking delays" and other "legal issues." We recommend removing this sentence as it does not align with the Committee's recommendations that clearly explain these three types of comments are *not* similar in nature.

Line 45: Replace the word "may" with "intend to." This would clarify that computer-generated and malattributed comments are intended to mislead an agency.

Lines 49-55: This passage contains conditional language, suggesting only that malattributed comments "can harm" agency processes or that malattribution "may also diminish the informational value of the comment." We recommend striking the conditional language and clarifying that comments that are either malattributed or computer-generated are created to deceive and mislead an agency. To the extent that the Committee wants to include statements about the informational value of computer-generated and malattributed comments, it should make clear that such comments have no informational value. In other words, even if the substance of a computer-generated or malattributed comment were factual and true, that fact is not properly on the record in the agency's proceeding if it cannot be attributed to any person or entity legitimately submitting it.

Lines 56-64: This section accurately captures the scope and purpose of the recommendations. We recommend moving this entire paragraph up, placing it after Line 27, to frame the recommendations from the start. This paragraph also will make it clear that ACUS is in favor of widespread public participation in administrative processes.

Recommendation 1: For lines 89-92, we recommend deleting this sentence as it is duplicative and devalues mass comments by contrasting them with “unique content” and comments with “meaningful information.” This language inadvertently attributes less value to mass comments submitted by members of the public with similar or identical text and should be deleted to accurately reflect the positions outlined in the Committee’s preamble.

Recommendation 2: In line 95, add “for the public” after docket. This will clarify that the navigation tools and suggestions are intended to make it easier for members of the public to review the agencies’ dockets.

Recommendation 2: In line 105, the Committee should further clarify what it means by “clear notice.” When, where, and how should this notice occur and/or be conveyed to members of the public? Does ACUS intend to use the APA definition of notice? If not, what standards is it trying to apply?

Recommendation 4: In line 115, delete “unless the agency identifies it as having informational value.” As noted by the Committee in the preamble, computer-generated comments are submitted for the purposes of misleading an agency. Even if they arguably contain truthful or factual statements, that information cannot legitimately be made part of the record if its submitter chose not only to remain anonymous, but instead to mislead the agency as to its source.

Recommendation 5: In lines 121-125, delete the language suggesting that an agency may also choose to notify the submitter of computer-generated comments directly that those comments have been flagged as computer-generated or removed from the docket. This suggestion is overly burdensome on an agency and unnecessary given the nature of this type of comments, as parties attempting to mislead the agency have no reasonable expectation that their submissions will be made part of the record.

Recommendation 7: In lines 130-131, delete the sentence that states an agency can rely on a computer-generated comment as long as it includes the comment in the docket. Suggesting that an agency can rely on such comments that are meant to mislead, simply by identifying them as

computer-generated, is counterproductive and would create a perverse incentive to submit computer-generated comments.

Recommendation 9: In lines 143-146, delete the language suggesting that an agency may also choose to identify the purported submitter directly. This suggestion is overly burdensome on an agency and unnecessary given the nature of the type of comments, except and unless the agency's intention in doing so is to notify individuals whose identities were stolen so that those individuals (and law enforcement agencies) may take appropriate steps.

Recommendation 10: Lines 147-150, delete the sentence that states an agency can rely on a malattributed comment as long as it includes the comment in the docket. Suggesting that an agency can rely on such comments that are meant to mislead simply by identifying them as fraudulent is counterproductive and would create a perverse incentive to submit fraudulent comments.

Recommendation 12: Line 159, we urge the Committee to reject including the Regulations.gov "Commenter's Checklist" in its recommendations. Adding this would go beyond the scope of the recommendations and put ACUS in a position of attributing value to various types of comments.

Recommendation 12: Lines 162-163 tell an agency that it should explain what types of responses it would find most "useful." This type of language is open-ended and could lead to agencies disregarding mass comments in ways that could raise barriers for the public to comment on administrative proceedings. We suggest deleting lines 162-163 and editing the language to say, "Agencies and relevant coordinating bodies....should consider making their policies publicly available in various formats to reach different audiences."

Respectfully,

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