

Comment from Senior Fellow Richard J. Pierce, Jr. on *Mass, Computer-Generated, and Fraudulent Comments*

April 17, 2021

Yesterday's meeting reinforced my belief that we are fundamentally on the wrong track in the approach we are taking to the problems created by mass comments, computer-generated comments, and fraudulent comments submitted in rulemakings. Here is what I learned at yesterday's meeting:

1. These phenomena have the potential to arise in only a small fraction of rulemakings.
2. The identity of the entity that submits a comment is, and should be, irrelevant in deciding whether to give serious consideration to the comment. Any comment that merely states a position or recites conclusory assertions is not taken seriously and should not be taken seriously independent of the source of the comment. Any comment that makes a substantive point and that provides data and analysis in support of that point is taken seriously and should be taken seriously independent of the source of the comment. That is the way that courts review the results of rulemakings to determine whether the result is arbitrary and capricious or is instead the product of reasoned decision making.
3. The draft recommendations would impose heavy burdens on all agencies that conduct rulemakings that would require them to devote significant scarce resources to attempts to comply with the recommendations.
4. Most of the recommendations are misdirected. Most agencies have no need to address the problems created by the 3 phenomena because they will never encounter those problems. Most agencies lack the combination of sophisticated resources and personnel required to comply with the recommendations. GSA and the other agencies that have the mission and potential capability to address the problems on a government-wide basis are aware of the problems and are addressing them as rapidly and effectively as possible, given their limited funding and staffing.
5. There are a few narrow circumstances in which it might be desirable for an agency to know the identity of the source of a comment and the number of people who share the views expressed in the comment. Thus, for instance, a committee member referred to a proposed rule that would have effects on truck drivers. It would be useful for the agency know whether a large number of truck drivers believe that the rule would create operational problems that the agency had not previously recognized or that resistance to the rule by truck drivers would be so strong and widespread that the agency should consider an alternative approach. It is hard to imagine, however, how the agency could use comments from individual truck drivers to determine the scope of the perception of operational problems or the scope of the resistance to the rule. A union that represents a large number of truck drivers would be in a far better position to make those determinations. The agency can safely assume that, if either problem exists on a widespread basis, the union will bring it to the attention of the agency in its comments.
6. The only serious legal problem raised by any of the three phenomena is the potential for a comment to be falsely attributed to another entity. That would be a federal crime. No regulatory or benefit-conferring agency has the capability to engage in the sophisticated forensic investigation required to determine whether someone who submits a comment is engaged in that type of criminal activity. Any agency that has evidence that suggests the existence of such a serious violation of criminal law should provide the evidence to a law

enforcement agency that has both the responsibility and the capability to act appropriately on the evidence.

7. The only serious problem that is created by the three phenomena is the widespread belief among members of the public and the press that the number of comments that support or oppose a rule are, or should be, considered by an agency in the rulemaking process. No one at the meeting attempted to make the case that comments can be used as an accurate approximation of public opinion. Everyone who has studied that question has concluded that there is no defensible way of using comments for that purpose. Yet, journalists regularly refer to comments as if they reflect public opinion and should be given effect by agencies. As the quote that Randy May attributed to the Acting Chair of the FCC illustrates, some agency decision makers share that serious misunderstanding of the notice and comment process and actively encourage the public to act on the false belief that agencies should consider the number of comments submitted for or against a proposed rule in its decision-making process. That false belief is the source of the three phenomena that we are studying and of the problems that they create. We can help to reduce those problems by making it completely clear that an agency cannot, and should not, consider the number of comments submitted in a rulemaking in support of or in opposition to a proposed rule in deciding whether to issue the rule. The draft recommendations pay lip service to what we all know—comments cannot be used as a plebiscite—but they implicitly accept the potential value of mass comments for that purpose by urging agencies to expend their scarce resources in an effort to accommodate the phenomenon of mass comments.

Richard J. Pierce, Jr.