This Recommendation addresses how agencies process comments they receive that present distinctive management challenges during notice-and-comment rulemaking. Under the Administrative Procedure Act (APA), agencies must give members of the public notice of proposed rules and the opportunity to comment on them.\(^1\) For each proposed rule subject to notice-and-comment procedures, agencies create and maintain an online public rulemaking docket where they collect and publish the comments they receive about the proposed rule, along with other publicly available information about the rulemaking.\(^2\) Agencies must then process, read, and analyze the comments, and must seriously consider any significant comment from a person or organization.\(^3\) The process is designed to improve the quality of rules by enabling agencies to receive information from a wide range of sources and by allowing the public to scrutinize rules before they take effect.

In recent high-profile rulemakings, members of the public have submitted comments in new ways or at new scales that call into question agencies’ capacities to effectively process certain kinds of comments and can pose challenges for the public when seeking to understand agency rulemaking dockets. These challenges have prompted concerns in the press and

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\(^1\) 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).

\(^3\) Am. Mining Cong. v. EPA, 907 F.2d 1179, 1188 (D. C. Cir. 1990); Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (per curiam).
investigations by Congress\(^4\) and the Government Accountability Office (GAO).\(^5\) These investigations identified several problems these comments can create, including their impact on the perceived legitimacy of the rulemaking process and on agency resources required to process the comments.\(^6\) Specifically, the comments that have featured prominently in these investigations have fallen into three categories: (1) identical or nearly identical comments submitted via mass campaigns (“mass comments”), (2) computer-generated comments, and (3) a type of fraudulent comment called a “malattributed comment.”

A mass comment campaign is characterized by members of the public orchestrating the submission of a large number of identical or nearly identical comments.\(^7\) Some of the challenges involving mass comment campaigns stem from agencies’ having to process large numbers of comments that are only slightly different. Mass comment campaigns may also make it more difficult for agencies to digest and analyze the overall content of comments.

Computer-generated comments are comments that are generated by software algorithms rather than humans.\(^8\) Computer-generated comments may present legal considerations for agencies in light of the APA’s stipulation that only “interested persons” are due an opportunity to comment on proposed rules. It can also be difficult for agencies to distinguish computer-generated comments from comments written by humans. Because these computer-generated comments are not produced by a human, their informational value to the agency may be limited or compromised, and an agency may be misled by them.

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\(^5\) 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); U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-413T, SELECTED AGENCIES SHOULD CLEARLY COMMUNICATE HOW THEY POST PUBLIC COMMENTS AND ASSOCIATED IDENTITY INFORMATION (2020).

\(^6\) Id.


\(^8\) See id. at 11-12, 38-43.
Malattributed comments are comments falsely attributed to persons who did not, in fact, submit them, a deceit made easier by online datasets of personal information and simple software applications that can automate malattribution. As with computer-generated comments, malattributed comments may mislead agencies. They may also harm the people whose identities are misappropriated, and thereby raise issues for agencies to consider under the APA or state and federal criminal laws.

Not all agencies will encounter mass, computer-generated, or malattributed comments. But some agencies have confronted all three, sometimes in the same rulemaking. Mass, computer-generated, and malattributed comments can make it difficult for agencies to extract and synthesize useful information during the comment process. They can tax agencies’ resources, adding processing costs and potential delays. They can harm public perceptions about the legitimacy of particular rules and the rulemaking process as a whole. They can also adversely affect the public’s ability to understand and interpret the public rulemaking docket. The Administrative Conference has previously called attention to some of these potential problems.

There are tools available to help agencies surmount or mitigate many of these problems. As part of its eRulemaking Program, for example, the General Services Administration (GSA) has implemented technologies on the Regulations.gov platform that make it easier for agencies to verify that a commenter is a human being. GSA’s eRulemaking site has also implemented an application programming interface for mass comment submission. This technology platform allows agencies to better manage comments from identifiable entities that submit large volumes of comments. Some federal agencies also use de-duplication software to identify and group duplicate or near-duplicate comments.

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9 Id. at 11, 26-38.


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

New technologies may also facilitate improved methods for encouraging and processing informative public comments. Already, governments in the United States and around the world are innovating new technologies, platforms, and processes to extract useful public input from the rulemaking process.\textsuperscript{13} Because these technologies are inchoate, this Recommendation does not recommend specific approaches. But agencies should consider whether such technologies might be helpful in managing mass, computer-generated, and malattributed comments and enhancing the comment process to promote meaningful public participation.

In offering the best practices that follow, the Administrative Conference recognizes that some agencies may decide they do not need to adopt some or all of these recommendations, perhaps because they do not receive mass, computer-generated, or malattributed comments. Agencies’ choices may also be constrained by their available resources. As such, agencies should tailor the suggestions in this Recommendation to their particular rulemaking programs and the types of comments they receive or expect to receive.

RECOMMENDATION

Policy and Transparency

1. When needed, agencies should publish policy statements about the posting and use of mass, computer-generated, and malattributed comments. These statements should take into account the meaningfulness of the public’s opportunity to participate in the rulemaking process and should balance concerns such as user-friendliness, transparency, and informational completeness. In their policy statements, agencies may provide for exceptions in appropriate circumstances.

2. Agencies should consider including different approaches in their policies with respect to identical or nearly identical comments, including the option for the agency to:

   a. Post a single representative example in the agency docket with the count of the number of identical or nearly identical comments received and an option to view

all comments;

b. Break out and post non-identical content in the agency docket; or
c. Ask people and entities orchestrating mass comment campaigns to submit a single comment with multiple signatures rather than separate but identical comments, such as by using the eRulemaking site’s available software or other available technologies.

3. An agency policy against submission of malattributed comments should provide that if the agency is aware that it has received such a comment, it either will retain the comment in the docket but remove the malattribution (i.e., render it an anonymous submission) or remove the comment from the docket altogether. An agency’s policy should, at a minimum, provide that if it determines that a malattributed comment will remain in the docket, the agency will anonymize the comment to protect the person whose identity has been used.

4. Agencies and relevant coordinating bodies should consider providing materials that explain to prospective commenters what information is useful to an agency in a public comment. These materials could include various formats to reach different audiences, such as in videos or in FAQs. These materials may also be statements in an agency’s notice of proposed rulemaking or on an agency’s website that explain the purpose of the comment process and explain that agencies seriously consider any substantive public comment from a person or organization.

5. In notices of proposed rulemaking, notices of inquiry, and advance notices of proposed rulemaking, agencies should ask specific questions and identify particular types of information that would be useful in developing the proposal.

**Technology**

6. Agencies should have access to reliable and appropriate software to identify the unique content in submitted comments and to extract meaningful information from comments. This software should provide agencies with enhanced search options based on the unique content of comments.
7. Agencies that operate commenting platforms should consider using technology that verifies that a commenter is a human being, such as reCAPTCHA or other similar identity proofing tools, in their comment submission processes.

8. The eRulemaking Program should provide a common de-duplication platform for agencies to use, although agencies should be free to modify it or use another platform as appropriate.

Coordination and Training

9. Agencies should work closely with relevant coordinating bodies (such as the eRulemaking Program, the Office of Information and Regulatory Affairs, and any governmental bodies or informal working groups that address common rulemaking issues) to improve existing technologies and develop new technologies to address issues associated with mass, computer-generated, and malattributed comments. Agencies and relevant coordinating bodies should share best practices and relevant innovations for addressing challenges related to these comments.

10. Agencies should offer opportunities for ongoing training and staff development to respond to the rapidly evolving nature of technologies related to mass, computer-generated, and malattributed comments and public participation more generally.

Docket Management

11. If an agency decides to exclude or remove any mass, computer-generated, and malattributed comments from the docket, it should articulate such a policy in advance or disclose in the docket why it is excluding the comment.

12. Agencies should not discard the computer-generated comments they receive unless those comments contain no informational value. When storing these comments, agencies may segregate computer-generated comments or treat them separately.

13. Any comment on which an agency actually relies should be placed and retained in the rulemaking docket, including malattributed and computer-generated comments. When placing such comments in the rulemaking docket, agencies should anonymize
malattributed comments and consider segregating or flagging computer-generated comments.

14. Agencies should provide opportunities (including potentially after the comment deadline) for individuals whose names have been attached to comments they did not submit to identify and request removal of such malattributed comments from the docket.

15. If an agency flags a comment as malattributed or computer-generated, or removes such a comment from the docket, and the submitter provided electronic contact information, the agency should notify the submitter of the agency’s action.

16. When publishing a final rule, agencies should state whether they removed from the docket any malattributed or computer-generated comments.

Additional Opportunities for Public Participation

17. Agencies and relevant coordinating bodies should stay abreast of new technologies, platforms, and processes for facilitating informative public participation in rulemaking, particularly to the extent public use of such platforms and processes might reduce the burdens agencies face in discerning useful information from mass, computer-generated, and malattributed comments.