Mass, Computer-Generated, and Fraudulent Comments

Committee on Rulemaking

Proposed Recommendation for Committee | April 16, 2021

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

Technological advances have made it easier for the public to comment on proposed rules and review comments submitted by other people. 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 information about the rulemaking the agencies have made available for public viewing.² The Administrative Conference has previously recommended that agencies manage their public rulemaking dockets to achieve maximum disclosure to the public but has also acknowledged that legal and prudential concerns may limit agencies from displaying certain information, including 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).
In addition to making it easier for people to comment on proposed rules and review others’ comments on proposed rules, however, technological advances have magnified the impact of three forms of potentially problematic commenting: mass comment campaigns, computer-generated comments, and a type of fraudulent comment called a “malattributed comment.” A mass comment campaign is characterized by organizations orchestrating the online submission of a large number of identical or nearly identical comments. Computer-generated comments are comments that are generated by software algorithms rather than humans. Malattributed comments are comments falsely attributed to persons who did not, in fact, submit them, a task made much easier by online datasets of personal information and simple software applications that can automate malattribution. These “technology-enabled comments” potentially pose problems for notice-and-comment rulemaking. The Administrative Conference has previously called attention to some of these potential problems, as has Congress.

Some of these potential problems apply to each type of technology-enabled comment. For example, technology-enabled 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 also harm public perceptions about the legitimacy of particular rules and the rulemaking process as a whole.

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

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

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

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

**RECOMMENDATION**

**Technology**

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7 5 U.S.C. § 553(b).
1. Agencies should continue to (or, if they have not already, begin to) utilize de-duplication software to identify the unique content in submitted comments.

2. Agencies should publish policies regarding the posting of duplicate and near-identical comments. These policies should balance concerns including user-friendliness, transparency, and informational completeness. Agencies should consider including different approaches in their duplication policies, including the option to:
   a. Post a single representative example with the count of the duplicates received and an option to view all comments;
   b. Break out and post non-identical content;
   c. Ask people and entities orchestrating mass comment campaigns to submit a single comment with multiple signatures rather than duplicate comments; and
   d. Provide enhanced search options based on the unique information content of comments.

3. Agencies, both those that use Regulations.gov and those that do not, should consider using identity validation or other similar identity proofing tools in their comment submission processes.

4. Agencies and relevant coordinating bodies (which could include the eRulemaking Program, the Office of Information and Regulatory Affairs, and any governmental bodies or informal working groups formed by agencies that address common rulemaking issues) should encourage the development of technology for identifying malattributed and computer-generated comments in the docket.

5. Agencies and relevant coordinating bodies should stay abreast of developments in the submission of mass, malattributed, and computer-generated comments so that approaches to combating difficulties arising from such developments can be implemented as needed.

Coordination and Training

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

7. Agencies should work closely with relevant coordinating bodies to improve existing technologies and develop new technologies to address issues associated with mass, malattributed, and computer-generated comments. The eRulemaking Program should provide a common de-duplication platform for agencies to use, though agencies should be free to modify it or use another platform as appropriate. The eRulemaking Program and other relevant coordinating bodies should also work with agencies and private sector experts and vendors to develop technologies that respond to common issues associated with mass, malattributed, and computer-generated comments.

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

Docket Management

9. If an agency decides to exclude or remove some or all duplicate, malattributed, or computer-generated comments from the docket, it should articulate such a policy in advance, or at least provide a reasoned explanation after excluding the comment or comments.

10. 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 retain the comment in the docket but remove the maltribution (i.e., render it an anonymous submission) or remove the comment from the docket altogether. While agencies do not have an obligation to affirmatively search the docket for malattributed comments, they are free to set reasonable policies concerning the public comment process and reject comments that violate their policies. Agencies may also rely on comments that violated their commenting policies (e.g. late comments) in some circumstances. If an agency determines that a malattributed comment will remain in the docket, anonymization should be used to protect the person whose identity has been used.

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

12. Any duplicative, malattributed, or computer-generated comment on which an agency actually relies should be placed and retained in the rulemaking docket. Agencies may choose to anonymize malattributed comments, and to segregate or flag computer-generated comments, that are retained in the docket.

13. 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 comments from the docket.

14. Agencies should consider taking affirmative steps to identify comments that are malattributed or computer-generated. Such steps may include the consideration and adoption of software programs that assist in identifying these types of comments.

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.

**Transparency**

17. 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. This could include various formats to reach different audiences, such as videos and FAQs.

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

**Public Participation Beyond the Comment Process**

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