Mass, Computer-Generated, and Fraudulent Comments

Committee on Rulemaking

Proposed Recommendation for Committee | May 11, 2021

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

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

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¹ 5 U.S.C. § 553. This requirement is subject to a number of exceptions. See id.
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. Aliina Health Services, 139 S. Ct. 1804, 1816 (2019).
Conference has encouraged. At the same time, in recent high-profile rulemakings, members of
the public have submitted comments in new ways or at new scales that can challenge agencies’
current approaches to processing these comments or managing their public rulemaking dockets.

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

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

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

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

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

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

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

Agencies’ ability to process comments can be enhanced by digital technologies. 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 Regulations.gov platform also includes an application programming interface to facilitate mass comment submission. This technology platform allows partner 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.

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

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

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

Not all agencies will encounter mass, computer-generated, or malattributed comments. But some agencies have confronted all three, sometimes in the same rulemaking. In offering the best practices that follow, the Administrative Conference recognizes that agency needs and resources will vary. 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**

**Managing Mass Comments**

1. The eRulemaking program that the General Services Administration (GSA) runs should provide a common de-duplication platform for agencies to use, although GSA should allow agencies to modify the platform or use another platform as appropriate. When agencies find it helpful to process a large number of comments, they should use 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 to identify the unique content of comments, such as the technologies used by commercial legal databases like Westlaw or LexisNexis.

2. If agencies decide to reduce the burdens associated with posting large volumes of identical or nearly identical comments to the docket, they may consider inviting people and entities organizing mass comments to submit a single comment with multiple

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

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

Managing Computer-Generated Comments

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

5. If an agency flags a comment as 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 either by noting the removal in the docket or by notifying the submitter directly.

6. Agencies that operate their own 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. The eRulemaking platform should continue to retain such functionality.

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

8. Agencies should provide opportunities (including potentially after the comment deadline) for individuals whose names or identifying information have been attached to comments they did not submit to identify such comments and to request that the comment be anonymized and removed from the docket.

9. If an agency flags a comment as malattributed, 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 either by noting the removal in the docket or by notifying the submitter directly.

10. When an agency relies on a comment it knows is malattributed, it should be certain to include that comment on its rulemaking docket and note that it was malattributed. When publishing a final rule, agencies should state whether they removed from the docket any malattributed comments.

Enhancing Agency Transparency in the Comment Process

11. Agencies should inform the public about their policies concerning the posting and use of mass, computer-generated, and malattributed comments. These policies 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 policies, agencies may provide for exceptions in appropriate circumstances.

12. Agencies and 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) should consider providing publicly available materials that explain to prospective commenters what types of responses the agency thinks would be most useful. These materials could include various formats to
reach different audiences, such as videos or FAQs. These materials may also be statements within 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 relevant public comment from a person or organization.

13. To encourage the most relevant submissions, agencies should, to the extent they have specific questions or are aware of specific information that may be useful, identify those questions or such information in the notice of proposed rulemaking.

Additional Opportunities for Public Participation

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

Coordination and Training

15. Agencies should work closely with relevant coordinating bodies 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.

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