



Mass, Computer-Generated, and Fraudulent Comments

Committee on Rulemaking

Proposed Recommendation | June 17, 2021

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and additional amendments from Council and Conference members (with sources shown in the margin).

1 Under the Administrative Procedure Act (APA), agencies must give members of the
2 public notice of proposed rules and the opportunity to offer their “data, views, or arguments” for
3 the agencies’ consideration.¹ For each proposed rule subject to these notice-and-comment
4 procedures, agencies create and maintain an online public rulemaking docket in which they
5 collect and publish the comments they receive as well as other publicly available information
6 about the proposed rule.² Agencies must then process, read, and analyze the comments received.
7 The APA requires agencies to consider the “relevant matter presented” in the comments received
8 and to provide a “concise general statement of [the rule’s] basis and purpose.”³ When a rule is
9 challenged on judicial review, courts have required agencies to demonstrate that they have
10 considered and responded to any comment that raises a significant issue.⁴ The notice-and-

¹ 5 U.S.C. § 553. This requirement is subject to a number of exceptions. *See id.*

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); *see also* Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013) (distinguishing between “the administrative record for judicial review,” “rulemaking record,” and the “public rulemaking docket”).

³ 5 U.S.C. § 553.

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.”).

Commented [A1]: The Committee on Rulemaking voted to replace the original title of this recommendation with *Managing Mass, Computer-Generated, and Malattributed Comments*.

The Council proposes changing the Committee’s proposed title to *Managing Mass, Computer-Generated, and Falsely Attributed Comments*.

The Council agrees with the Committee that the proposed title better reflects the objectives of the recommendation, and it shares the Committee’s concern with the word “fraudulent.” The Council proposes one modification to the proposed title—namely, substituting “falsely attributed” for “malattributed” both in the title and wherever else it appears in the document—for the following reasons: First, the Recommendation already defines “malattributed” to mean “falsely attributed” (line 26). There is no reason to introduce another term. Second, while “malattributed” is used in some academic literature (including Professor Herz’s excellent article), it is not the commonly used term by agencies, Congress, and the public. It is important that ACUS titles its recommendation so that their subjects are immediately understood by the intended audience. (No other governmental bodies that have addressed the subject—including GAO, the NY Attorney General, and the U.S. Senate Permanent Subcommittee on Investigations—have used the word “malattributed.”) And third, “malattributed” is not a word. The Council prefers common English words.

See also conforming changes to paragraph beginning at line 19 and to all subsequent instances of the term “malattributed” or “malattribution.”



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11 comment process is an important opportunity for the public to provide input on a proposed rule
12 and the agency to “avoid errors and make a more informed decision” on its rulemaking.⁵

13 Technological advances have expanded the public’s access to agencies’ online
14 rulemaking dockets and made it easier for the public to comment on proposed rules in ways that
15 the Administrative Conference has encouraged.⁶ At the same time, in recent high-profile
16 rulemakings, members of the public have submitted comments in new ways or at new scales that
17 can challenge agencies’ current approaches to processing these comments or managing their
18 online rulemaking dockets.

19 Agencies have confronted three types of comments that present distinctive management
20 challenges: (1) mass comments, (2) computer-generated comments, and (3) ~~a type of fraudulent~~
21 ~~comment called a “malattributed comment.”~~ falsely attributed comments. For the purposes of
22 this Recommendation, mass comments are comments submitted in large volumes by members of
23 the public, including the organized submission of identical or substantively identical comments.
24 Computer-generated comments are comments whose substantive content has been generated by
25 computer software rather than by humans.⁷ ~~Malattributed~~ Falsely attributed comments are
26 comments falsely attributed to people who did not submit them.

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See also comment on title. All subsequent instances of the term “malattributed” have been changed in redline to reflect this proposed amendment.

⁵ Azar v. Allina Health Services, 139 S. Ct. 1804, 1816 (2019).

⁶ See Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48791 (Aug. 9, 2011).

⁷ The ability to automate the generation of comment content may also remove human interaction with the agency and facilitate the submission of large volumes of comments in cases in which software can repeatedly submit comments via Regulations.gov.



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27 These three types of comments, which have been the subject of recent reports by both
28 federal⁸ and state⁹ authorities, can raise challenges for agencies in processing, reading, and
29 analyzing the comments they receive in some rulemakings. If not managed well, the processing
30 of these comments can contribute to rulemaking delays or can raise other practical or legal
31 concerns for agencies to consider.

32 In addressing the three types of comments in a single recommendation, the Conference
33 does not mean to suggest that agencies should treat these comments in the same way. Rather, the
34 Conference is addressing these comments in the same Recommendation because, despite their
35 differences, they can present similar or even overlapping management concerns during the
36 rulemaking process. In some cases, agencies may also confront all three types of comments in
37 the same rulemaking.

38 The challenges presented by these three types of comments are by no means identical.
39 With mass comments, agencies may encounter processing or cataloging challenges simply as a
40 result of the volume as well as the identical or substantively identical content of some comments
41 they receive. Without the requisite tools, agencies may also find it difficult or time-consuming to
42 digest or analyze the overall content of all comments they receive.

43 In contrast with mass comments, computer-generated comments and ~~malattributed-falsely~~
44 attributed comments may mislead an agency or raise issues under the APA and other statutes.
45 One particular problem that agencies may encounter is distinguishing computer-generated
46 comments from comments written by humans. Computer-generated comments may also raise

⁸ See PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, U.S. SENATE COMM. ON HOMELAND SECURITY AND GOV'T 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).

⁹ N.Y. STATE OFF. OF THE ATT'Y GEN LETITIA JAMES, FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE (2021).



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47 potential issues for agencies as a result of the APA’s provision for the submission of comments
48 by “interested persons.”¹⁰ ~~Malattributed-Falsely attributed~~ comments can harm people whose
49 identities are ~~stolen-appropriated~~ and may create the possibility of prosecution under state or
50 federal criminal law. ~~Malattribution-False attribution~~ may also deceive agencies or diminish the
51 informational value of a comment, especially when the commenter claims to have situational
52 knowledge or the identity of the commenter is otherwise relevant. The informational value that
53 both of these types of comments provide to agencies is likely to be limited or at least different
54 from comments that have been neither computer-generated nor ~~malattributed-falsely attributed~~.

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55 This Recommendation is limited to how agencies can better manage the processing
56 challenges associated with mass, computer-generated, and ~~malattributed-falsely attributed~~
57 comments.¹¹ By addressing these processing challenges, the Recommendation is not intended to
58 imply that widespread participation in the rulemaking process, including via mass comments, is
59 problematic. Indeed, the Conference has explicitly endorsed widespread public participation on
60 multiple occasions,¹² and this Recommendation should help agencies cast a wide net when
61 seeking input from all individuals and groups affected by a rule. The Recommendation aims to
62 enhance agencies’ ability to process comments they receive in the most efficient way possible
63 and to ensure that the rulemaking process is transparent to prospective commenters and the
64 public more broadly.

¹⁰ 5 U.S.C. § 553.

¹¹ This Recommendation does not address what role particular types of comments should play in agency decision making or what consideration, if any, agencies should give to the number of comments in support of a particular position.

¹² See Recommendation 2018-7, *supra* note 6; Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75117 (Dec. 17, 2014); Recommendation 2013-5, *supra* note 6; Recommendation 2011-8, *supra* note 6; Admin. Conf. of the U.S., Recommendation 2011-7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 Fed. Reg. 2261 (Jan. 17, 2012); Recommendation 2011-2, *supra* note 6.



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65 Agencies can advance the goals of public participation by being transparent about their
66 comment policies or practices and by providing educational information about public
67 involvement in the rulemaking process.¹³ Agencies' ability to process comments can also be
68 enhanced by digital technologies. As part of its e-Rulemaking Program, for example, the General
69 Services Administration (GSA) has implemented technologies on the Regulations.gov platform
70 that make it easier for agencies to verify that a commenter is a human being.¹⁴ GSA's
71 Regulations.gov platform also includes an application programming interface (API)—a feature
72 of a computer system that enables different systems to communicate with it—to facilitate mass
73 comment submission.¹⁵ This technology platform allows partner agencies to better manage
74 comments from identifiable entities that submit large volumes of comments. Some federal
75 agencies also use a tool, sometimes referred to as de-duplication software, to identify and group
76 identical or substantively identical comments, sometimes to identify and group identical or
77 substantively identical comments.

78 New software and technologies to manage public comments will likely emerge in the
79 future, and agencies will need to keep apprised of innovations in managing public comments of
80 them. Agencies might also consider adopting innovations that augment the notice and comment
81 process with alternative methods for encouraging public participation that augment the notice-
82 and-comment process, particularly to the extent that doing so ameliorates some of the

¹³ For an example of educational information on rulemaking participation, see the "Commenter's Checklist" that the e-Rulemaking Program currently displays in a pop-up window for every rulemaking webpage that offers the public the opportunity to comment. *See Commenter's Checklist*, GEN. SERVS. ADMIN. ISTRATION, <https://www.Regulations.gov> (last visited May 24, 2021) (navigate to any rulemaking with an open comment period; click comment button; then click "Commenter's Checklist"). In addition, the text of this checklist appears on the project page for this Recommendation on the ACUS website.

¹⁴ This software is distinct from identity validation technologies that force commenters to prove their identities.

¹⁵ *See Regulations.gov API*, GEN. SERVS. ADMIN. ISTRATION, <https://open.gsa.gov/api/regulationsgov/> (last visited May 24, 2021).



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83 management challenges described above.¹⁶ Because technology is rapidly changing, agencies
84 will need to stay apprised of new developments that could enhance public participation in
85 rulemaking.

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86 Not all agencies will encounter mass, computer-generated, or ~~malattributed-falsely~~
87 attributed comments. But some agencies have confronted all three, sometimes in the same
88 rulemaking. In offering the best practices that follow, the Conference recognizes that agency
89 needs and resources will vary. For this reason, agencies should tailor the best practices in this
90 Recommendation to their particular rulemaking programs and the types of comments they
91 receive or expect to receive.

RECOMMENDATION

Managing Mass Comments

- 92 1. The e-Rulemaking Program that the General Services Administration (GSA) administers
93 should provide a common de-duplication tool for agencies to use, although GSA should
94 allow agencies to modify the de-duplication tool to fit their needs or to use another tool,
95 as appropriate. When agencies find it helpful to use other software tools to perform de-
96 duplication or extract information from a large number of comments, they should use
97 reliable and appropriate software. Such software should provide agencies with enhanced
98 search options to identify the unique content of comments, such as the technologies used
99 by commercial legal databases like Westlaw or LexisNexis.
- 100 2. To enable easier public navigation through online rulemaking dockets, agencies may
101 welcome any person or entity organizing mass comments to submit comments with
102 multiple signatures rather than separate identical or substantively identical comments.

¹⁶ See Steve Balla, Reeve Bull, Bridget Dooling, Emily Hammond, Michael Herz, Michael Livermore, & Beth Simone Noveck, Mass, Computer-Generated, and Fraudulent Comments 43–48 (Apr./June 12, 2021) (draft report to the Admin. Conf. of the U.S.).



103 Alternatively, agencies may wish to consider approaches to managing the display of
104 comments online, such as by posting only a single representative example of identical
105 comments in the online rulemaking docket or by breaking out and posting only non-
106 identical content in the docket, taking into consideration the importance to members of
107 the public to be able to verify that their comments were received and placed in the agency
108 record. When agencies decide not to display all identical comments online, they should
109 ~~be transparent about their actions~~ provide publicly available explanations of their criteria
110 for verifying the receipt of individual comments or locating identical comments in the
111 docket and for deciding what comments to display, and the existence of any process for
112 verifying the receipt of individual comments or locating identical comments in the
113 docket.

- 114 3. When an agency decides not to include all identical or substantively identical comments
115 in its online rulemaking docket to improve the navigability of the docket, it should ensure
116 that any reported total number of comments (such as in Regulations.gov or in the
117 preambles to final rules) ~~accounts for~~ includes the number of identical or substantively
118 identical comments. ~~If resources permit~~ If resources permit, agencies should separately
119 report the total number of identical or substantively identical comments they receive.
120 ~~A~~ Agencies should also consider providing an opportunity for interested members of the
121 public to obtain or access all comments received.

Managing Computer-Generated Comments

- 122 4. If an agency identifies a comment as computer-generated, it may disregard the comment
123 unless the agency identifies it as having informational value.
- 124 5. To the extent feasible, agencies should flag any comments they have identified as
125 computer-generated or display or store them separately from other comments. If an
126 agency flags a comment as computer-generated, or displays or stores it separately from
127 the online rulemaking docket, the agency should note its action in the docket. The agency
128 may also choose to notify the submitter directly if doing so does not violate any relevant

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- 129 policy prohibiting direct contact with senders of “spam” or similar communications.
- 130 6. Agencies that operate their own commenting platforms should consider using technology
- 131 that verifies that a commenter is a human being, such as reCAPTCHA or another similar
- 132 identity proofing tool. The e-Rulemaking Program should continue to retain this
- 133 functionality.
- 134 7. If an agency considers or relies on a comment the agency knows to be computer-
- 135 generated, it should include that comment in its online rulemaking docket. When
- 136 publishing a final rule, agencies should note any computer-generated comments on which
- 137 they considered or on which they relied. ~~rely that are computer-generated and~~ They
- 138 should also state whether they removed from the docket any comments they identified as
- 139 computer-generated.

Managing ~~Malattributed~~ Falsely Attributed Comments

- 140 8. Agencies should provide opportunities (including after the comment deadline) for
- 141 individuals whose names or identifying information have been attached to comments they
- 142 did not submit to identify such comments and to request that the comment be anonymized
- 143 or removed from the online rulemaking docket.
- 144 9. If an agency flags a comment as ~~malattributed~~ falsely attributed or removes such a
- 145 comment from the online rulemaking docket, it should note its action in the docket.
- 146 Agencies may also choose to notify the purported submitter directly if doing so does not
- 147 violate any agency policy.
- 148 10. If an agency relies on a comment it knows is ~~malattributed~~ falsely attributed, it should
- 149 include an anonymized version of that comment in its online rulemaking docket. When
- 150 publishing a final rule, agencies should note any comments on which they rely that are
- 151 ~~malattributed~~ falsely attributed and should state whether they removed from the docket

Commented [CA8]: Council Comment:

The Council would like the Committee and the consultants to address whether there is a risk that comment-review systems may reflect agency personnel’s programmatic, ideological, or other biases with respect to the viewpoints expressed in or the source of comments; and, if the answer is “no,” why that is the case. Depending on the answer, the Council may wish to suggest the inclusion of a new paragraph 7 (between current paragraphs 6 and 7) providing that “agencies should take steps to assure that decisions respecting whether comments are computer-generated (especially in the absence of a tool such as reCAPTCHA) and whether agencies disregard such comments are not influenced by agency personnel’s programmatic, ideological, or other biases respecting the viewpoints expressed in or the source of comments.” The Council is open to alternative formulations that capture the point.

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I would suggest these minor edits because dockets should be populated with an eye towards the administrative record, which is comprised of all non-deliberative information that the agency considered, not just relied on. In addition, when addressing public comments in a final rule, the agency must respond to all substantive comments, which could include comments considered even if the agency did not ultimately rely on them. I think these edits will help cover the bases on either front.



152 any ~~malattributed~~-falsely attributed comments.

Enhancing Agency Transparency in the Comment Process

153 11. Agencies should inform the public about their policies concerning the posting and use of
154 mass, computer-generated, and ~~malattributed~~-falsely attributed comments. These policies
155 should take into account the meaningfulness of the public’s opportunity to participate in
156 the rulemaking process and should balance goals such as user-friendliness, transparency,
157 and informational completeness. In their policies, agencies may provide for exceptions in
158 appropriate circumstances.

159 12. Agencies and relevant coordinating bodies (such as GSA’s e-Rulemaking Program, the
160 Office of Information and Regulatory Affairs, and any other governmental bodies ~~or~~
161 informal working groups that address common rulemaking issues) should consider
162 providing publicly available materials that explain to prospective commenters what types
163 of responses they anticipate would be most useful, while also welcoming any other
164 comments that members of the public wish to submit and remaining open to learning
165 from them. These materials could be presented in various formats—such as videos or
166 FAQs—to reach different audiences. These materials may also include statements within
167 the notice of proposed rulemaking for a given agency rule or on agencies’ websites to
168 explain the purpose of the comment process and explain that agencies seriously consider
169 any relevant public comment from a person or organization.

170 13. To encourage the most relevant submissions, agencies that have specific questions or are
171 aware of specific information that may be useful should identify those questions or such
172 information in their notices of proposed rulemaking.

Additional Opportunities for Public Participation

173 14. Agencies and relevant coordinating bodies should stay abreast of new technologies for
174 facilitating informative public participation in rulemakings. These technologies may help
175 agencies to process mass comments or identify and process computer-generated and

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176 ~~malattributed-falsely attributed~~ comments. In addition, new technologies may offer new
177 opportunities to engage the public, both as part of or as a supplement to the notice-and-
178 comment process. Such opportunities may help ensure that agencies receive input from
179 communities that may not otherwise have an opportunity to participate in the
180 conventional comment process.

Coordination and Training

- 181 15. Agencies should work closely with relevant coordinating bodies to improve existing
182 technologies and develop new technologies to address issues associated with mass,
183 computer-generated, and ~~malattributed-falsely attributed~~ comments. Agencies and
184 relevant coordinating bodies should share best practices and relevant innovations for
185 addressing challenges related to these comments.
- 186 16. Agencies should develop and offer opportunities for ongoing training and staff
187 development to respond to the rapidly evolving nature of technologies related to mass,
188 computer-generated, and ~~malattributed-falsely attributed~~ comments and to public
189 participation more generally.
- 190 17. As authorized by 5 U.S.C. § 594(2), the Conference’s Office of the Chairman should
191 provide for the “interchange among administrative agencies of information potentially
192 useful in improving” agency comment processing systems. The subjects of interchange
193 might include technological and procedural innovations, common management
194 challenges, and legal concerns under the APA and other relevant statutes.