



Administrative Conference Recommendation 2021-1

Managing Mass, Computer-Generated, and Falsely Attributed Comments

Adopted June 17, 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 these notice-and-comment procedures, agencies create and maintain an online public rulemaking docket in which they collect and publish the comments they receive along with other publicly available information about the proposed rule.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 the agency to “avoid errors and make a more informed decision” on its rulemaking.⁵

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 eRulemaking 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.”).

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



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

Agencies have confronted three types of comments that present distinctive management challenges: (1) mass comments, (2) computer-generated comments, and (3) falsely attributed comments. For the purposes of this Recommendation, mass comments are comments submitted in large volumes by members of the public, including the organized submission of identical or substantively identical comments. Computer-generated comments are comments whose substantive content has been generated by computer software rather than by humans.⁷ Falsely attributed comments are comments attributed to people who did not submit them.

These three types of comments, which have been the subject of recent reports by both federal⁸ and state⁹ authorities, can raise challenges for agencies in processing, reading, and analyzing the comments they receive in some rulemakings. If not managed well, the processing

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 eRulemaking*, 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.

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., FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE (2021).



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of these comments can contribute to rulemaking delays or can raise other practical or legal concerns for agencies to consider.

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

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

In contrast with mass comments, computer-generated comments and falsely attributed comments may mislead an agency or raise issues under the APA and other statutes. One particular problem that agencies may encounter is distinguishing computer-generated comments from comments written by humans. Computer-generated comments may also raise potential issues for agencies as a result of the APA's provision for the submission of comments by "interested persons."¹⁰ Falsely attributed comments can harm people whose identities are appropriated and may create the possibility of prosecution under state or federal criminal law. False attribution may also deceive agencies or diminish the informational value of a comment, especially when 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

¹⁰ 5 U.S.C. § 553.



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provide to agencies is likely to be limited or at least different from comments that have been neither computer-generated nor falsely attributed.

This Recommendation is limited to how agencies can better manage the processing challenges associated with mass, computer-generated, and falsely attributed comments.¹¹ By addressing these processing challenges, the Recommendation is not intended to imply that widespread participation in the rulemaking process, including via mass comments, is problematic. Indeed, the Conference has explicitly endorsed widespread public participation on multiple occasions,¹² and this Recommendation 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 can advance the goals of public participation by being transparent about their comment policies or practices and by providing educational information about public involvement in the rulemaking process.¹³ Agencies' ability to process comments can also be enhanced by digital technologies. As part of its eRulemaking Program, for example, the General

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.

¹³ For an example of educational information on rulemaking participation, see the "Commenter's Checklist" that the eRulemaking 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., <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.



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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.¹⁴ GSA's Regulations.gov platform also includes an application programming interface (API)—a feature of a computer system that enables different systems to communicate with it—to facilitate mass comment submission.¹⁵ This technology platform allows partner agencies to better manage comments from identifiable entities that submit large volumes of comments. Some federal agencies also use a tool, sometimes referred to as de-duplication software, to identify and group identical or substantively identical comments.

New software and technologies to manage public comments will likely emerge in the future, and agencies will need to keep apprised of them. Agencies might also consider adopting alternative methods for encouraging public participation that augment the notice-and-comment process, particularly to the extent that doing so ameliorates some of the management challenges described above.¹⁶ Because technology is rapidly changing, agencies will need to stay apprised of new developments that could enhance public participation in rulemaking.

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

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

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

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 (June 1, 2021) (report to the Admin. Conf. of the U.S.).



RECOMMENDATION

Managing Mass Comments

1. The General Services Administration's (GSA) eRulemaking Program should provide a common de-duplication tool for agencies to use, although GSA should allow agencies to modify the de-duplication tool to fit their needs or to use another tool, as appropriate. When agencies find it helpful to use other software tools to perform de-duplication or extract information from a large number of comments, they should use reliable and appropriate software. Such 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. To enable easier public navigation through online rulemaking dockets, agencies may welcome any person or entity organizing mass comments to submit comments with multiple signatures rather than separate identical or substantively identical comments.
3. Agencies may wish to consider alternative approaches to managing the display of comments online, such as by posting only a single representative example of identical comments in the online rulemaking docket or by breaking out and posting only non-identical content in the docket, taking into consideration the importance to members of the public to be able to verify that their comments were received and placed in the agency record. When agencies decide not to display all identical comments online, they should provide publicly available explanations of their actions and the criteria for verifying the receipt of individual comments or locating identical comments in the docket and for deciding what comments to display.
4. When an agency decides not to include all identical or substantively identical comments in its online rulemaking docket to improve the navigability of the docket, it should ensure that any reported total number of comments (such as in Regulations.gov or in the preambles to final rules) includes the number of identical or substantively identical comments. If resources permit, agencies should separately report the total number of



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identical or substantively identical comments they receive. Agencies should also consider providing an opportunity for interested members of the public to obtain or access all comments received.

Managing Computer-Generated Comments

5. To the extent feasible, agencies should flag any comments they have identified as computer-generated or display or store them separately from other comments. If an agency flags a comment as computer-generated, or displays or stores it separately from the online rulemaking docket, the agency should note its action in the docket. The agency may also choose to notify the submitter directly if doing so does not violate any relevant policy prohibiting direct contact with senders of “spam” or similar communications.
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 another similar identity proofing tool. The eRulemaking Program should continue to retain this functionality.
7. When publishing a final rule, agencies should note any comments on which they rely that they know are computer-generated and state whether they removed from the docket any comments they identified as computer-generated.

Managing Falsely Attributed Comments

8. Agencies should provide opportunities (including 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 or removed from the online rulemaking docket.
9. If an agency flags a comment as falsely attributed or removes such a comment from the online rulemaking docket, it should note its action in the docket. Agencies may also choose to notify the purported submitter directly if doing so does not violate any agency



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policy.

10. If an agency relies on a comment it knows is falsely attributed, it should include an anonymized version of that comment in its online rulemaking docket. When publishing a final rule, agencies should note any comments on which they rely that are falsely attributed and should state whether they removed from the docket any falsely attributed 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 falsely attributed comments. These policies should take into account the meaningfulness of the public's opportunity to participate in the rulemaking process and should balance goals 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 GSA's eRulemaking Program, the Office of Information and Regulatory Affairs, and any other governmental bodies that address common rulemaking issues) should consider providing publicly available materials that explain to prospective commenters what types of responses they anticipate would be most useful, while also welcoming any other comments that members of the public wish to submit and remaining open to learning from them. These materials could be presented in various formats—such as videos or FAQs—to reach different audiences. These materials may also include statements within the notice of proposed rulemaking for a given agency rule or on agencies' websites to 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 that have specific questions or are aware of specific information that may be useful should identify those questions or such information in their notices of proposed rulemaking.



Additional Opportunities for Public Participation

14. Agencies and relevant coordinating bodies should stay abreast of new technologies for facilitating informative public participation in rulemakings. These technologies may help agencies to process mass comments or identify and process computer-generated and falsely attributed comments. In addition, 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 falsely attributed 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 falsely attributed comments and to public participation more generally.
17. As authorized by 5 U.S.C. § 594(2), the Conference's Office of the Chairman 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 Administrative Procedure Act and other relevant statutes.