Managing Mass, Computer-Generated, and Malattributed Fraudulent Comments

Commented [DS1]: Proposed Committee change to title.

Committee on Rulemaking

Proposed Recommendation from Committee on Rulemaking | May 24, 2021

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-
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]

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[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.").

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

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." For the purposes of this Recommendation, mass

22 comments are comments submitted in large volumes by members of the public, including the

23 organized submission of identical or substantively identical comments. Computer-generated

24 comments are comments whose substantive content has been generated by computer software

25 rather than by humans.[7] Malattributed comments are comments falsely attributed to people who

26 did not submit them.

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[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   federal[8] and state[9] 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

44   comments may mislead an agency or raise issues under the APA and other statutes. One

45   particular problem that agencies may encounter is distinguishing computer-generated comments

46   from comments written by humans. Computer-generated comments may also raise potential

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[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 issues for agencies as a result of the APA's provision for the submission of comments by

48 "interested persons."[10] Malattributed comments can harm people whose identities are stolen and

49 may create the possibility of prosecution under state or federal criminal law. Malattribution may

50 also deceive agencies or diminish the informational value of a comment, especially when the

51 commenter claims to have situational knowledge or the identity of the commenter is otherwise

52 relevant. The informational value that both of these types of comments provide to agencies is

53 likely to be limited or at least different from comments that have been neither computer-

54 generated nor malattributed.

55 This Recommendation is limited to how agencies can better manage the processing

56 challenges associated with mass, computer-generated, and malattributed comments.[11] By

57 addressing these processing challenges, the Recommendation is not intended to imply that

58 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.

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[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 de-duplication software to identify and group identical or substantively

76 identical comments.

77   New software and technologies will likely emerge in the future, and agencies will need to

78 keep apprised of innovations in managing public comments. Agencies might also consider

79 adopting innovations that augment the notice-and-comment process with alternative methods for

80 encouraging public participation, particularly to the extent that doing so ameliorates some of the

81 management challenges described above.[16] Because technology is rapidly changing, agencies

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[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. ADMINISTRATION, 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. ADMINISTRATION, 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 (Apr. 2, 2021) (draft report to the Admin. Conf. of the U.S.).

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82 will need to stay apprised of new developments that could enhance public participation in
83 rulemaking.

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

89 <div align="center">**RECOMMENDATION**</div>

Managing Mass Comments

90   1. The e-Rulemaking Program that the General Services Administration (GSA) administers
91   should provide a common de-duplication tool for agencies to use, although GSA should
92   allow agencies to modify the de-duplication tool to fit their needs or to use another tool,
93   as appropriate. When agencies find it helpful to use other software tools to perform de-
94   duplication or extract information from a large number of comments, they should use
95   reliable and appropriate software. Such software should provide agencies with enhanced
96   search options to identify the unique content of comments, such as the technologies used
97   by commercial legal databases like Westlaw or LexisNexis.
98   2. To enable easier public navigation through online rulemaking dockets, agencies may
99   welcome any person or entity organizing mass comments to submit comments with
100   multiple signatures rather than separate identical or substantively identical comments.
101   Alternatively, agencies may wish to consider approaches to managing the display of
102   comments online, such as by posting only a single representative example of identical
103   comments in the online rulemaking docket or by breaking out and posting only non-
104   identical content in the docket, taking into consideration the importance to members of
105   the public to be able to verify that their comments were received and placed in the agency
106   record. When agencies decide not to display all identical comments online, they should

107 be transparent about their actions and the existence of any process for verifying the
108 receipt of individual comments or locating identical comments in the docket.

109 3. When an agency decides not to include all identical or substantively identical comments
110 in its online rulemaking docket to improve the navigability of the docket, it should ensure
111 that any reported total number of comments (such as in Regulations.gov or in the
112 preambles to final rules) accounts for the number of identical or substantively identical
113 comments. If resources permit, agencies should also consider providing an opportunity
114 for interested members of the public to obtain or access all comments received.

Managing Computer-Generated Comments

115 4. If an agency identifies a comment as computer-generated, it may disregard the comment
116 unless the agency identifies it as having informational value.

117 5. To the extent feasible, agencies should flag any comments they have identified as
118 computer-generated or display or store them separately from other comments. If an
119 agency flags a comment as computer-generated, or displays or stores it separately from
120 the online rulemaking docket, the agency should note its action in the docket. The agency
121 may also choose to notify the submitter directly if doing so does not violate any relevant
122 policy prohibiting direct contact with senders of "spam" or similar communications.

123 6. Agencies that operate their own commenting platforms should consider using a
124 technology that verifies that a commenter is a human being, such as reCAPTCHA or
125 another similar identity proofing tool. The e-Rulemaking Program should continue to
126 retain this functionality.

127 7. If an agency relies on a comment the agency knows to be computer-generated, it should
128 include that comment in its online rulemaking docket. When publishing a final rule,
129 agencies should note any comments on which they rely that are computer-generated and
130 state whether they removed from the docket any comments they identified as computer-

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131 generated.

Managing Malattributed Comments

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

136 9. If an agency flags a comment as malattributed or removes such a comment from the
137   online rulemaking docket, it should note its action in the docket. Agencies may also
138   choose to notify the purported submitter directly if doing so does not violate any agency
139   policy.

140 10. If an agency relies on a comment it knows is malattributed, it should include an
141   anonymized version of that comment in its online rulemaking docket. When publishing a
142   final rule, agencies should note any comments on which they rely that are malattributed
143   and should state whether they removed from the docket any malattributed comments.

Enhancing Agency Transparency in the Comment Process

144 11. Agencies should inform the public about their policies concerning the posting and use of
145   mass, computer-generated, and malattributed comments. These policies should take into
146   account the meaningfulness of the public's opportunity to participate in the rulemaking
147   process and should balance goals such as user-friendliness, transparency, and
148   informational completeness. In their policies, agencies may provide for exceptions in
149   appropriate circumstances.

150 12. Agencies and relevant coordinating bodies (such as GSA's e-Rulemaking Program, the
151   Office of Information and Regulatory Affairs, and any other governmental bodies or
152   informal working groups that address common rulemaking issues) should consider
153   providing publicly available materials that explain to prospective commenters what types
154   of responses they anticipate would be most useful, while also welcoming any other

155   comments that members of the public wish to submit and remaining open to learning
156   from them. These materials could be presented in various formats—such as videos or
157   FAQs—to reach different audiences. These materials may also include statements within
158   the notice of proposed rulemaking for a given agency rule or on agencies' websites to
159   explain the purpose of the comment process and explain that agencies seriously consider
160   any relevant public comment from a person or organization.

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

Additional Opportunities for Public Participation

164 14. Agencies and relevant coordinating bodies should stay abreast of new technologies for
165   facilitating informative public participation in rulemakings. These technologies may help
166   agencies to process mass comments or identify and process computer-generated and
167   malattributed comments. In addition, new technologies may offer new opportunities to
168   engage the public, both as part of or as a supplement to the notice-and-comment process.
169   Such opportunities may help ensure that agencies receive input from communities that
170   may not otherwise have an opportunity to participate in the conventional comment
171   process.

Coordination and Training

172 15. Agencies should work closely with relevant coordinating bodies to improve existing
173   technologies and develop new technologies to address issues associated with mass,
174   computer-generated, and malattributed comments. Agencies and relevant coordinating
175   bodies should share best practices and relevant innovations for addressing challenges
176   related to these comments.

177 16. Agencies should develop and offer opportunities for ongoing training and staff
178   development to respond to the rapidly evolving nature of technologies related to mass,

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179   computer-generated, and malattributed comments and to public participation more
180   generally.
181   17. As authorized by 5 U.S.C. § 594(2), the Conference's Office of the Chairman should
182   provide for the "interchange among administrative agencies of information potentially
183   useful in improving" agency comment processing systems. The subjects of interchange
184   might include technological and procedural innovations, common management
185   challenges, and legal concerns under the APA and other relevant statutes.

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