



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

This is the latest working draft of the ACUS Rulemaking Committee's Recommendation on Mass, Computer-Generated, and Fraudulent Comments. This draft reflects the Committee's most recent deliberations on the Recommendation and will be subject to further consideration at the next Committee meeting on May 24, 2021 at 10:00 AM. The draft has not been approved by the Rulemaking Committee.

Mass, Computer-Generated, and Fraudulent Comments

Committee on Rulemaking

Proposed Recommendation for Committee | May 11, 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 notice-and-comment procedures,
4 agencies create and maintain an online public rulemaking docket in which they collect and
5 publish the comments they receive about the proposed rule, along with other publicly available
6 information about the rulemaking.² Agencies must then process, read, and analyze the comments
7 received. The APA requires agencies to consider the “relevant matter presented” in the
8 comments received and to provide a “concise general statement of [the rule’s] basis and
9 purpose.”³ When a rule is challenged on judicial review, courts have required agencies to
10 demonstrate that they have considered and responded to any comment that raises a significant
11 issue.⁴ The notice-and-comment process is an important opportunity for the public to provide

Commented [DS1]: For Committee Discussion: At the last meeting, the Committee discussed the possibility of changing the title. If the Committee decides to recommend a title change, it will be offered as a proposed amendment at the Plenary Session.

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(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.”).



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12 input on a proposed rule and for the agency to “avoid errors and make a more informed decision”
13 on its rulemaking.⁵

14 Technological advances have expanded the public’s access to agency rulemaking dockets
15 and made it easier for the public to comment on proposed rules in ways that the Administrative
16 Conference has encouraged.⁶ At the same time, in recent high-profile rulemakings, members of
17 the public have submitted comments in new ways or at new scales that can challenge agencies’
18 current approaches to processing these comments or managing their public 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 defined as ~~submitted in large volumes by members of the public, including the~~
23 ~~organized submission of identical or nearly identical comments as comments submitted by~~
24 ~~members of the public organizing the submission of a large number of identical or nearly~~
25 ~~identical comments.~~ Computer-generated comments are comments generated by a software
26 algorithm rather than a human. And malattributed comments are comments falsely attributed to
27 people who did not submit them.

Commented [DS2]: Suggested edits from Nina Mendelson (05-09-2021): This sentence defining mass comments is unclear. As the recommendation later makes clear, the key characteristic of mass comments is that they are submitted in large volumes. They also often include the submission of a large number of identical or nearly identical comments. I suggest the following instead of the language beginning “submitted by” through the end of the sentence: “submitted in large volumes by members of the public, including the organized submission of identical or nearly identical comments.”

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).



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28 These three types of comments, which have been the subject of recent reports by both
29 federal⁷ and state⁸ authorities, can strain how agencies currently process, read, and analyze the
30 comments they receive in some rulemakings. If not managed well, these comments can
31 contribute to rulemaking delays and raise other legal issues for agencies to consider during the
32 rulemaking process. In addressing the three types of comments in a single recommendation, the
33 Conference does not mean to suggest that these comments are to be addressed in the same way.
34 Rather, the Conference is addressing these comments in the same Recommendation because,
35 despite their differences, they present similar and often overlapping management concerns
36 during the rulemaking process. In some cases, agencies may also confront all three types of
37 comments in the same rulemaking.

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

44 In contrast with mass comments, computer-generated comments and malattributed
45 comments may mislead an agency or raise potential issues under the APA and other relevant
46 statutes. One particular problem that agencies may find difficult is distinguishing computer-
47 generated comments from comments written by humans. Computer-generated comments may

Commented [DS3]: Suggested Chair Amendment: delete second half of this sentence starting at “but may at times be somewhat overlapping or similar.”

Commented [DS4]: Suggested edits from Nina Mendelson (05-09-2021): The processing challenges come from the volume of mass comments. Identical content probably makes those large volumes easier to handle because less individual analysis is required. But not all mass comments are identical or nearly identical. Some simply aren’t identical, and even when sets of identical comments are filed, there may be numerous such sets. The sentence should be clarified starting with “result of . . .” “. . . result of the volume as well as the identical or nearly identical content of some comments.”

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).



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48 also raise potential issues for agencies based on the APA’s intention to allow only “interested
49 persons” the opportunity to comment on proposed rules. Malattributed comments can harm
50 people whose identities are stolen and may create the possibility of prosecution under state or
51 federal criminal law. Malattributed comments may also diminish the informational value of a
52 comment, particularly in cases in which the commenter claims to have situational knowledge or
53 the identity of the commenter is otherwise relevant. The informational value that both of these
54 types of comments provide to the agency may be limited, or at least different **from comments**
55 **generated or submitted by identified members of the public.**

Commented [DS5]: Suggested Chair Amendment.

56 This Recommendation is limited to how agencies can better manage the processing
57 challenges associated with these types of comments.⁹ By addressing these processing challenges,
58 the Recommendation does not intend to imply that widespread participation in the rulemaking
59 process, including via mass comments, is problematic. Indeed, the Administrative Conference
60 has explicitly spoken in favor of widespread public participation on multiple occasions,¹⁰ and the
61 current recommendations should help agencies cast a wide net when seeking input from all
62 individuals and groups affected by a rule. The Recommendation aims to enhance agencies’
63 ability to process comments they receive in the most efficient way possible and to ensure that the
64 rulemaking process is transparent to prospective commenters and the public more broadly.

65 Agencies’ ability to process comments can be enhanced by digital technologies. As part
66 of its eRulemaking Program, for example, the General Services Administration (GSA) has

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.

¹⁰ 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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67 implemented technologies on the Regulations.gov platform that make it easier for agencies to
68 verify that a commenter is a human being.¹¹ GSA’s Regulations.gov platform also includes an
69 application programming interface to facilitate mass comment submission.¹² This technology
70 platform allows partner agencies to better manage comments from identifiable entities that
71 submit large volumes of comments. Some federal agencies also use de-duplication software to
72 identify and group duplicate or near-duplicate comments.

73 New software and technologies will likely emerge in the future, and agencies will need to
74 keep apprised of innovations in managing public comments. Agencies might consider
75 innovations that augment the notice-and-comment process with alternative methods for
76 encouraging public participation, particularly to the extent that these innovations can address
77 some of the management challenges described above.¹³ Because technology is rapidly changing,
78 agencies will need to be aware of new developments that could enhance and promote meaningful
79 public participation in rulemaking.

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

RECOMMENDATION

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

¹² See *Regulations.gov API*, REGULATIONS.GOV, <https://open.gsa.gov/api/regulationsgov/> (last visited Apr. 22, 2021).

¹³ 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.).



Managing Mass Comments

- 86 1. The eRulemaking program that the General Services Administration (GSA) runs should
87 provide a common de-duplication ~~platform-tool~~ for agencies to use, although GSA should
88 allow agencies to modify ~~their de-duplication analytic parameters the platform~~ or use
89 another ~~platformtool~~, as appropriate. When agencies find it helpful to process a large
90 number of comments, they should use reliable and appropriate software to identify the
91 unique content in submitted comments and to extract meaningful information from
92 comments. This software should provide agencies with enhanced search options to
93 identify the unique content of comments, such as the technologies used by commercial
94 legal databases like Westlaw or LexisNexis.
- 95 2. ~~To enable easier navigation through the docket, If agencies decide to reduce the burdens~~
96 ~~associated with posting large volumes of identical or nearly identical comments to the~~
97 ~~docket, they agencies~~ may ~~consider welcome inviting~~ people and entities organizing mass
98 comments to submit ~~a single comments~~ -with multiple signatures rather than separate but
99 identical comments. Alternatively, they may wish to consider approaches to managing
100 the display of comments online, such as by posting only a single representative example
101 of identical comments in the agency docket or by breaking out and posting only non-
102 identical content in the agency docket, ~~taking into consideration the importance to~~
103 ~~members of the public to be able to verify that their comment was received and placed in~~
104 ~~the agency record. In rulemakings w~~When agencies decide not to display all identical
105 comments online, they should provide clear notice ~~to of their actions and any process for~~
106 ~~verifying the receipt of individual comments or locating identical comments in the~~
107 ~~docketthe public.~~
- 108 3. When an agency decides not to include all identical or nearly identical comments in its
109 public rulemaking docket due to management concerns, it should ensure that any reported
110 total number of comments (such as in Regulations.gov or in the preambles to final rules)
111 accounts for the number of identical or nearly identical comments and that the agency



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112 provides an opportunity for interested members of the public to obtain or access all the
113 comments received.

Managing Computer-Generated Comments

- 114 4. ~~If an agency identifies a comment as computer-generated, it Agencies should not may~~
115 ~~disregard the comment unless the agency identifies it as having informational value.~~
116 ~~discard the computer-generated comments they receive unless those comments contain no~~
117 ~~informational value. When storing these comments, agencies may store computer-~~
118 ~~generated comments in a separate folder or other location.~~
- 119 5. ~~To the extent feasible, agencies should flag computer-generated comments or display or~~
120 ~~store them separately from other comments.~~ If an agency flags a comment as computer-
121 generated, or removes such a comment from the docket, the agency should ~~note the~~
122 ~~removal its action~~ in the docket. ~~The agency may also choose to notify the submitter~~
123 ~~directly, if: (1) the submitter provided contact information; and (2) contacting the~~
124 ~~submitter does not violate the agency's security policies, which may prohibit directly~~
125 ~~contacting senders of "spam" or similar computer-generated communications.~~
- 126 6. Agencies that operate their own commenting platforms should consider using technology
127 that verifies that a commenter is a human being, such as reCAPTCHA or other similar
128 identity proofing tools, in their comment submission processes. The eRulemaking
129 platform should continue to retain such functionality.
- 130 7. ~~When~~ If an agency relies on a ~~comment the agency knows to be a~~ computer-generated
131 comment, it should ~~be certain to~~ include that comment on its rulemaking docket ~~and note~~
132 ~~that it was computer-generated.~~ When publishing a final rule, agencies should ~~note any~~
133 ~~comments on which they rely that are computer-generated and~~ state whether they
134 removed from the docket any ~~computer-generated~~ comments ~~they identified as computer-~~
135 ~~generated.~~

Managing Malattributed Comments



- 136 8. Agencies should provide opportunities (including potentially after the comment deadline)
137 for individuals whose names or identifying information have been attached to comments
138 they did not submit to identify such comments and to request that the comment be
139 anonymized ~~and-or~~ removed from the docket.
- 140 9. If an agency flags a comment as malattributed, or removes such a comment from the
141 docket, ~~it should note its action in the docket, and the submitter provided electronic~~
142 ~~contact information, the agency should notify the submitter of the agency's action either~~
143 ~~by noting the removal in the docket or by notifying the submitter directly. The agency~~
144 ~~may also choose to notify the purported submitter directly, if: (1) the agency has the~~
145 ~~purported submitter's contact information; and (2) contacting the purported submitter~~
146 ~~does not violate the agency's security policies.~~
- 147 10. ~~When-If~~ an agency relies on a comment it knows is malattributed, it should ~~be certain to~~
148 include ~~an anonymized that version of that~~ comment ~~on-in~~ its rulemaking docket. ~~When~~
149 ~~publishing a final rule, agencies should note any comments on which they rely that are~~
150 ~~malattributed and and note that it was malattributed. When publishing a final rule,~~
151 ~~agencies~~ should state whether they removed from the docket any malattributed
152 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 comments. These policies should take into
155 account the meaningfulness of the public's opportunity to participate in the rulemaking
156 process and should balance concerns such as user-friendliness, transparency, and
157 informational completeness. In their policies, agencies may provide for exceptions in
158 appropriate circumstances.
- 159 12. ~~Agencies and relevant coordinating bodies~~ (such as the eRulemaking Program, the Office
160 of Information and Regulatory Affairs, and any governmental bodies or informal working
161 groups that address common rulemaking issues) should consider providing publicly

Commented [D56]: Comment from Liaison Representative Rebecca Orban (05-10-2021):

In the context of Recommendation 12, I want to ensure the committee members have seen the relatively new "Commenter's Checklist" on Regulations.gov. If one clicks "Comment" on a document that is open for comment in Regulations.gov, the next screen has the option to click on hyperlinked words reading "Commenter's Checklist." This link opens a new window that shows:

- a list of advice on how to prepare persuasive comments;
- a list of reasons why one's comment may not appear in the docket, including "part of a mass submission campaign or is a duplicate" and "identified as spam"; and
- a section on form letters that reads as follows:

Organizations often encourage their members to submit form letters designed to address issues common to their membership. Organizations including industry associations, labor unions, and conservation groups sometimes use form letters to voice their opposition or support of a proposed rulemaking. Many in the public mistakenly believe that their submitted form letter constitutes a "vote" regarding the issues concerning them. Although public support or opposition may help guide important public policies, agencies make determinations for a proposed action based on sound reasoning and scientific evidence rather than a majority of votes. A single, well-supported comment may carry more weight than a thousand form letters.

Note this checklist also includes the following statement: "The comment process is not a vote – one well supported comment is often more influential than a thousand form letters."



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162 available materials that explain to prospective commenters what types of responses the
163 agency thinks would be most useful. These materials could include various formats to
164 reach different audiences, such as videos or FAQs. These materials may also be
165 statements within an agency's notice of proposed rulemaking or on an agency's website
166 that explain the purpose of the comment process and explain that agencies seriously
167 consider any relevant public comment from a person or organization. Agencies may use
168 the eRulemaking program's 'Tips for Submitting Effective Comments' checklist as a
169 model.

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

Additional Opportunities for Public Participation

173 14. Agencies and relevant coordinating bodies should stay abreast of new technologies,
174 platforms, and processes for facilitating informative public participation in rulemaking.
175 These technologies may help agencies to process mass comments or they may help
176 agencies identify and process computer-generated and malattributed comments. Finally
177 in addition, new technologies may offer new opportunities to engage the public, both as part
178 of or as a supplement to the notice-and-comment process. Such opportunities may help
179 ensure that agencies receive input from communities that may not otherwise have an
180 opportunity to participate in the 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 comments. Agencies and relevant coordinating
184 bodies should share best practices and relevant innovations for addressing challenges
185 related to these comments.

Commented [DS7]: Edits to reflect Dick Pierce's 05-10-2021 comment on endorsing the eRulemaking program's checklist for commenters.



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- 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 comments and public participation more
189 generally.
- 190 17. As authorized by 5 U.S.C. § 594(2), the Office of the Chairman of the Administrative
191 Conference should provide for the “interchange among administrative agencies of
192 information potentially useful in improving” agency comment processing systems. The
193 subjects of interchange might include technological and procedural innovations, common
194 management challenges, and legal concerns under the APA and other relevant statutes.