

Comment from Government Member Robert F. Stone on *Mass, Computer-Generated, and Fraudulent Comments*

May 18, 2021

This updated draft (dated 05-11-2021) uses several similar terms and phrases to discuss mass comments. These include:

1. “identical comments” (e.g., line 99);
2. “identical or nearly identical comments” (e.g., line 23); and
3. “duplicate or near-duplicate comments” (e.g., line 72).

Note also the presence of two other terms used to discuss mass comments:

4. “unique content in submitted comments” (e.g., line 91); and
5. “the informational value of a comment” (e.g., lines 54-55)

The first three phrases appear to be used casually and interchangeable throughout, but they do not mean the same thing. And they do not accomplish what agencies needs them to do.

Take, for instance, the first one, “identical comments.” Some organizations may wish to demonstrate their enthusiasm for (or opposition to) a rule by orchestrating a large number of identical comments. That is no problem for agencies that have adopted the draft “identical comment” language. But other organizations may be opposed to the rule and to the entire rulemaking process and would like to delay and undermine it as much as possible. For example, they might orchestrate a mass comment campaign by adding the occasional random space between words or sentences in otherwise identical comments. And they would succeed in defeating the agency’s attempt to combine identical comments since the comments would no longer be identical.

The second and third phrases, “identical or nearly identical comments” and “duplicate or near-duplicate comments,” introduce another type of problem in that they beg the question of what “nearly identical” and “near-identical” mean. That’s no problem when, as in the earlier example, the comments differ by an added random space. But it is a problem if one comment differs by adding a relevant qualifying adjective or a “not” before a verb. Then the meanings of the comments are different and can’t be treated as identical if the agency wishes to survive judicial review. Phrases 4 and 5, “unique content in submitted comments” and “the informational value of a comment” point to the heart of what makes comments identical in the context of a rulemaking: “content” and “informational value.” In other words, they have the identical meaning; they are substantively identical.

My suggestion, then, is to replace the first three phrases wherever they appear in the updated draft with “identical or substantively identical comments.”

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