Mass, Computer-Generated, and Fraudulent Comments

Committee on Rulemaking

Proposed Recommendation for Committee | April 29, 2021

1   This Recommendation addresses how agencies process comments they receive that

2   present distinctive management challenges during notice-and-comment rulemaking. Under the

3   Administrative Procedure Act (APA), agencies must give members of the public notice of

4   proposed rules and the opportunity to comment on them.[1] For each proposed rule subject to

5   notice-and-comment procedures, agencies create and maintain an online public rulemaking

6   docket where they collect and publish the comments they receive about the proposed rule, along

7   with other publicly available information about the rulemaking.[2] Agencies must then process,

8   read, and analyze the comments, and must seriously consider any significant comment from a

9   person or organization.[3] The process is designed to improve the quality of rules by enabling

10   agencies to receive information from a wide range of sources and by allowing the public to

11   scrutinize rules before they take effect.

12   In recent high-profile rulemakings, members of the public have submitted comments in

13   new ways or at new scales that call into question agencies' capacities to effectively process

14   certain kinds of comments and can pose challenges for the public when seeking to understand

15   agency rulemaking dockets. These challenges have prompted concerns in the press and

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[1] 5 U.S.C. § 553.

[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).

[3] Am. Mining Cong. v. EPA, 907 F.2d 1179, 1188 (D. C. Cir. 1990); Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (per curiam).

16 investigations by Congress[4] and the Government Accountability Office (GAO).[5] These

17 investigations identified several problems these comments can create, including their impact on

18 the perceived legitimacy of the rulemaking process and on agency resources required to process

19 the comments.[6] Specifically, the comments that have featured prominently in these investigations

20 have fallen into three categories: (1) identical or nearly identical comments submitted via mass

21 campaigns ("mass comments"), (2) computer-generated comments, and (3) a type of fraudulent

22 comment called a "malattributed comment."

23 A mass comment campaign is characterized by members of the public orchestrating the

24 submission of a large number of identical or nearly identical comments.[7] Some of the challenges

25 involving mass comment campaigns stem from agencies' having to process large numbers of

26 comments that are only slightly different. Mass comment campaigns may also make it more

27 difficult for agencies to digest and analyze the overall content of comments.

28 Computer-generated comments are comments that are generated by software algorithms

29 rather than humans.[8] Computer-generated comments may present legal considerations for

30 agencies in light of the APA's stipulation that only "interested persons" are due an opportunity to

31 comment on proposed rules. It can also be difficult for agencies to distinguish computer-

32 generated comments from comments written by humans. Because these computer-generated

33 comments are not produced by a human, their informational value to the agency may be limited

34 or compromised, and an agency may be misled by them.

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[4] 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), https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf.

[5] 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); U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-413T, SELECTED AGENCIES SHOULD CLEARLY COMMUNICATE HOW THEY POST PUBLIC COMMENTS AND ASSOCIATED IDENTITY INFORMATION (2020).

[6] *Id.*

[7] *See* Balla, Bull, Dooling, Hammond, Herz, Livermore & Noveck, *supra* note 3, at 10-11, 17-25.

[8] *See id.* at 11-12, 38-43.

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35   Malattributed comments are comments falsely attributed to persons who did not, in fact,

36 submit them, a deceit made easier by online datasets of personal information and simple software

37 applications that can automate malattribution.[9] As with computer-generated comments,

38 malattributed comments may mislead agencies. They may also harm the people whose identities

39 are misappropriated, and thereby raise issues for agencies to consider under the APA or state and

40 federal criminal laws.

41   Not all agencies will encounter mass, computer-generated, or malattributed comments.

42 But some agencies have confronted all three, sometimes in the same rulemaking. Mass,

43 computer-generated, and malattributed comments can make it difficult for agencies to extract

44 and synthesize useful information during the comment process. They can tax agencies'

45 resources, adding processing costs and potential delays. They can harm public perceptions about

46 the legitimacy of particular rules and the rulemaking process as a whole. They can also adversely

47 affect the public's ability to understand and interpret the public rulemaking docket. The

48 Administrative Conference has previously called attention to some of these potential problems.[10]

49   There are tools available to help agencies surmount or mitigate many of these problems.

50 As part of its eRulemaking Program, for example, the General Services Administration (GSA)

51 has implemented technologies on the Regulations.gov platform that make it easier for agencies to

52 verify that a commenter is a human being.[11] GSA's eRulemaking site has also implemented an

53 application programming interface for mass comment submission.[12] This technology platform

54 allows agencies to better manage comments from identifiable entities that submit large volumes

55 of comments. Some federal agencies also use de-duplication software to identify and group

56 duplicate or near-duplicate comments.

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[9] *Id.* at 11, 26-38.

[10] Admin. Conf. of the U.S., Symposium on Mass and Fake Comments in Agency Rulemaking (Oct. 5, 2018), https://www.acus.gov/sites/default/files/documents/10-5-18%20Mass%20and%20Fake%20Comments%20in%20Agency%20Rulemaking%20Transcript.pdf.

[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).

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57   New technologies may also facilitate improved methods for encouraging and processing
58 informative public comments. Already, governments in the United States and around the world
59 are innovating new technologies, platforms, and processes to extract useful public input from the
60 rulemaking process.[13] Because these technologies are inchoate, this Recommendation does not
61 recommend specific approaches. But agencies should consider whether such technologies might
62 be helpful in managing mass, computer-generated, and malattributed comments and enhancing
63 the comment process to promote meaningful public participation.

64   In offering the best practices that follow, the Administrative Conference recognizes that
65 some agencies may decide they do not need to adopt some or all of these recommendations,
66 perhaps because they do not receive mass, computer-generated, or malattributed comments.
67 Agencies' choices may also be constrained by their available resources. As such, agencies should
68 tailor the suggestions in this Recommendation to their particular rulemaking programs and the
69 types of comments they receive or expect to receive.

RECOMMENDATION

Policy and Transparency

70 1. When needed, agencies should publish policy statements about the posting and use of
71   mass, computer-generated, and malattributed comments. These statements should take
72   into account the meaningfulness of the public's opportunity to participate in the
73   rulemaking process and should balance concerns such as user-friendliness, transparency,
74   and informational completeness. In their policy statements, agencies may provide for
75   exceptions in appropriate circumstances.
76 2. Agencies should consider including different approaches in their policies with respect to
77   identical or nearly identical comments, including the option for the agency to:
78   a. Post a single representative example in the agency docket with the count of the
79   number of identical or nearly identical comments received and an option to view

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[13] *See* Balla, Bull, Dooling, Hammond, Herz, Livermore & Noveck, *supra* note 3, at 43-48.

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80   all comments;

81   b. Break out and post non-identical content in the agency docket; or

82   c. Ask people and entities orchestrating mass comment campaigns to submit a single

83   comment with multiple signatures rather than separate but identical comments,

84   such as by using the eRulemaking site's available software or other available

85   technologies.

86   3. An agency policy against submission of malattributed comments should provide that if

87   the agency is aware that it has received such a comment, it either will retain the comment

88   in the docket but remove the malattribution (i.e., render it an anonymous submission) or

89   remove the comment from the docket altogether. An agency's policy should, at a

90   minimum, provide that if it determines that a malattributed comment will remain in the

91   docket, the agency will anonymize the comment to protect the person whose identity has

92   been used.

93   4. Agencies and relevant coordinating bodies should consider providing materials that

94   explain to prospective commenters what information is useful to an agency in a public

95   comment. These materials could include various formats to reach different audiences,

96   such as in videos or in FAQs. These materials may also be statements in an agency's

97   notice of proposed rulemaking or on an agency's website that explain the purpose of the

98   comment process and explain that agencies seriously consider any substantive public

99   comment from a person or organization.

100   5. In notices of proposed rulemaking, notices of inquiry, and advance notices of proposed

101   rulemaking, agencies should ask specific questions and identify particular types of

102   information that would be useful in developing the proposal.

      Technology

103   6. Agencies should have access to reliable and appropriate software to identify the unique

104   content in submitted comments and to extract meaningful information from comments.

105   This software should provide agencies with enhanced search options based on the unique

106   content of comments.

107   7.   Agencies that operate commenting platforms should consider using technology that
108   verifies that a commenter is a human being, such as reCAPTCHA or other similar
109   identity proofing tools, in their comment submission processes.

110   8.   The eRulemaking Program should provide a common de-duplication platform for
111   agencies to use, although agencies should be free to modify it or use another platform as
112   appropriate.

Coordination and Training

113   9.   Agencies should work closely with relevant coordinating bodies (such as the
114   eRulemaking Program, the Office of Information and Regulatory Affairs, and any
115   governmental bodies or informal working groups that address common rulemaking
116   issues) to improve existing technologies and develop new technologies to address issues
117   associated with mass, computer-generated, and malattributed comments. Agencies and
118   relevant coordinating bodies should share best practices and relevant innovations for
119   addressing challenges related to these comments.

120   10. Agencies should offer opportunities for ongoing training and staff development to
121   respond to the rapidly evolving nature of technologies related to mass, computer-
122   generated, and malattributed comments and public participation more generally.

Docket Management

123   11. If an agency decides to exclude or remove any mass, computer-generated, and
124   malattributed comments from the docket, it should articulate such a policy in advance or
125   disclose in the docket why it is excluding the comment.

126   12. Agencies should not discard the computer-generated comments they receive unless those
127   comments contain no informational value. When storing these comments, agencies may
128   segregate computer-generated comments or treat them separately.

129   13. Any comment on which an agency actually relies should be placed and retained in the
130   rulemaking docket, including malattributed and computer-generated comments. When
131   placing such comments in the rulemaking docket, agencies should anonymize

132   malattributed comments and consider segregating or flagging computer-generated

133   comments.

134   14. Agencies should provide opportunities (including potentially after the comment deadline)

135   for individuals whose names have been attached to comments they did not submit to

136   identify and request removal of such malattributed comments from the docket.

137   15. If an agency flags a comment as malattributed or computer-generated, or removes such a

138   comment from the docket, and the submitter provided electronic contact information, the

139   agency should notify the submitter of the agency's action.

140   16. When publishing a final rule, agencies should state whether they removed from the

141   docket any malattributed or computer-generated comments.

Additional Opportunities for Public Participation

142   17. Agencies and relevant coordinating bodies should stay abreast of new technologies,

143   platforms, and processes for facilitating informative public participation in rulemaking,

144   particularly to the extent public use of such platforms and processes might reduce the

145   burdens agencies face in discerning useful information from mass, computer-generated,

146   and malattributed comments.

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