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S. Hrg. 116–114

REVIEW OF E–RULEMAKING COMMENT SYSTEMS

JOINT HEARING

BEFORE THE

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

AND THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

OCTOBER 24, 2019

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Committee on Homeland Security and Governmental Affairs

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REVIEW OF E–RULEMAKING COMMENT SYSTEMS

THURSDAY, OCTOBER 24, 2019

U.S. SENATE,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
AND SUBCOMMITTEE ON REGULATORY,
AFFAIRS AND FEDERAL MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittees met, pursuant to notice, at 10:04 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Rob Portman and James Lankford, Chairmen of the Subcommittees, presiding.

Present: Senators Portman, Lankford, Romney, Hawley, Scott, Sinema, and Hassan.

OPENING STATEMENT OF SENATOR PORTMAN[1]

Senator PORTMAN. Welcome, everybody. This is a joint hearing of the Permanent Subcommittee on Investigations (PSI) and the Regulatory Affairs and Federal Management (RAFM) Subcommittee. I hope it is a practice we will continue. I think it makes a lot of sense. PSI, which is the investigative Subcommittee, has issued a report[2] today that is of great importance in ensuring Americans can have a voice in Federal regulations, so I think it is appropriate that we have a combined hearing.

I want to welcome Chairman James Lankford and Ranking Member Kyrsten Sinema. They are on the Regulatory Affairs Subcommittee.

With regard to PSI, the Ranking Member is Tom Carper. He was looking forward to his hearing. He and his staff were very engaged in the report. He is unable to be here because he is in Delaware this morning attending a funeral for a very close friend of his. He sends his regrets to our witnesses, and he asked that I submit his opening statement for the record,[3] which I do now, without objection. He also, by the way, submitted plenty of questions that I think Senator Sinema and I will both be asking to be sure that his voice is heard in this hearing.

As members of a free and open democracy, it is critical that American citizens be able to influence and inform the laws and regulations that govern them. I think we all agree with that.

[1] The prepared statement of Senator Portman appear in the Appendix on page 31.
[2] The report referenced by Senator Portman appears in the Appendix on page 64.
[3] The prepared statement of Senator Carper appear in the Appendix on page 35.

Whether agencies are setting guidelines on the safety of the food we eat, regulating the emissions standards of the cars we drive, or adjusting the fees we pay to visit our national parks, the agency rulemaking process has a big impact on Americans' lives.

That is why over 70 years ago, the U.S. Congress gave the American people the ability to comment directly to Federal agencies on proposed rules so agencies would consider the views of the people who will be most directly affected by them.

When that system is working well, government agencies can get constructive feedback before they finalize their rules. More importantly, it gives the rulemaking process greater transparency the public deserves and lets Americans have their say.

With the rise of the Internet over the past few decades, Congress aimed to modernize that commenting process. In 2002, we passed a law requiring the Federal commenting system to be put online with the goal of giving more Americans an easier way to have a voice. That resulted in the platform Regulations.gov and other agency platforms to accept comments.

It was a good idea. Americans should be able to communicate easily with their government about the issues that affect them.

What we have found here at the Permanent Subcommittee is that, to be frank, we got complacent. Over the years, across both Republican and Democrat administrations, these systems have become outdated and wide open to abuse. What is worse, right now there is no game plan in Congress or in the agencies for how we can correct this moving forward.

Many of these problems are not new. As witnesses know well, the U.S. Government Accountability Office (GAO) issued a report back in 2003 noting that it was difficult to search Regulations.gov and that proposed rules and other documents are not posted using consistent terminology. These were similar issues to those raised by the Administrative Conference, which is the Federal body that offers improvements to the administrative process, in its December 2018 report.

Regarding that same GAO report, by the way, back in 2003, former Senator Joe Lieberman noted that the GAO had found the Environmental Protection Agency (EPA) had made the least progress of all major regulatory agencies in using Regulations.gov, which, he said, "raises questions about why EPA was designated the lead agency for the administration's e-rulemaking initiative." He may have been prescient. Regulations.gov was transferred from EPA to the General Services Administration (GSA) only 24 days ago. It took a while, but it has happened. That is, again, one reason it is hopeful to me that we may have some changes, and it is an appropriate time for us to have this hearing.

The report that Senator Carper and I put out today should be a wakeup call to all of us, in the agencies and here in Congress. It shows just how broken these commenting systems have become.

To name a few examples in our report:

Thousands of comments submitted under stolen identities with no recourse for the identity theft victim to remove the comment from the system;

Comments posted by dead people, including Elvis Presley, Richard Nixon, and many others;

Comments containing the entire text of the 1,225-page novel "War and Peace";

Comments containing threats of violence against government officials and comments with excessive profanity.

For one notable rulemaking relating to the repeal of net neutrality, the Federal Communications Commission (FCC) comment system contains 17,482 "F" words—a record.

What is really ironic is that the FCC is the agency that polices our television and radio airwaves, of course, and they are the ones who fine broadcasters thousands of dollars for airing profanity, but now that same type of content, profanity, sits on their own comment platform.

That is just part of the broader problem the FCC has had with their comment system. Most of the comments on the FCC platform are just noise that do not advance the rulemaking process. That includes a half million comments traced to Russian email addresses. Let me repeat that: 500,000 comments traced to Russian email addresses.

On top of that, nearly 8 million comments came from email domains associated with FakeMailGenerator.com. Eight million. Even though these problems have been clear since at least 2017, the FCC has not taken steps to address them.

The *Wall Street Journal* found that in that same 2017 FCC proceeding, in a random sample of 2,757 comments, 72 percent of respondents they surveyed had not submitted the comments that were posted under their names. This was a *Wall Street Journal* investigation showing that 72 percent of the time respondents said, "That was not my comment."

The Pew Research Center analyzed the 24 million comments the FCC received on this rulemaking and found that only about 6 percent of all of the comments were individual, unique comments. The other 94 percent were submitted multiple times—in some cases, hundreds of thousands of times.

Pew also found that some commenters posted computer viruses as comments, and the FCC left those comments on its platforms. Pew said that meant that members of the public trying to review those comments would end up having their computers infected by malware on a government site. An FCC Commissioner we interviewed for our report confirmed this finding.

While the FCC has its own comment platform, the rest of the government uses Regulations.gov, which is run by a committee led by the General Services Administration and the Office of Management and Budget (OMB). Just like the FCC's system, Regulations.gov has been abused and overrun with spam.

We repeatedly found comments posted on Regulations.gov using stolen identities. When we followed up on this with a dozen agencies that use Regulations.gov, we found none of them reported taking steps to prevent comments from being posted under stolen identities. None of them. In fact, only the Commodities Futures Trading Commission (CFTC), reported that it flagged comments posted under false identities for law enforcement.

Part of the problem is that right now, each agency that uses Regulations.gov has its own policies regarding whether to remove or

redact a comment, so there are currently no consistent guidelines for removing abusive or spammed comments from the site.

This needs to change. The notice and comment process is a crucial part of our regulatory system, and it should function with integrity and consistency.

At its best, the comment process allows everyday Americans to be heard by their government, ensures that agencies write rules based on the best information possible, and helps inspire public confidence in the rulemaking process.

At its worst, clogging the system with unrelated, false, and profane comments keeps legitimate comments from being heard and misleads the public and sometimes the agencies regarding public sentiment about a proposed rule.

We have to be better than that to ensure that a thoughtful, real comment is not lost, like a needle in a haystack.

We are not here to point fingers for letting this happen. As I said earlier, this is an issue where both parties in Congress and the past three Administrations have dropped the ball over the years. My hope instead is that this hearing will be the start of a serious bipartisan conversation about improving these systems. I hope to work with all of the witnesses here and my colleagues on this panel to help build on the report's findings to produce legislative solutions to some of these problems.

I appreciate the fact that the Subcommittee on Regulatory Affairs and Federal Management is here, and I would now like to ask the Chairman of that Subcommittee, Senator James Lankford, for his opening statement.

OPENING STATEMENT OF SENATOR LANKFORD[1]

Senator LANKFORD. Mr. Chairman, thank you so much for pulling this together, for the report that is here, for the witnesses, and your own individual preparation for this. This is one of those things that is behind the scenes that just needs to get solved. Americans want to know that when they can comment, the comments are heard, that they have the ability to be able to have those comments read, and that they do not get lost in the stack of other comments that are not helpful in the process, that are intentionally designed to be able to distract rather than actually to be able to help the process.

This whole table knows and many people here know about the Administrative Procedures Act (APA). It allows interested persons an opportunity to participate in the rulemaking process. That is a good gift to Americans so that they know they are actually being heard.

The Administrative Procedures Act's legislative history shows it was designed to be the minimum agencies were required to be able to provide for actual engagement. We have had Executive Orders (EO) 12866 and 13563 allowing additional rules to be able to get involved to be able to find ways for more people to be involved in the process. That is helpful.

[1] The prepared statement of Senator Lankford appears in the Appendix on page 37.

Today we are talking about are there actually road blocks in the process actually contributing, not just an easier way to contribute but the road blocks to actually getting involved.

There are multiple websites to be able to navigate through. If anyone is not a professional in trying to be able to work their way through Regulations.gov at times, it is difficult to be able to find out whether this is a proposed rule, whether it is a finalized rule, whether there is additional information somewhere else on it, or find out what comments were made.

If someone manages to wade through all these issues and actually submit a comment, then hope they the agency has not already made up its mind, and they want to know did that comment get there in time and is it actually going to be heard.

To address this problem, Senator Sinema and I introduced the Early Participation in Regulations Act, which would require an advanced notice for major rules. That bill passed out of this Committee with bipartisan support. Our focus was not to try to get less comment but to get earlier comment and make it substantial, so that we would know that every entity, when they are thinking through a rule, they have the ability to be able to actually be heard in the process and get it heard.

I agree completely and I am not going to repeat the things that Senator Portman was saying about all of the issues that are currently going through the system, especially in the FCC, the number of foul words that are in it, the death threats that are in it. I only have one thing to be able to push back on. He mentioned that there are comments that are there from dead people as well, and he mentioned Richard Nixon and Elvis Presley. I can go with him on President Nixon being gone, but I am still holding out for Elvis Presley still being alive. [Laughter.]

We will just put that one in dispute as well.

Thanks for holding this hearing. It is a much needed topic.

Senator PORTMAN. Great. Hope springs eternal on Elvis. Senator Sinema.

OPENING STATEMENT OF SENATOR SINEMA[1]

Senator SINEMA. Thank you, Chairman Portman.

First, I want to offer my condolences to Tom for the loss of his dear friend, and our thoughts are with him today.

Thank you to all of our witnesses for being here today. When I hear from Arizonans and Arizona business owners, they tell me how difficult it can be to make sure their voices are heard in the regulatory process. They want to be good actors in their communities, but complex and burdensome rules coming out of Washington can make it more difficult for them to thrive.

Hardworking Arizonans want to comply with sensible rules, but they also want to be heard when Washington makes rules that affect their bottom lines. It is frustrating when Washington does not seem to listen. This is why the regulatory comment system is so incredibly important to our democracy. It is the one time in our regulatory process where small business owners and everyday citizens can talk directly to the people who are making the rules.

[1] The prepared statement of Senator Sinema appears in the Appendix on page 39.

The comment system lets everyday Arizonans tell Washington that there is a better way to do something or a cheaper system that works just as well. Perhaps they have developed a company best practice that goes beyond the requirements in the proposed rule. We must protect the commenting systems from abuse by bad actors posting with these stolen names. We must stop bot farms, whether down the street or across the globe, from interfering with such an important government function.

We must also make sure that no proposed fix to the system gets in the way of allowing any person or business to provide opinions, studies, or data to an agency and help improve the final rule. I am looking forward to hearing from our witnesses today.

Thank you, Mr. Chairman.

Senator PORTMAN. Thank you, Senator Sinema. Thanks for being here.

Senator Romney, would you like to make an opening statement?

OPENING STATEMENT OF SENATOR ROMNEY

Senator ROMNEY. Yes, thank you, Mr. Chairman. I appreciate the opportunity to be here today, and I appreciate the witnesses and their willingness to focus on this important issue.

I represent a State with millions of acres of Federal land. About 70 percent of our State in Utah is Federal land, and obviously, the integrity of the commenting system is very important to the residents of our State because when agencies like the Bureau of Land Management (BLM) are going to issue rules, these comments can have an impact on these rules. Individuals in many cases feel that people off in Washington are making decisions that affect their lives in a very dramatic way, but their voices are not heard. Clearly, when there are reams and reams of fake comments being made, people who have a legitimate concern feel that their particular voice is not being heard.

I would specifically request that as you consider the adjustments necessary to protect the integrity of our comment system, you give consideration to situations like this where, in rural parts of our country—and I am thinking of rural parts of my own State—it is very important for people to have their voice heard and to know that it is being heard by people that are far away that may not be terribly familiar with their circumstances and how a rule might dramatically affect their life.

I would hope that there is some way for those people whose lives are dramatically affected to have a very clear and convincing voice as rulemaking is being considered, and the need to remove from our system fake voices would give people who feel that they are not connected with decisionmaking in a real way a much stronger voice and a much greater confidence that people were listening to them and that Washington actually cared about the interests of people in rural Utah, in rural Missouri, in rural corners of our Nation as a whole.

I just want to underscore, Mr. Chairman, and to each of the people who are testifying today, that this capacity of the American people to comment on a potential rule is critical and elemental as part of their conviction that our democracy is working and that Washington and the government is intent on being aware of their

concerns and reaching decisions that actually are in the best interests of themselves and of our Nation.

Thank you, Mr. Chairman.

Senator PORTMAN. Thank you, Senator Romney.

Senator Hassan is going to hold off until questions, and let us now welcome our witnesses this morning.

Ms. Beth Angerman is here, Principal Deputy Associate Administrator for the Office of Government-Wide Policy at the General Services Administration.

Mr. Dominic Mancini is here. He is the Acting Director of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget.

Ms. Ashley Boizelle is here. She is the Deputy General Counsel (GC) of the Federal Communications Commission.

Mr. Seto Bagdoyan is here. He is the Director of the Forensic Audits and Investigative Service team at the Government Accountability Office.

We thank you all for being here. We in this Subcommittee have a rule to swear in our witnesses, so at this time I would ask for you to please stand and raise your right hand. Do you swear that the testimony you will give before the Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. ANGERMAN. I do.

Mr. MANCINI. I do.

Ms. BOIZELLE. I do.

Mr. BAGDOYAN. I do.

Senator PORTMAN. Thank you all. Please be seated. Let the record reflect the witnesses all answered in the affirmative.

We will be using a timing system today. All of your written testimony will be printed in the record entirely, and we would ask you to try to limit your oral testimony to 5 minutes.

Ms. Angerman, we will hear from you first.

TESTIMONY OF ELIZABETH ANGERMAN,[1] PRINCIPAL DEPUTY ASSOCIATE ADMINISTRATOR, OFFICE OF GOVERNMENT–WIDE POLICY, U.S. GENERAL SERVICES ADMINISTRATION

Ms. ANGERMAN. Thank you very much. Good morning, Chairmen, Ranking Members, and the other Members of the Subcommittees. My name is Beth Angerman, and I am the Principal Deputy Associate Administrator for the Office of Government-wide Policy at GSA. Thank you for inviting me here today to discuss GSA's recent assignment as the Managing Partner for the e-Rulemaking Program and GSA's plans to effectively execute this important and new area of responsibility.

While the Environmental Protection Agency has managed this program since 2002, on July 1, 2019, the OMB announced that GSA was to become the new Managing Partner for the program. GSA was selected as the Managing Partner because the Administration recognized the important synergies that could be achieved by moving the e-Rulemaking Program to GSA. This transition became effective October 1, 2019.

[1] The prepared statement of Ms. Angerman appears in the Appendix on page 40.

OMB made the decision to designate GSA as the Managing Partner as, one, it is consistent with the President's Management Agenda's goal for Centralized Mission Support Capabilities in the Federal Government; two, allows GSA to leverage its technology modernization expertise; and, three, builds on the Regulatory Information Service Center (RISC), which supports the Unified Regulatory Agenda and is already housed at GSA.

To manage e-rulemaking, GSA has established the Office of Regulation Management under my office. This will enable GSA to create a more integrated and streamlined Federal rulemaking program using modernized technology.

GSA's overarching vision for Rulemaking Modernization is threefold:

First, to better integrate data and information technology (IT) between the program and other systems to support data analytics;

Second, to apply innovative technology solutions to promote public access, accountability, and transparency;

Third, to provide a quality shared service to modernize and standardize the technology platform while also reducing duplication.

With that in mind, the e-rulemaking program is a shared service that provides the public with one-stop access to review electronic dockets and electronically submit comments on proposed rulemaking for multiple Federal agencies. It is compromised of both the Federal Docket Management System (FDMS), used by partner agencies to create electronic dockets, and Regulations.gov, which allows the public to interact with those dockets.

Participation is voluntary, and the shared service is funded through interagency agreements with those that participate. As of today, there are 221 Federal rulemaking organizations, including subcomponents of agencies using our e-rulemaking program.

After an agency has posted a docket, a member of the public may participate in the development of a proposed rule by entering a comment and/or uploading relevant files through Regulations.gov. The requirements for submitting information vary greatly by agency. Some agencies require multiple fields, such as name and address. Other agencies allow for anonymous comments. GSA provides a shared technology service that allows participating agencies to configure the information flow to the needs of their rulemaking policies and processes.

GSA's primary focus since assuming ownership has been to ensure continuity of service to agency partners and the public. However, GSA recognizes our responsibility to deliver a secure, innovative, and modern platform to agencies, the public, OMB, and other stakeholders. We have already awarded a contract to assess the current technology platform and design a road map for modernization, both for the e-rulemaking and RISC programs. The study aims to identify strategies to improve the customer experience, better leverage data for analytics, improve interactions with other rulemaking technology in other agencies, and research emerging concerns around public comments.

As GSA embarks on this technology modernization initiative, it is our intent to engage with agencies, Congress, and the public to better understand their priorities and concerns as we design a road

map to improve the efficiency and effectiveness of the program. An initial version of that road map should be complete by the end of fiscal year (FY) 2020.

In conclusion, GSA is proud and honored to have been asked to take on the role of Managing Partner for e-rulemaking. GSA's establishment of a new Office of Regulation Management recognizes the high value placed on the integrity of the regulatory process as a foundation of our Nation's democratic system and our deep respect for the importance of this program as a cornerstone of our democratic process.

Thank you again, and I look forward to your questions.

Senator PORTMAN. Thank you, Ms. Angerman. Mr. Mancini.

TESTIMONY OF DOMINIC MANCINI,[1] ACTING DIRECTOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. MANCINI. Thank you, and good morning, Chairman Portman, Chairman Lankford, Ranking Member Sinema, and other Members of the Subcommittees. I have proudly served as a career civil servant since my first job as an economist at the Food and Drug Administration (FDA) in 2000. Among my current duties, I serve as the Co-Chair of the e-Rulemaking Executive Steering Committee.

Since the enactment of the 2002 E-Government Act and the establishment of the e-rulemaking program in 2003, the interagency Executive Steering Committee has helped to set long-term strategies, goals, and technologies that support the vision and mission of the program. It is in that capacity that I thank you for the opportunity to speak about how the Federal regulatory system endeavors to provide all Americans and interested stakeholders a meaningful opportunity to participate in the regulatory development process.

I will briefly touch on a few general characteristics of the system and recent e-rulemaking updates and highlights.

E-rulemaking is provided as a shared service that is funded by the partner agencies with an average annual budget of approximately $8 million and a funding mechanism reflective of each agency's usage of the system. In addition to the Steering Committee, much of the work is done one step down in the Advisory Board, and most major decisions, such as budget levels and allocations, and major projects, things of this nature, are subject to a majority vote in both the Board and the Committee.

To give you a sense of the scope of the system, in fiscal year 2019, the agencies opened over 330,000 dockets for regulations and related policies and collected about 1 million public comments to Regulations.gov. The usage of the system generally goes up each year; however, the number of comments is usually driven by a few large rulemakings. As an example, a few months ago we did do a brief review that suggested that about 80 percent of proposed rules received ten or fewer public comments.

As you are probably aware, on October 1st of this year, the General Services Administration, as we have discussed before, recently became the Managing Partner of e-rulemaking. The transition has

[1] The prepared statement of Mr. Mancini appears in the Appendix on page 44.

been successful, and I look forward to working closely with our new partners on the opportunities and challenges ahead.

As the Steering Committee considers how to improve e-rulemaking, GSA leadership, as the program management office and co-chair, gives me great confidence because of the technology expertise and mission support functions that GSA has already demonstrated. This includes, as mentioned, our long-time partnership with GSA's Regulatory Information Service Center in managing RegInfo.gov, the website that discloses to the public information about reviews of significant regulations and information collections and manages the semiannual Unified Regulatory Agenda.

The Executive Steering Committee Co-Chairs are both very interested in looking for ways to improve e-rulemaking to increase the functionality of commenting and to improve the interaction between the distinct regulatory systems run by the Federal Government. To that end, as already mentioned, GSA has engaged in a study to look at opportunities for modernization.

Finally, I would like to briefly discuss challenges regarding the ability of the commenting process to continue to be an effective way for the public to express their views. We know that modern technologies both provide an opportunity for the public to participate in the regulatory process in a much more accessible way and also has lowered the cost of engaging in mass mailing and related activities, some of them problematic, that have challenged the agencies. The Executive Steering Committee and agency members of the e-rulemaking community are always looking for ways to improve the usability, security, and integrity of the platform for receiving comments from the public. The system does provide tools to the agencies that handle some of these types of comments, and we look forward to working with a variety of stakeholders to consider potential enhancements.

We have been and are going to continue to take a good look at issues such as technologies and policies associated with the attribution of comments and other modern challenges to the commenting process. I think the mission statement on the front of Regulations.gov sums it up well. It says, "Make a difference. Submit your comments and let your voice be heard." My goal, one I am confident the interagency community shares, is to ensure that we continue to effectively provide the public that opportunity.

Thank you again for inviting me here today, and I would be happy to answer any questions you have about the e-rulemaking program.

Senator PORTMAN. Thank you, Mr. Mancini. Ms. Boizelle.

TESTIMONY OF ASHLEY BOIZELLE,[1] DEPUTY GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

Ms. BOIZELLE. Thank you. Good morning, Chairmen Portman and Lankford, Ranking Member Sinema, and other Members of the Subcommittees. Thank you for the opportunity to testify today about how the FCC uses the Electronic Comment Filing System (ECFS), to collect and review public comments in its rulemaking.

[1] The prepared statement of Ms. Boizelle appears in the Appendix on page 47.

Like other Federal agencies, the FCC adheres to the notice-and-comment rulemaking framework Congress established in the Administrative Procedure Act of 1946. In conducting rulemakings, we are guided by our legal obligations to provide interested individuals with a meaningful opportunity to comment on our proposals and to respond to their significant factual, legal, and policy arguments when we make final decisions. ECFS helps us achieve these objectives by facilitating the intake, posting, retrieval, and review of public comments.

From its inception in 1998, 4 years before the E-Government Act, ECFS has been designed to maximize public participation in rulemaking by making the filing, posting, and retrieval of comments as easy, inclusive, and accessible as possible. To assist in this effort, we offer an ECFS user guide that provides step-by-step instructions for submitting comments. In addition, ECFS is available 24 hours a day, 7 days a week to file or access comments. It accepts short express comments via a text box and longer standard comments in most file formats. It automatically posts submissions to the docket for the public's consideration. Once posted, ECFS enables users and agency staff to search for and review comments via keyword and full text searches.

ECFS's openness is a product both of our legal obligations and many decades of rulemaking experience, the lesson of which is that robust public input means better regulatory policy. We also understand, however, that the more open the system is to the public, the more opportunity there is for mischief. We actively monitor ECFS to ensure that it is both accessible and secure, and that the system's openness does not impede the public's or our ability to use the system for its intended purpose.

Among other updates, we have worked to ensure sufficient network capacity to prevent system disruptions and improved ECFS's search capabilities so those looking to review and respond to substantive comments can find relevant materials.

When we review comments, we focus on their contents rather than the number for and against a specific position. An agency rulemaking is not a public opinion survey, nor is a filer's identity generally critical to our analysis. It is the substance of comments that matters, and in particular, what they have to say about our proposals. By serving as the repository for our rulemaking records, ECFS is integral to our efforts to consider relevant material in these proceedings, address significant issues commenters have raised, and base our decisions on record evidence. Even in rulemakings with millions of comments, ECFS has enabled us to comply with these requirements and successfully defend our actions in Federal court.

Although ECFS has served us well throughout its history, we know that it can be improved. Over the past 3 years, the FCC's information technology staff has implemented various changes to enhance the system's functionality and security. Even more importantly, we have lodged a fulsome review to revamp ECFS from the ground up. A cross-bureau working group is leading this effort and is now in the process of convening roundtables with external stakeholders to ensure that the next generation of ECFS is even more accessible, secure, and resilient than the current system.

Among other things, we are exploring changes like the implementation of CAPTCHA to distinguish human filers from bots, tools to authenticate identities, and the creation of docket home pages that highlight comment deadlines and links to major filings.

As we move ahead with our system overhaul, the Commission will carefully consider the guidance of the performance audit conducted by GAO and the recommendations of the FCC's Inspector General and these Subcommittees. We are committed to using all available resources to ensure that ECFS is a strong, dynamic, and user-friendly platform.

Thank you again for the opportunity to testify today. I look forward to answering your questions.

Senator PORTMAN. Thank you, Ms. Boizelle. Mr. Bagdoyan.

TESTIMONY OF SETO J. BAGDOYAN,[1] DIRECTOR OF AUDITS, FORENSIC AUDITS AND INVESTIGATIVE SERVICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. BAGDOYAN. Thank you. Chairmen Portman and Lankford, Ranking Member Sinema, Members of the Subcommittees, I am pleased to appear before you today to discuss GAO's June 2019 report on identity information in public comments during Federal rulemaking. As part of our overall review which you have requested, this is the first of two planned reports by my team. Complementary data analytics work continues on the identity characteristics of all public comments submitted to the 10 selected agencies we reviewed over a 5-year period. We expect to report on our results in the fall of 2020.

Federal agencies publish on average about 3,700 proposed rules yearly and are generally required to provide interested persons an opportunity to comment on these rules. In recent years, some high-profile rulemakings have received extremely large numbers of public comments raising questions about how agencies manage the identity information associated with such comments.

The APA governs the manner in which many Federal agencies develop and issue regulations, which includes the public comment process. While the APA does not require the disclosure of identifying information from a commenter, agencies may choose to collect this information.

Today I will highlight our report's four principal takeaways regarding how the ten selected agencies we reviewed handle identity information and public comments during proposed rulemaking.

First, Regulations.gov and agency-specific comment websites collect some identity information, such as name and email address, from commenters who choose to provide it and these websites also accept anonymous comments. In this regard, the APA does not require commenters to disclose identity information when submitting comments. In addition, agencies have no obligation under the APA to verify the identity of commenters should they submit such information with their comments.

Second, 7 of the 10 selected agencies have some internal guidance associated with the identity of commenters, but the content and level of detail varies, reflecting the differences among the

[1] The prepared statement of Mr. Bagdoyan appears in the Appendix on page 51.

agencies. The guidance most frequently relates to the comment intake or response to comment phases of the overall public comment process.

Third, within the discretion afforded them by the APA selected agencies' treatment of commenters' identity information also varies, particularly when posting duplicate comments which are identical or near-identical comment text with varied identity information. Generally, agencies told us that they, one, post all comments within the comment system or, two, maintain some comments outside of the system such as in email file archives.

However, within these broad categories, posting practices vary considerably, even within the same agency or rulemaking docket, and identity information is inconsistently presented on public websites. For instance, one agency posts a single example of duplicate comments, then indicates the total number of comments received; whereas, another agency posts every duplicate comment individually with no indication of the total number of duplicates received.

Fourth, selected agencies do not clearly communicate their practices for posting comments and identity information. According to key practices for transparently reporting government data, Federal Government websites should disclose data sources and limitations to help public users make informed decisions about how to utilize such data. Without transparency on posting practices, public users of the comment websites could draw inaccurate conclusions about comments, including who submitted a particular comment or how many individuals commented on an issue. This could limit users' ability to participate in the rulemaking process in a meaningful manner.

In our June report, we made eight recommendations to eight different agencies in our review to more clearly communicate to the public their policies for posting comments and associated identity information to Regulations.gov and agency-specific comment websites. The agencies generally agreed with the recommendations and described actions they planned to take to implement them. At least one agency has actually completed such action.

By more clearly communicating their posting policies, particularly regarding identity information and duplicate comments, the agencies in our review could help public users make informed decisions about how to use comment data as well as provide insights about how comments may have informed the rulemaking process.

Chairmen Portman and Lankford, Ranking Member Sinema, Members of the Subcommittee, this concludes my remarks. I look forward to your questions.

Senator PORTMAN. Thank you, Mr. Bagdoyan. I appreciate your response to our request for the report. I think it is very helpful information for this hearing and for the possibility of us finding some bipartisan solutions going forward.

Some of our colleagues have other responsibilities, so since I will be here until the end, I will defer to them. Senator Lankford, would you like to go now or would you——

Senator LANKFORD. I can defer to Josh if he wants to go.

Senator PORTMAN. Let us go first to Senator Sinema. I know she has another Committee where she is supposed to be right now. Senator Sinema?

Senator SINEMA. Thank you so much, Mr. Chairman. I appreciate that.

When I am home, I hear a lot of concerns from Arizonans because they want low-cost quality health care. They want their family and friends to be physically safe and financially secure, protecting from fraudsters and scammers. They want their kids to get good educations, and they want the opportunity to work hard, build successful lives, and create businesses. They do not want to spend all their time drafting comment letters to the Federal Government when a Notice of Proposed Rulemaking is published in the Federal Register.

Whether as individuals or members of community organizations and advocacy groups, Arizonans expect government, government groups, and government regulations to work for them. When we have a concern, Arizonans expect their voice to be heard. Sign-on comments are an important piece in the functioning of the representative democracy, and it must be afforded the attention and care that it deserves.

My first question is for Mr. Mancini. As we discuss ways to improve the commenting process so that it is not abused or manipulated by bad actors, what can agencies do today to make sure that legitimate commenters are better heard?

Mr. MANCINI. Thank you, Senator, for that question. I do think that as the Co-Chair of the Executive Steering Committee I would like to say that I will defer to the particular agencies on their particular policies, but I do think that in most cases the agencies have the ability to identify and discuss mass mailing campaigns, for instance, in which they can say whether something is 60 or 70 percent like the model versions. This has always been the case. My recommendation because of some of the issues that we have been talking about here, are that actually the system, if they are able to identify all these other activities, an individualized comment that is personal and not duplicative of other comments actually does get a decent amount of attention now. We, as an organization, believe that the agencies actually look forward to seeing those types of individualized comments.

I take your point about how that might be more difficult than to depend on an advocacy organization, but those are the types of comments that are not duplicative, that still can stand out in rulemaking records.

Senator SINEMA. Thank you. What additional direction can OMB provide agencies to make sure that they are taking account of all serious and relevant comments while filtering out submissions that are irrelevant to the issue at hand?

Mr. MANCINI. Thank you again for that question. I have seen the report this morning. I have not digested it. I do think it has very interesting recommendations regarding whether we should provide more guidance on this issue, and we are going to take that very seriously.

As my Co-Chair said, and as I mentioned, we do like to try to drive toward consensus in the agencies, but I can tell you that us

providing more guidance to systematize and to make sure that the agencies have a policy in place I think that is a relatively good recommendation that we are going to take seriously.

Senator SINEMA. Thank you.

My next question is for Ms. Boizelle. In order to provide greater understanding and access by private citizens to comments that are already submitted by the Electronic Comment Filing System, what additional authority or guidance do you need to make sure that you are complying with the Administrative Procedures Act and the E-Government Act while filtering out those fraudulent or irrelevant comments?

Ms. BOIZELLE. Thank you, Senator, for that question. The Committee's report is very helpful in that regard, as is the GAO report on agency comment systems. We believe that we have the tools to improve the Electronic Comment Filing System so that comments are received, posted, and easily accessed once they appear on public dockets.

We believe that that is really a matter of search functionality and that if we can deploy our resources to optimize the search functionality on our platform, individuals looking to access comments that have already been submitted and respond to those comments will be able to do so.

Senator SINEMA. Thank you.

My next question is for Mr. Bagdoyan. The GAO report you discussed in your testimony highlights that duplicative comments, mass mailings, and letters with more than one signatory received different treatment depending on the agency because of the discretion that is afforded under current law. As we know, many people do not have the time or energy to write their own comment letters, and so when they join a campaign, they may not know how the group will package their comments, but they do expect the agency to account for their comments and their opinions.

The report noted the procedures at the EPA, the Consumer Financial Protection Bureau (CFPB), and sub-agencies located within the Department of Labor, so for those audited agencies without guidance, how do they handle duplicative comments, mass mailings, or letters with more than one signatory?

Mr. BAGDOYAN. Sure. Thanks for your question, Senator. I would respond that the six remaining ones essentially operate on an institutional knowledge basis, past practice and experience, again, using their discretion under their interpretation of the APA. I would leave it at that. They employ a variety of formats and measures as we describe in our report from June 2019. It is basically how they have chosen to do business in this regard.

Senator SINEMA. Thank you.

Mr. Chairman, my final question is for Mr. Mancini again. As the Co-Chair of the Executive Steering Council of the Federal Docket Management System, has there been or is there now more discussion regarding standardization across agencies to treat these kinds of mass mailings and comments?

Mr. MANCINI. We have had a significant amount of discussion about that issue, including a couple of the recommendations in the report that we have been discussing. We have not made any major changes to the system at this time, but, yes, we have taken these

issues seriously and have actually done, for instance, a technology review to at least ensure that the current tools that we have can at the least identify even some of the potential technologies that we are talking about here, can identify comments that are actually generated through some sort of automated process.

Senator SINEMA. Thank you.

Thank you, Mr. Chairman.

Senator PORTMAN. Thank you, Senator Sinema. Senator Hawley.

OPENING STATEMENT OF SENATOR HAWLEY

Senator HAWLEY. Thank you, Mr. Chairman. Thank you to you and Chairman Lankford for holding this hearing today and for this important work and for the Subcommittee's report, which is, I think, eye-opening and also terrifying.

I am perhaps more familiar with the comment and rulemaking procedure and the comment submission process than I might otherwise like to be, having formerly practiced in this area of law when I was in private practice. It is troubling that the rulemaking process for Federal agencies has become so inundated, as the report sets out, with profane, abusive, and sometimes downright fraudulent commentary. I think today's hearing is very important.

Mr. Bagdoyan, let me start with you and pick up on something that Senator Sinema was asking just a second ago. In June of this year, your agency made recommendations to eight other Federal agencies about how they might improve their comment posting policies. As of today, as I understand it, only one of those eight has actually implemented any of your recommendations, although I gather that all of them mostly agreed with the recommendations that the GAO issued. Can you tell me, is there any indication that the other agencies will follow GAO recommendations? If so, when?

Mr. BAGDOYAN. Sure. Thank you, Senator Hawley, for your question. I will mention that the Securities and Exchange Commission (SEC) is one agency that has taken action. They have provided us with sufficient documentation for us to make a judgment that they have met that recommendation as intended.

We have an extensive tracking process for how agencies implement our recommendations. It sometimes takes a number of years for them to get around to doing that. We measure progress on intervals as frequently as 6 months where we work through our agency liaisons to get information on the latest status of how they will implement recommendations. We take them at their word that they did agree, and that was a sincere agreement, of course. Then we, as I said, use the formal follow up process that we have. We track them electronically. We update them. I have to sign off on the status when it comes in. Then we employ old-fashioned pestering, actually, to get them to comply.

Senator HAWLEY. We will be happy to join you in that pestering, so we will continue to monitor the progress there. Thank you for the work that your agency has done on this.

Ms. Boizelle, let me turn to you. The report that the Subcommittee is discussing today was initiated after the FCC, as you know, received nearly 24 million comments in just one rulemaking proceeding back in 2017, which is just extraordinary.

Let me just ask you, is it true that almost 8 million of those came from email addresses that were associated with, I think it is, FakeMailGenerator.com? Is that right?

Ms. BOIZELLE. That is our understanding, yes.

Senator HAWLEY. Is it true that more than 500,000 of the comments were associated with Russian email addresses?

Ms. BOIZELLE. That is my understanding, yes.

Senator HAWLEY. Is it true that more than 2 million comments submitted to the proceedings used stolen identities?

Ms. BOIZELLE. I believe you are referring to a recent article, and that is my understanding based on those allegations.

Senator HAWLEY. Now, the Subcommittee report notes that your agency has a general policy that it should, and I am quoting now, "accept and post online all comments it receives, including duplicates and near-duplicates and comments containing copyrighted, profane, and irrelevant material." The report also notes that the FCC has accepted and posted files, some of which contained viruses, which, of course, are dangerous to the general public.

In your written testimony, you note that the FCC's Electronic Comment Filing System has been designed to maximize participation by making the submission and posting of comments as easy and inclusive as possible. I wonder if you could just speak to some of the tradeoffs you think that policy engenders and presents to us given the threats and abuses that we are seeing.

Ms. BOIZELLE. Yes, thank you for that question, and I would be happy to address it. We have historically adopted a policy that errs on the side of openness and inclusiveness and accessibility out of a desire to afford members of the public the opportunity to meaningfully participate in our rulemakings. We believe that public input is of great value.

We understand that values like openness must be balanced against other values, and sometimes those values are competing values like security. We are presently evaluating the balance that we have historically struck and exploring how to recalibrate that balance to better address the issues that the Subcommittee report identified.

Senator HAWLEY. Can you be a little more specific on that? What specifically are you considering, what steps are you considering to ensure that you separate real feedback from fake, fraudulent, and sometimes in the case of viruses downright threatening comments, posts, "participation"?

Ms. BOIZELLE. Sure. Well, we have convened a cross-bureau working group at the FCC, and they have been tasked with overhauling ECFS to address the issues identified in the Committee's report and covered in various media outlets.

They are currently convening roundtables with external stakeholders to explore solutions to the various issues that have been identified to ensure that we address them, but that the platform remains user-friendly. Some of those possibilities include CAPTCHA, like I mentioned during my oral testimony, identity authentication, and optimizing our search functionality to enable people to screen out profane, offensive, or threatening comments. We are exploring a variety of options, and we are committed to ensur-

ing, as I said, that the next generation of ECFS does strike a better balance between openness and security.

Senator HAWLEY. Thank you very much. Thank you all for being here.

Thank you, Mr. Chairman.

Senator PORTMAN. Great questions. Senator Lankford.

Senator LANKFORD. Mr. Chairman, thank you. Thanks to you all for your preparation on this. There is a lot to be able to dig into, so let me try to just randomly jump in here as we can.

As I go through Regulations.gov and the FCC programs you do find obviously a lot of helpful comments from people who are actually going through it, trying to contribute, trying to be able to get in exactly what it is designed for. You also find a lot of folks who just have an opinion on it one way or the other. They want to be able to voice their opinion, like it, do not like it. They are not necessarily helpful in helping design the comments to be helpful for, but they want to be able to contribute and to be able to engage. Then you do find, as Senator Hawley had mentioned, individuals that have posted viruses to it. Clearly, that is an opinion as well, that they just want to carry out whatever they choose to be able to carry out when they choose to come to the site, foul language, Elvis Presley, noting it multiple times, by the way, putting in different comments, proving he is still alive, that is right, because he is still posting on Regulations.gov.

The challenge that we have here is trying to figure out how to get to the public interest and how to also be able to get to allowing comment and interaction among people to say, "I saw this comment. That is a good idea. Let me comment on that comment."

Now, I wish this was something that was only at Regulations.gov. You can go to any one of our Facebook pages, pick any one of us, and see the comments that are posted there and also see a lot of energetic involvement. This is not just an issue with the comments around all these sites. What we are trying to figure out is how to be able to allow the American people to still be able to engage and, as you mentioned, Ms. Boizelle, to try to be able to allow people to put their comments there, but also filter through and be able to find what is helpful in it.

Let me just ask some basic ideas. You talked before about the famous "I am not a robot" filtering here to be able to identify how to be able to filter out bots. Is that in process at this point?

Ms. BOIZELLE. We are not currently using CAPTCHA, but it is under consideration by our working group as a means of distinguishing human filers from bots.

Senator LANKFORD. OK. Is that a conversation for Regulations.gov?

Ms. ANGERMAN. Yes, GSA is currently looking at all of the options available to us to address some of these issues.

Senator LANKFORD. OK, but that is one of the considerations there?

Ms. ANGERMAN. Yes, sir.

Senator LANKFORD. For the FCC, is there a consideration of joining Regulations.gov, cooperating together on that? Or is there a need to be able to keep those two separate since Regulations.gov does cover so many other agencies?

Ms. BOIZELLE. We believe that the Electronic Comment Filing System is the right tool for the FCC. It was designed by the FCC to meet our unique needs. We handle rulemakings and comment volumes of a different scale than many of our peer agencies. In addition to that, we use robust reply comment periods, and we have a robust ex parte process in which people are permitted to meet with Commissioners after a comment period closes and then file summaries of those meetings on the docket.

We have slightly different needs than other agencies, and ECFS has been tailored to satisfy those needs. We obviously also have a lot of experience with our comment platform, as do our external stakeholders. We are not presently considering joining Regulations.gov because we believe that ECFS can be improved to address——

Senator LANKFORD. Is FCC still allowing executable files to be uploaded into the system, not just a Word file or a PDF but executable files as well?

Ms. BOIZELLE. I am really glad that you asked that question. No. In fact, our IT staff combed through ECFS, and they were not able to identify any executable files. As of September 2017, we stopped accepting them, and all submissions are screened——

Senator LANKFORD. As of September 17th of this year?

Ms. BOIZELLE. As of September 2017.

Senator LANKFORD. 2017.

Ms. BOIZELLE. We stopped accepting any executable files. Our IT staff looked at ECFS, looked at legacy submissions, and was not able to identify any infected executable files. At this time all submissions are screened by anti-virus software.

Senator LANKFORD. Good.

Ms. BOIZELLE. Anything infected is quarantined and not posted to a public docket. If anyone has information about files that are infected on our dockets, we would greatly appreciate being directed to those files so that we can rectify them.

Senator LANKFORD. Great. Thank you for that. That would be helpful.

Do you all allow executable files in Regulators.gov?

Ms. ANGERMAN. No, we do not.

Senator LANKFORD. The question here is, as you mentioned, Ms. Boizelle, it does not matter who the name is. It is the comment. We are looking for the quality of the information to try to be able to get that information in. Is there a need to be able to help the American public to be able to filter this out? Because you have systems to be able to go through it, you have staff that can go through it, and to be able to say, OK, that is not relevant, that is not relevant, this is relevant. If individuals looking at the comments want to be able to comment on other comments and say, "That is a good idea, let me add to it," they have to go through at times thousands, or millions on a rare occasion, to be able to look through all those comments.

Is there a need to be able to have an opportunity for individuals to say if you want to just comment agree/disagree like a Facebook page and just say like/do not like, is there a need to be able to allow people to say, "I like this, do not like this"? They are not making a comment, they are just making a reference on it, but if

you really want to make a helpful comment we want your text on that? Would that help people to say, "I express my opinion, but I really do not have something to contribute," that also helps other people to be able to look at comments?

Ms. BOIZELLE. It might be useful to individuals looking to express support for or opposition to a particular agency proposal. We treat agency rulemakings as a process that focuses on the substance of comments rather than the number of comments in support or in opposition. It is well established that rulemaking is not intended to be——

Senator LANKFORD. It is not a vote——

Ms. BOIZELLE [continuing]. A plebiscite. While it may be of utility to people looking to weigh in with respect to our review of substantive comments in the record, I do not think that it would make an enormous difference.

Senator LANKFORD. OK. What about that idea?

Ms. ANGERMAN. I would agree, and I also think that is one of the things that GSA is prioritizing in our new role, is to really engage with the user community and the public and others who actually use the site to figure out what would make it a more user-friendly experience.

Senator LANKFORD. OK. Do you all do any kind of two-factor authentication or verification of the identity in the sense that if a person is going to contribute a comment, they would also contribute an email address, and then they would get a code basically delivered to that email address to make sure it is real, and so if there is going to be interaction between the agencies and this individual, we know this is actually a real working email address that they gave us and we cannot verify whether that is that person's name or not, but at least we have some way of contacting back and a working address?

Ms. ANGERMAN. Certainly, two-factor authentication and other options are things that we will be looking at over the course of the modernization assessment that we have already begun.

Senator LANKFORD. What about Advance Notice of Proposed Rulemaking (ANPRM) as you all start thinking this through? Does that help? Not help? Have you seen any kinds of trends? Obviously, you have been at this all of less than a month at this point. Do we have to look at helpful comments coming in early or comments coming in later? Which one are a greater asset to the agencies as they are going through—advanced early comments or comments after the proposed rule?

Ms. ANGERMAN. I do not know yet, but it is certainly something that we will go back and investigate.

Senator LANKFORD. OK. Let me defer back, and I may have a couple of follow up questions as well.

Senator PORTMAN. Great questions. This is a difficult area because, as has been noted this morning, when you are accepting comments online, particularly when you are asking for consistency between the agencies, which is something Mr. Bagdoyan has referenced, you are going to run into this difficult issue. It is sort of a tightrope. You want to allow for people to express themselves, and yet you want to be sure that the legitimate, real comments, as opposed to comments that are not legitimate, are getting through.

Let me start with one of the issues that is clearly a problem, and I think that chart[1] that is up there probably is about this, which is false identities. People are stealing other people's identities and then issuing comments. By the way, we found examples of this with regard to our colleagues. We found that Senator McConnell had submitted some comments. We asked him if they were his, and he says they were not, but also other colleagues. As we noted earlier, that includes Donald Trump, Barack Obama, my favorite, LeBron James, and a number of other people. Identity theft is an issue again that is not only found with regard to comments to the Federal agencies and it is a difficult issue, but we have to figure out a way to deal with it.

The FCC has responded by telling people who complain that they should write their own comment, as I understand it. In other words, if you actually find out that your identity has been taken and that your name has been used, the response has been, make your own comment. A number of those people do not have a comment to make. They do not have an opinion on the rule, so that does not seem very satisfying. I do not think anyone should be required to engage in a regulatory comment period just because their identity was stolen if they do not otherwise choose to.

Our report found that no agency except for CFTC reported these complaints to law enforcement. That seems to me to be an issue. If you know that it is identity theft, why wouldn't you report that?

What should Regulations.gov and what should the FCC do about that? Do you need any additional authorities from Congress to be able to report the identity theft? Ms. Angerman.

Ms. ANGERMAN. Thank you for that question. GSA's role is to provide the service to the agencies, the rulemaking agencies, to be able to support their own rulemaking processes, which I think we have highlighted they vary greatly in terms of the kinds of data that agencies require. What GSA's role can be in that context is to ensure that when we are alerted to there being any sort of issue, whether it is a false identity or whether it is a threat, we ensure that our help desk is very attentive to those and immediately let the rulemaking agency know when something has been flagged to us so that they can institute their own processes in terms of how they choose to escalate or address that problem.

Senator PORTMAN. OK, but you are not answering the question about whether you believe that it should be standard policy if someone identifies that there is an identity that has been stolen, that that be reported to law enforcement. Is that something you think makes sense as you are looking at the policy?

Ms. ANGERMAN. I think it would make sense, but GSA is not in the role to weigh in on whether law enforcement or any of those agencies should become involved.

Senator PORTMAN. This goes to you, Mr. Mancini. Again, thank you for being here, and as you may know, since I had this discussion with OMB, I think OMB can play a bigger policy role here. I appreciated your comments earlier about the need to have a consensus-driven process and work with all the stakeholders. Ultimately there needs to be a policy decision made here. If you need

[1] The chart referenced by Senator Portman appears in the Appendix on page 215.

additional authorities, I think Congress is very interested, particularly after the GAO work and after this report, to try to be helpful. Do you think that an agency should report claims to law enforcement?

Mr. MANCINI. Again, actually, Senator, I am a little bit hesitant as, for many good reasons, OMB does not usually opine on enforcement decisions of that nature. I do think, however, that—I think that you have identified a potentially good need to have more general policies in this area across the government. I think that the ultimate decision about what a person has discovered—I think your report mentioned CFPB as well—I think really does, for good reasons, reside at the agency itself. I would be happy to take this back to the Steering Committee, I think, if we can standardize that a little bit more.

Senator PORTMAN. I think that is a good idea, standardize it a little bit more. In fact, I think standardization, another topic more broadly that was raised by Mr. Bagdoyan this morning, is important. It seems to me that people ought to know, if they are submitting comments to the FCC, submitting comments to the EPA, or submitting comments to other agencies or departments, that they are being treated equally. In other words, there is a consistent policy of the Federal Government.

Mr. Bagdoyan, maybe you can comment on that. You indicated that you had made suggestions to several agencies, and one actually complied. Part of what you are trying to do, as I understand it, is to try to drive some consistency and standardization across the agencies.

Mr. BAGDOYAN. Right. Thank you, Mr. Chairman. You are absolutely right. The recommendations in our June 2019 report we view as a starting point, if you will. Our ongoing work, as I mentioned earlier, involves very extensive data analytics. For example, we have a survey ongoing of actual commenters who we are approaching to see whether they made the comment associated with their identity or not. We are hoping that will provide us with insight into what else might have to be done. Parallel to that, we are actually crunching, so to speak, data related to approximately—right now not a final count, I must admit—about 60 million comments that were submitted to the 10 agencies during the 5-year period I mentioned, 2013 to 2017. As you can imagine, that is a considerable lift, so that is another source for us to obtain insights about what really went on here. The survey respondents have been generous with their responses. I think the response rate is very good. We will be able to project, as things stand right now, the results of that survey. We are optimistic that we will have a lot more to work with to develop additional recommendations if necessary.

Senator PORTMAN. We would be very interested in seeing the results of that survey. We talked about the *Wall Street Journal's* work on this, investigative reporting, and I think the number was 72 percent, if I recall correctly, of people who said, "That was not me."

Mr. BAGDOYAN. Right. Our final report will come out in the fall of next year, but, of course, we have been in touch with staff over the past year, actually, filling them in as to where we are, and we

would be happy to come up and chat some more about where we are with that.

Senator PORTMAN. Our goal is to end up with policy suggestions and legislation that actually helps you to be able to do your jobs, and that data would be very helpful in that regard.

In terms of consistency, Ms. Boizelle, understanding your comment that the FCC is different than other agencies in some regards, it seems to me that consistency makes sense. Let us assume that you do have your separate approach to this and that the other agencies are under a now GSA-driven process and that OMB and others providing policy guidance are ensuring they have consistency. Shouldn't you be talking to each other? One of the things that drives me crazy is that it seems to me that you are off doing your own thing, and yet you have a process that Ms. Angerman talked about today with Regulations.gov, and you are not sharing best practices and you are not cooperating. Doesn't that make sense at a minimum?

Ms. BOIZELLE. Absolutely. There is great value in interagency communication and coordination. My understanding is that our IT staff does have monthly and weekly conversations with IT folks at other agencies. I do not know what the scope of the communication is, but I absolutely agree. We support coordination on these issues.

Senator PORTMAN. Mr. Mancini has something to say.

Mr. MANCINI. I will add that one thing that I will take from this conference is we actually have had a good bit of discussion—I will refer to the technical folks—about CAPTCHA, and that is—we were talking before the hearing that maybe as soon as we get through this that we need to have a serious conversation about that because there are some tradeoffs in that technology, but that is one specific area in which I think that we really need to get to the bottom of where they can provide technology that just stopped kind of the non-human interaction with it. I will definitely go forward on that.

Senator PORTMAN. I think that is a great example of where sharing best practices and analysis and coming up with a consistent approach would be in the interest of people who have legitimate comments to be made.

Let us talk about CAPTCHA for a second. We talked about the 500,000 emails received from Russian email addresses. We did not talk about the fact that there is lots of evidence that bots are involved here. As an example, the Pew analysis found that on nine occasions, more than 75,000 comments were submitted at the very same second, which looks like an automated spamming campaign to me. This was the restoring Internet freedom proposal. There is no question that millions of fake comments are coming in, and you talked a little bit today about to keep bots from posting on your platforms, it might make sense to install CAPTCHA or other software, not just to focus on CAPTCHA, the one that most of us are aware of. A lot of us have to use it a lot in order to access a website's platforms.

Why would we not turn to that? What is the negative? It is used constantly in service organizations around the world, not just in government agencies but for-profit entities. What is the negative to using it? Is it cost? Is there better technology out there? Why would

you not want to use that kind of software to be able to ensure you have a person at the other end of the comment? Ms. Boizelle, then Mr. Mancini, and Ms. Angerman.

Ms. BOIZELLE. As I said, we are considering CAPTCHA. We do understand the problem of bot submissions spamming our ECFS dockets. It has been described to me that sometimes bot communications are comparable to a modern postcard campaign, and so my understanding, limited as it is in the technological context, is that bots are not always inherently nefarious. Nonetheless, we agree that there is an opportunity for significant abuse and mischief, and we are exploring ways to limit bot activity on our dockets.

In addition to CAPTCHA, we also are exploring whether to eliminate an open application programming interface which we use to allow the submission of mass comments from entities like grassroots organizations, and we are considering eliminating that option because now we believe that our system can accept submissions from organizations like that without dealing with machine-to-machine communication.

Senator PORTMAN. Mr. Mancini, do you agree that bots are not inherently bad?

Mr. MANCINI. I really do not have a general opinion about that. I will say that in the e-rulemaking community there was one instance—I believe it was FDA so I will defer to them if they have more details about this—that was a similar situation. They were getting bot traffic, and it was really overwhelming the system, and they actually turned off some access to the system, and apparently the help desk at EPA at the time got a call, and it was apparently a legitimate—well, they said they were a legitimate person wanting to comment and provide a mass mailing campaign. That said, we do have one example. One example certainly is not a trend.

We have seriously considered and are continuing to seriously consider some sort of human verification process. I will say—and maybe it was the technology, and, again, I will defer to the Program Management Office (PMO)—that one of the technologies, the CAPTCHA technology that they were looking at, actually there were online work-arounds that you could purchase, that you could actually spoof the CAPTCHA, something like a 90-percent success rate, which I will note is probably a lot higher than I actually do when I have to use one of our human things.

The short version, it is not an easy question to answer from a technology point of view, and the PMO and the agencies have been looking at this. We have not really found that one that strikes the balance yet.

Senator PORTMAN. Senator Lankford.

Senator LANKFORD. It is very helpful to be able to get the insight on this. Let me walk through just a couple of the questions that I have.

Ms. Angerman, you had mentioned before that not every agency has the same amount of information that they are pulling in. Some are getting names; some are not getting names. Some are getting addresses; some are not. Can you give me the extremes of one side that does very little and one side that does a lot? What do you see the most that is gathered?

Ms. ANGERMAN. Thank you for the question. The extremes are an agency could just require the comment itself and no other——

Senator LANKFORD. No name, totally anonymous.

Ms. ANGERMAN. Totally anonymous. Some require a name, but there is little validation, the point of this discussion, to verify that that name is a person who is alive or is actually attributable to the person making the comment. If they decide that they want to require a name, they can also opt to provide address and other information, email as well.

Senator LANKFORD. Is that made public?

Ms. ANGERMAN. It is up to the agency, ultimately, to decide, the rulemaking agency to decide what information is made public as a result of the comment process.

Senator LANKFORD. OK. Do any of the agencies ask if you are an American citizen that is making the comment?

Ms. ANGERMAN. I do not believe that that is a question on Regulations.gov

Senator LANKFORD. Does that matter?

Ms. ANGERMAN. At this point it has not been raised to my knowledge that the Steering Committee has made that a requirement for the system.

Senator LANKFORD. In the protection of the personally identifiable information (PII), for those that do gather information but are not making it public at that point, is there any standard for how that information has to be protected to make sure someone cannot get through the system to be able to get access to that?

Ms. ANGERMAN. GSA is the custodian of the data, which means we are responsible for ensuring that the data is protected, that there is disaster recovery in place, that there is continuous monitoring and auditing of the system. Ultimately, the data itself and the comments are owned by the rulemaking agency.

Senator LANKFORD. Are the comments posted immediately, or is there some filtering where someone looks at it and evaluates before this goes live, or they just type it in, push the button, and it goes live immediately?

Ms. ANGERMAN. No, there is a whole process that the agency goes through. Those are the analytics and the procedures that they implement as they are evaluating the comments.

Senator LANKFORD. How long is the delay before that comment goes live?

Ms. ANGERMAN. It is unique to each agency.

Senator LANKFORD. Give me extremes on that. Two minutes? Twenty days? Or is it——

Ms. ANGERMAN. I think that would be a very good example of the extremes.

Senator LANKFORD. OK. FCC, is that the same? Do they go live immediately or are they filtered, reviewed by someone before they go live?

Ms. BOIZELLE. They are not posted immediately, but it is an automated process, so it is done without human intervention. Comments that are filed are posted every 2 hours.

Senator LANKFORD. OK. They are just all pooled together and then put up all at once every 2 hours to be able to——

Ms. BOIZELLE. Correct.

Senator LANKFORD. Foul language comments, attacks on Ajit Pai, which we had tons of that come in, personal attacks, threats on his life, those are automatic. No one is kind of filtering through those to be able to say, hey, that is really not relevant?

Ms. BOIZELLE. That is correct.

Senator LANKFORD. Is that something that can and should be fixed? Obviously when you get a massive amount of people that start making comments, that makes it much more difficult to be able to go through and be able to filter that. Is there a need for some human interaction?

Ms. BOIZELLE. As you indicated, the volume of comments makes putting human eyes on each of them untenable in most circumstances.

Senator LANKFORD. I am struggling through the comment that has been made about mass mail campaigns, and when I go through Regulators.gov, there will be times—and some rules will have every single name on it, and some of them will list mass mail campaign, and then you can go into that and start seeing all the names that are identified and such. If this is not really a vote, like I prefer/I do not prefer, but you are really looking for comments, and really it is more ideas, how can this be improved? How do we need to make sure that there are changes and things that we need to pay attention to before we finish this rule? Why does it matter about a mass mail campaign? Is it really a head count issue quietly in some of the agencies? Is it just about improving the quality of the regulation?

Mr. MANCINI. I think as mentioned before, as a general matter it is not a vote. It is about the quality. I will answer in part with an anecdote, though. We did have in the Administrative Conference of the United States a conference on this issue. I think it was about this time last year. There were a lot of discussions about how to discourage that kind of mass mailing campaign and that it is not actually a useful input into the rulemaking process.

Then someone in the audience said, "Well, look, I am an advocacy organization, and I actually value the ability for my constituents to participate, even if for just support or something like that." That was actually a learning experience for me because I think that there is in the public—and, again, I am not going to speak to whether it is useful for influencing the rulemaking, to actually just express their views in that way.

I do think that some of the challenge that we have heard is that, for instance, a perfectly legitimate advocacy organization can have an attachment that everyone has agreed that they have signed on to this, but there is also modern versions of that and maybe not nefarious versions of that where they mix and match the comments, they make it look like it's more of a grassroots uprising. I think the term is "astroturfing." I think that is the challenge—what we have heard is actually support for maintaining that ability, just express their opinions in the rulemaking process with limiting the worse ways that that can be done.

Senator LANKFORD. Right. If we all marched over today to the National Archives, they would take us to giant petitions that used to come to Congress where people would literally go around different States when Congress was discussing a law in the 1800s,

and they would get people to sign names on those petitions, and often there would be false names of exactly what we are talking about today. This is not something new. They would send the petition up to Congress and would store it there, and someone would deliver it in a speech and say here is the petition of how many thousands of people oppose this or support this. I have no issue with that. That is a beneficial thing, and it has always been around since the beginning of our republic.

The challenge that I have is when we are talking about rulemaking, we want the interaction of people that have ideas, that say, hey, there is a better way to do this, there is some engagement. This person gave a really good idea. I want to comment on their really good idea. Here is something that could even be improved on that because that helps regulators put out better regulations.

What I am trying to figure out is how we can sort this comment process and say there are people's opinions that are here, like/do not like, support/do not support from ideas, and to be able to figure out how we can keep that interaction. If that is something that you all can consider as you are going through the process, but also helping people understand, hey, this is not a big massive vote. A regulation comes from statute, and so this regulation is coming in some form because a statute requires it. If you want to express I like/do not like, go back to our offices, which people are not shy to do either, and to say change the statute. This is really about making a better regulation. Does that make sense? Somehow to be able to make that clear to people, but then to say this is resulting from a statute that we are carrying this out. It is not just an up-down that is coming from it, but here is a way to be able to improve it. Make sense?

Mr. MANCINI. Thank you, Senator. That makes a lot of sense. I am going to take what we have talked about at this hearing and absolutely try to gather the Executive Steering Committee and see if there are better ways, because I think that the agencies in an ideal world are already striving to do that, to try to clearly identify those that are part of the mass mailing campaigns, for whatever legitimate reason, from the individual "here are the insights I want to provide" kind of comments. I think we are taking this very seriously. I think we can think about enhancements on that point.

Senator LANKFORD. For the agencies to be able to filter, that is one thing. For the American public, for them to be able to interact is a different thing, because it is harder if there are 500 comments on something for them to go through each one and to be able to filter, hey, that is not relevant, not relevant, especially when you have to open each one of them up and to be able to go through it, because in Regulators.gov you are only getting the first couple of lines there, and so you have to open each one up and determine is this just a comment or is this an idea beneath it. It is a much slower process for them than it would be for the agencies. If we are going to have interaction, help the American people to have interaction, but just know this is a vote, whether I like it/do not like it, this is an idea, and we can have interactions over here. Anyway, grateful for that.

Ms. Angerman, do you have any comment on that?

Ms. ANGERMAN. I just want to say I think that is an excellent kind of definition of human-centered design. One of the reasons we are really excited to have this program at GSA is that we are really leaning forward at implementing human-centered design with many of the other services that we deliver, and I think we can do the same with this program.

Senator LANKFORD. OK. Senator Portman, thanks for pulling all this together. You and I both requested this, but you really led on requesting the initial study on this, and I appreciate you taking the lead on this.

Senator PORTMAN. Thank you. As I said at the outset, this is an issue that certainly goes across our two Subcommittees—one, the investigative one, and two, the way in which our regulatory system can work better. More broadly, this affects our democracy in fundamental ways, so I appreciate the witnesses being here today. I think we have been able to identify a number of the problems. I think the report does a good job with that. I think most Americans would be shocked to learn about the abuse of the system, for instance, the *Wall Street Journal* survey that 72 percent of the people who were asked, "Did you submit this comment?" said, "It was not me." The identity theft issue is obviously one we have to focus on, allowing people access, but at the same time not having their comments be diluted by comments that are not real, that are fake comments.

I know, Mr. Bagdoyan, you are going to do additional surveys. We are going to be eager to get your information about what has been the history here and how can we solve these issues.

Another thing we have talked about a lot today is consistency and cooperation and best practices. You have 43 agencies, I think, that you are working with, and of those 43 agencies, there are dozens of different approaches to these issues. How do you deal with profane comments? How do you deal with comments that are unrelated? How do you deal with identity theft? It seems to me consistency is the right thing to do both with regard to being sure it is the best approach, the best practices, but also for people who are interested in commenting, they are not just interested in commenting at the FCC or the EPA. They are interested in commenting typically with other agencies, and they would need to know that there is a consistent way they can get their voices heard. I think that is one thing that has come out of this.

Mr. Mancini, you talked about the willingness to sit down now with your task force and talk about the issues that have been discussed in the report and in today's hearing. I appreciate that. We also want to hear from you on legislative ideas. As I said earlier, I think OMB can play a more substantive role on the policy side, and you should not be shy about doing that. In my view, the consensus-driven process is a difficult one. I realize that. It requires leadership. I am also pleased that there has been a transfer made from EPA to GSA because I agree with what Ms. Angerman said earlier, which is that you have this broader responsibility and function, and you indicated in response to Chairman Lankford's comments, you also have other projects that you are undertaking to try to—you said "human-centered," meaning about people. We really want to hear from people and not have their comments be less

impactful because of all the noise. This is a challenge area. We want to be helpful. We expect to stay in touch with you. We are going to be moving forward with some legislative ideas, and we need your input for that.

I want to thank my colleagues, particularly Chairman Lankford, for joining us today and for pursuing this, and we look forward to working with you going forward.

This hearing is now over.

[Whereupon, at 11:27 a.m., the Subcommittees were adjourned.]

APPENDIX

STATEMENT OF CHAIRMAN ROB PORTMAN
U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
Review of E-Rulemaking Comment Systems
OCTOBER 24, 2019

Welcome everyone to a joint hearing of the Permanent Subcommittee on Investigations and the Regulatory Affairs and Federal Management Subcommittee. PSI, the investigative committee, has release our report today on a topic of great importance in ensuring Americans can have a voice in federal regulations.

We welcome Chairman James Lankford and Ranking Member Kyrsten Sinema of the Regulatory Affairs Subcommittee.

I want to note that Ranking Member Senator Carper of PSI was looking forward to his hearing, and he and his staff have put a lot of work into the report. He is unable to be here because he is in Delaware this morning attending a funeral for a close friend who passed away over the weekend. He sends his regrets to our witnesses, and he asked that I submit his opening statement for the record, which I do now, without objection."

As members of a free and open democracy, it is critical that American citizens be able to influence and inform the laws and regulations that govern them.

Whether agencies are setting guidelines on the safety of the food we eat, regulating the emissions standards of the cars we drive, or adjusting the fees we pay to visit national parks, the agency rulemaking process has a significant impact on Americans' lives.

That's why over 70 years ago, Congress gave the American public the ability to comment directly to federal agencies on proposed rules so agencies could consider the views of the people who will be most directly affected by them.

When that system is working well, government agencies can get constructive feedback before they finalize their rules. But more importantly, it gives the rulemaking process the greater transparency the public deserves, and lets Americans have their say.

With the rise of the Internet over the past few decades, Congress aimed to modernize the commenting process—in 2002, we passed a law requiring the federal commenting system to be put online with the goal of giving more Americans an easier way to have a voice. That resulted in the platform Regulations.gov and other agency platforms to accept comments.

It was a good idea. Americans should be able to communicate easily with their government about the issues that affect them.

But what we've found here at the Permanent Subcommittee on Investigations is that, to be frank, we got complacent. Over the years, across both Republican and Democrat administrations, these systems have become outdated and wide open to abuse. What's worse, right now there's no game plan in Congress or in the agencies for how we can correct this moving forward.

Many of these problems are not new. For example, GAO issued a report in 2003 noting that it is difficult to search Regulations.gov and that proposed rules and other documents are not posted using consistent terminology. These were similar issues to those raised by the Administrative Conference, the federal body that offers improvements to the administrative process, in its December 2018 report.

Regarding that same GAO report in 2003, former Senator Joe Lieberman noted that the GAO had found EPA had made the least progress of all major regulatory agencies in using Regulations.gov, which "raises questions about why EPA was designated the lead agency for the Administration's e-rulemaking initiative." He may have been prescient – Regulations.gov was transferred from EPA to the GSA only 24 days ago.

The report Sen. Carper and I put out today should be a wakeup call for all of us. It shows how broken these commenting systems have become.

Just to name a few examples in our report:

- Thousands of comments submitted under stolen identities with no recourse for the identity theft victim to remove the comment from the system;
- Comments posted by dead people, including Elvis Presley and Richard Nixon;
- Comments containing the entire text of the 1,225 page novel *War and Peace*;
- Comments containing threats of violence against government officials and comments with excessive profanity.

For one notable rulemaking relating to the repeal of net neutrality, the FCC comment system contains 17,482 F-words, a record.

And what's really ironic about that is that the FCC is the agency that polices our television and radio airwaves. In other words, it fines broadcasters thousands of dollars for airing profanity, but right now that same type of content sits on its own comment platform.

But that's just part of the broader problem the FCC has with their comment system. Most of the comments on the FCC platform are just noise that do not advance the

rulemaking process. That includes a half million comments traced to Russian email addresses. Let me repeat that—500,000 comments linked to Russian email addresses.

On top of that, nearly 8 million comments came from email domains associated with FakeMailGenerator.com.

And even though these problems have been clear since at least 2017, the FCC has not taken steps to address them.

The Wall Street Journal found that in that same 2017 FCC proceeding, in a random sample of 2,757 comments, 72 percent of respondents they surveyed had not submitted the comments that were posted under their names.

The Pew Research Center analyzed the 24 million comments the FCC received on this rulemaking and found that only about six percent of all of the comments were individual, unique comments.

- The other 94 percent were submitted multiple times—in some cases, hundreds of thousands of times.

- Pew also found that some commenters posted computer viruses as comments, and the FCC left those comments on its platforms. Pew said that meant that members of the public trying to review those comments would end up getting having their computers infected by malware on a government site. An FCC commissioner we interviewed for our report confirmed this finding.

While the FCC has its own comment platform, the rest of the government uses Regulations.gov, which is run by a committee led by the General Services Administration and the Office of Management and Budget. But just like the FCC's system, Regulations.gov has been abused and overrun with spam.

We repeatedly found comments posted on Regulations.gov using stolen identities.

When we followed up on this with a dozen agencies that use Regulations.gov, none of them reported taking steps to prevent comments from being posted under stolen identities.

In fact, only the Commodities Futures Trading Commission (CFTC) reported that it flagged comments posted under false identities for law enforcement.

Part of the problem is that right now, each agency that uses Regulations.gov has its own policies regarding whether to remove or redact a comment, so there are

currently no consistent guidelines for removing abusive or spammed comments from the site.

This needs to change. The notice and comment process is a crucial part of our regulatory system, and it should function with integrity and consistency.

At its best, the comment process allows everyday Americans to be heard by their government, ensures that agencies write rules based on the best information possible, and helps inspire public confidence in the rulemaking process.

At its worst, clogging the system with unrelated, false, and profane comments keeps legitimate comments from being heard and misleads the public and agencies regarding public sentiment about a proposed rule.

We have to be better than that to ensure that thoughtful, real comments are not lost, like a needle in a haystack.

We're not here to point fingers for letting this happen—as I said earlier, this is an issue where both parties in Congress and the past three administrations have dropped the ball over the years. My hope instead is that this hearing will be the start of a serious bipartisan conversation about improving these systems. And I hope to work with all of the witnesses here and my colleagues to build on the report's findings to produce legislative solutions to some of these problems.

I now turn to Sen. Lankford, the Chairman for the Subcommittee on Regulatory Affairs and Federal Management, for his opening statement.

Opening Statement of Senator Tom Carper

"Review of E-Rulemaking Comment Systems"

October 24, 2019

Thank you, Mr. Chairman, for holding this hearing today and for the work you and your staff did on the report we released today detailing a number of serious problems in agency rulemaking processes.

I often say that everything I do I know I can do better. When things aren't perfect, as elected officials, we have an obligation to improve them. I can think of few more worthy causes than ensuring that the American people can make their voices heard when an agency is considering a rule or regulation of interest to them.

Major rulemaking agencies like the FCC, EPA, and others play a vitally important role. After those of us in Congress write bills and the President signs them into law, we rely on these agencies to make our work real and put new polices into effect. To do this, they need feedback from the people a new rule might impact.

Our rulemaking process today is very open. Anyone seeking to weigh in on a proposed rule can go online to Regulations.gov or one of the handful of other federal regulatory web sites to suggest an alternative approach, or even just register their support or opposition to what's being considered. Nobody needs to hire a lawyer or a lobbyist to have their voice heard, and that's exactly as it should be.

But as our report lays out, the open nature of our rulemaking process leaves it vulnerable to abuse.

Recent high-profile rulemakings have unfortunately become yet another forum for the kind of heated and negative political debates we've been having in our country in recent years. Someone who goes online today to learn more about the status of a rule they care about may find among the filings comments laced with profanity, abuse, and even threats against agency personnel and leadership.

Even more troubling is the fact that the open nature of our rulemaking process has created an opportunity for interest groups or even hostile foreign governments to tilt proceedings in their favor.

An October 3rd *BuzzFeed* article details how a telecommunications industry-backed group appears to have orchestrated the submission of more than 1.5 million fake comments in support of the FCC's 2017 effort to overturn the Commission's "Net Neutrality" rules.

In addition, a significant number of comments filed at the FCC in 2017 have been traced to email addresses in Russia.

This is extremely troubling. Our constituents deserve to know that agency rulemakings – whether they agree with the final decision or not – have been conducted with their interests in mind, not those of well-funded groups or hackers seeking to make mischief.

It's my hope that this hearing today can start a conversation about the steps rulemaking agencies and Congress can do to restore confidence in the federal rulemaking process. Our report points to some technological and policy changes agencies can take now, likely without new legislation. I look forward to hearing from our witnesses about what we can do to help.

I also hope the attention that's been called to this issue in recent months will result in consequences for anyone found to have improperly interfered in agency rulemakings. I think that will send an important message to others that the kind of fraud *BuzzFeed* and others have reported on will not be tolerated.

Opening Statement of Chairman James Lankford

Joint hearing before the Permanent Subcommittee on Investigations

And

Regulatory Affairs and Federal Management Subcommittee

Thursday, October 24th at 10:00

"Review of E-Rulemaking Comment System"

- Good morning, welcome to today's hearing and thank you to Senator Portman and Permanent Subcommittee on Investigations for partnering with the Regulatory Affairs Subcommittee on this hearing to discuss improvements to the systems by which the public responds to proposed regulations.

- The Administrative Procedure Act outlines the basic requirement that "interested persons" shall have the opportunity to participate in the rulemaking process through the submission of their views.

- The APA's legislative history shows this was designed to be the minimum agencies were required to do for public engagement.

- Most executive orders that currently govern the rulemaking process emphasize the need for public engagement.

- Executive Order 12866 directs agencies to provide the public with "meaningful participation in the regulatory process" and a "meaningful opportunity to comment on any proposed regulation."

- Similarly, Executive Order 13563 directs agencies to adopt regulations through a process that "involves public participation."

- These requirements to engage the public recognize that agencies do not have all the answers and ideas that work on paper might not work in practice so it is vital that potentially regulated parties be involved in this process.

- Today's notice and comment process, however, is often a roadblock to meaningful participation.

- As outlined in reports by PSI, GAO, the Administrative Conference and other organizations, these websites are not as user friendly as they should be.

- Interested parties must navigate through multiple websites, multiple dockets, and poor search features to find the specific rule on which they wish to comment.

- Once they have found the correct rule and correct docket the public faces a host of backend issues that the PSI report describes in detail: significant number of spam comments, explicit language, and even virus-infected files.

- If someone manages to wade through these issues and submits a comment, they then hope the agency has not already made up its mind on the major aspects of the proposed rule and is truly open to different perspectives.

- Earlier this year, the Regulatory Affairs and Federal Management Subcommittee held a hearing and discussed the need for advanced notices of proposed rulemaking. Former OIRA Administrators supported the idea, recognizing that at the proposed rule stage, where the APA requires notice and comment, agencies have generally already made up their mind on how they will regulate.

- To address this problem, Senator Sinema and I introduced the Early Participation in Regulations Act, which would require an advanced notice for major rules. The bill passed out of this committee with bi-partisan support.

- Public participation is vital to the rulemaking process, but if agencies only take public comments after they have decided how they want to regulate or the system for receiving those comments is unnecessarily difficult to navigate, then the public comment requirement is not effective.

- Requiring earlier public outreach and simplifying the notice and comment system would give the public a meaningful voice and provide regulators with perspectives they otherwise may not have considered, which would result in more effective and less burdensome regulations.

- I look forward to discussing solutions to these issues this morning. Thank you.

Ranking Member Kyrsten Sinema
Subcommittee on Regulatory Affairs and Federal Management
Joint Hearing with the Permanent Subcommittee on Investigations
"Abuses of the Federal Notice-and-Comment Rulemaking Process"
Opening Statement

When I hear from Arizonans and Arizona business owners, they tell me how difficult it can be to make sure their voices are heard in the regulatory process.

They want to be good actors in their communities. But, complex and burdensome rules coming out of Washington can make it difficult for them to thrive.

Hardworking Arizonans want to comply with sensible rules, but Arizonans also want to be heard when Washington makes rules that affect their bottom lines. It is frustrating when Washington does not seem to listen.

This is why the regulatory comment system is so incredibly important to our democracy. It is the one time in our regulatory process where small business owners and everyday citizens can talk directly to the people making the rules.

The comment system lets everyday Arizonans tell Washington that there is a better way to do something, or a cheaper system that works just as well – perhaps that they have developed a company best practice that goes beyond the requirements in the proposed rule.

We must protect the commenting systems from abuse by bad actors posting with stolen names. We must stop bot farms, whether down the street or across the globe, from interfering with such an important function of government.

We must also make sure that no proposed fix to this system gets in the way of allowing any person or business to provide opinions, studies or data to an agency and help improve the final rule.

STATEMENT OF ELIZABETH ANGERMAN
PRINCIPAL DEPUTY ASSOCIATE ADMINISTRATOR
OFFICE OF GOVERNMENT-WIDE POLICY
U.S. GENERAL SERVICES ADMINISTRATION

BEFORE THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS AND THE SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT, SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE

October 24, 2019

Good morning Chairman Portman, Chairman Lankford, Ranking Member Carper, Ranking Member Sinema, and the other Members of the Subcommittees. My name is Beth Angerman, and I am the Principal Deputy Associate Administrator for the Office of Government-wide Policy at the U.S. General Services Administration (GSA). Thank you for inviting me here today to discuss GSA's recent assignment as Managing Partner for the eRulemaking Program and GSA's plans to effectively execute this new area of responsibility.

Before delving into the substance of the eRulemaking Program, I would like to briefly discuss GSA's new role in this space. While the Environmental Protection Agency has managed this program since 2002, on July 1, 2019, the Office of Management and Budget (OMB) announced that GSA would become the new Managing Partner for the Program. GSA was selected as the Managing Partner because the Administration recognized the important synergies that could be achieved by moving the eRulemaking Program to GSA. This transition became effective October 1, 2019.

GSA was designated as the Managing Partner for several noteworthy reasons. First, this new role is consistent with the goals of the President's Management Agenda and the vision outlined in OMB Memorandum M-19-16, Centralized Mission Support Capabilities for the Federal Government. GSA has a key role in implementing OMB M-19-16 because of its long history in offering shared services for Federal real estate and acquisition.

Second, GSA will leverage its expertise in technology modernization to ensure that the eRulemaking Program delivers a modern service with secure and innovative technical solutions that are responsive to the needs of the interagency community.

Third, GSA is already home to the Regulatory Information Service Center (RISC) which offers support to agencies and OMB's Office of Information and Regulatory Affairs (OIRA) in the creation of the Spring and Fall Unified Agendas, and in managing the process by which OIRA executes its regulatory and information collection review authorities. GSA is uniquely positioned to collaborate both internally with RISC and externally with the Office of the Federal Register (OFR), the Government Publishing Office (GPO), and other regulatory stakeholders.

Components of the eRulemaking Program

With that in mind, the eRulemaking Program is a shared service that provides the public with one-stop access to review electronic dockets and electronically submit comments on proposed rulemaking and other agency actions for multiple Federal agencies. It is comprised of both the Federal Docket Management System (FDMS), used by Partner agencies to create electronic dockets, and Regulations.gov, which allows the public to interact with those dockets. The eRulemaking Program allows rulemaking agencies to fulfill the requirements of the E-Government Act of 2002. Participation is voluntary and the shared service is funded through interagency agreements with those that participate. As of today, there are 221 partner agencies, including subcomponents of agencies, using the eRulemaking program.

To use the system, partner agencies post electronic dockets for proposed rules and other actions on Regulations.gov. Members of the public can search the site for information in dockets by name or by topic area. A member of the public may participate in the development of a proposed rule by entering a comment and/or uploading relevant files through Regulations.gov. The policies for submitting information vary greatly by agency. Some agencies require multiple fields, such as name and address. Other agencies allow for anonymous comments. GSA provides a shared technology service that allows participating agencies to configure the information flow to the needs of their rulemaking policies and processes.

GSA's primary focus since assuming ownership has been to ensure continuity of service to agency partners and the public. GSA also recognizes its responsibility to deliver a secure, innovative, and modern platform to agencies, the public, OMB, and other stakeholders moving forward. The Office of Regulation Management has already awarded a contract to assess the current technology platform and design a roadmap for modernization, both for the eRulemaking program and the RISC and OIRA Consolidated Information System (ROCIS).

Office of Regulation Management

In recognition of the importance of the program, GSA has established a new Office of Regulation Management within the Office of Government-wide Policy. This office will enable GSA to create a more integrated and streamlined federal rulemaking program using modernized technology. While the missions of RISC and of the eRulemaking program remain the same -- to promote transparency and efficiency in the rulemaking process -- GSA's overarching vision for Rulemaking Modernization is three-fold:

- Better integration of data and information technology between the Program and other systems to support data analytics, both for rulemakers and members of the public.
- Apply innovative approaches to promote public access, accountability, and transparency.
- In support of the President's Management Agency and Cross Agency Priority Goal #5, provide a quality shared service to modernize and standardize the technology platform, while reducing duplication in support of improved services across the Federal rulemaking landscape.

Some of the potential outcomes we plan to explore:

- Improving value, reducing costs, and ensuring secure implementations for underlying technology, including best practices for shared hardware components and software licensing.
- Improving customer experience for existing services provided by the eRulemaking and RISC programs.
- Expanding the portfolio of shared services to address aspects of the regulatory process that are still performed redundantly by partner agencies. GSA will investigate the extent to which participating agencies supplement their use of eRulemaking systems with investments in labor and technology for their regulatory programs and docket centers.
- Addressing any unmet needs for non-participating agencies, and expanding the membership in the eRulemaking Program.
- In partnership with the OFR, GPO, and other stakeholders, enabling federal-wide regulatory analysis for rulemakers and the public. This includes:
    - Improved practices for data standards, data quality, and data governance.
    - Improved system interfaces among eRulemaking, RISC, OFR and GPO to integrate datasets, streamline the publication process and track a rulemaking throughout its lifecycle.
    - New approaches and technologies for making the unstructured content in regulatory documents and comments more machine-readable and accessible for automated analysis.

Challenges and Opportunities

GSA is also prepared to research potential risks posed by external forces related to data integrity, falsified identities, and the automated generation of public comments. Although we will vigorously work to mitigate any identified risks, we understand this to be a complex dynamic that extends beyond technology fixes to legal and policy considerations with multiple interested stakeholders. It is our intention to protect the transparency and accessibility of the process to the American public while providing the best, most cost effective tools possible to agencies to ensure they have sophisticated analytics programs necessary to make data driven regulatory decisions.

As GSA embarks on this technology modernization initiative, it is our intent to engage with stakeholders -- agencies, Congress, and the public -- to better understand their priorities and concerns as we design a roadmap to improve the efficiency and effectiveness of the program. An initial version of that roadmap should be complete by the end of FY 2020.

In conclusion, GSA is proud and honored to be the Managing Partner for the eRulemaking Program. GSA's establishment of a new Office of Regulation Management recognizes the high value placed on the integrity of the regulatory process as a foundation of our nation's democratic system and our deep respect for the importance of this program as a cornerstone of the democratic process.

Thank you, again, Chairman Portman, Chairman Lankford, Ranking Member Carper, Ranking Member Sinema, and the other Members of the Subcommittees, for inviting me here today.

I look forward to your questions.

STATEMENT OF DOMINIC MANCINI
CO-CHAIR, EXECUTIVE STEERING COMMITTEE, eRULEMAKING PROGRAM

BEFORE THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS AND THE SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT, SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE

October 24, 2019

Good morning Chairman Portman, Chairman Lankford, Ranking Member Carper, Ranking Member Sinema, and the other Members of the Subcommittees. My name is Dominic Mancini; I am the career Deputy Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), and in that capacity I also serve as the Co-Chair of the eRulemaking Executive Steering Committee.

Thank you for the opportunity to speak before the Subcommittees in my role as Co-Chair of the eRulemaking Program's Executive Steering Committee. The eRulemaking Program is a cornerstone of the Federal regulatory system, as it provides all Americans and interested stakeholders a meaningful opportunity to participate in the rulemaking process. The website allows the public to find, read, and comment on proposed regulations and related documents published in the Federal Register.

Since enactment of the 2002 E-Government Act, the Executive Steering Committee has worked to support the eRulemaking Program to increase transparency, improve regulatory policy decisions, decrease administrative costs, and increase regulatory compliance. In addition to the public-facing website Regulations.gov, the eRulemaking Program includes the back-end Federal Docket Management System (FDMS), which provides a platform for agencies to organize their rulemakings and other dockets and make their proposed rulemakings available for public comment.

Since the establishment of the eRulemaking Program in 2003, the Executive Steering Committee sets long-term strategies, goals, and technologies that support the vision and mission of the Program. The Executive Steering Committee is committed to working with the General Services Administration (GSA), our new managing partner, to modernize the Federal rulemaking landscape while maintaining current services, leveraging common technology, and reducing duplication to the extent possible. Specifically, we endeavor to make the eRulemaking Program more responsive to partner agencies and public stakeholders by adopting emerging technologies to continuously improve the way the Federal government implements the E-Government Act, the Administrative Procedure Act and numerous other laws and Federal regulatory policies.

Since 2003, the eRulemaking Program has grown to be the most prominent way in which most Federal agencies comply with their obligations under the E-government Act. The eRulemaking program is provided as a shared service and is funded by the partner agencies, with a budget of about $8 million per year and a consensus funding mechanism approximating each

agency's usage of the system. In addition to the Steering Committee, much of the work is done one step down in the Advisory Board, and most major decisions, including budget levels and allocations, and major projects, are subject to a majority vote in both the Board and the Committee.

To give you a sense of the scope of the system, in Fiscal Year 2019, the agencies opened over 330,000 dockets for regulations and related policies and collected about one million public comments. The usage of the system generally goes up each year; however, the number of total comments is usually driven by a few large rulemakings. For example, a few months ago we did a brief review that suggested that about 80 percent of proposed rules receive 10 or fewer comments.

One recent development I am excited about is the new "front page" of Regulations.gov, currently available in beta. Among the enhancements are significantly improved search capability (including separating searches by document type), and more intuitive ways for the public to submit comments. I believe the team has received good feedback on the beta, and hope to continue to refine and eventually launch that as the permanent front door to Regulations.gov in the future.

As mentioned briefly above, GSA recently became the managing partner of eRulemaking. Consistent with the President's Management Agenda[1] and the goals of Executive Order 13781, "Comprehensive Plan for Reorganizing the Executive Branch," OMB announced that the eRulemaking Program would move from the EPA to GSA in fiscal year 2020. The transition has been successful, and I look forward to working closely with our new managing partner on the opportunity and challenges ahead. As the Steering Committee considers how to improve eRulemaking, GSA leadership, as the Program Management Office and Co-Chair, gives me great confidence because of the technology expertise and mission support functions that GSA has already demonstrated. For example, GSA's Regulatory Information Service Center (RISC) manages RegInfo.gov, the website that discloses to the public information about OIRA reviews of significant regulations under Executive Order 12866, "Regulatory Planning and Review," and information collections under the Paperwork Reduction Act. RISC is also responsible for working with agencies to publish summary information regarding significant regulations in the semiannual Unified Agenda of Federal Regulatory and Deregulatory Actions and the annual Regulatory Plan. Similar to FDMS, the back-end database that supports Reginfo.gov is the RISC OIRA Consolidated Information System (ROCIS).

GSA and OIRA are both very interested in looking for other ways to improve the eRulemaking process, including increasing the functionality of commenting, and improving interaction among the various systems relating to rulemaking. To that end, GSA has engaged in a study of opportunities for modernization. This includes taking a good look at issues such as technologies and policies associated with the attribution of comments, and other modern challenges to the eRulemaking process.

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[1] OMB Memorandum M-19-16, *Centralized Mission Support Capabilities for the Federal Government.*

Regarding commenting in general, the Executive Steering Committee and all agency members of the Advisory Board are looking at ways to improve the usability, security, and integrity of the platform for receiving comments from the public, and eRulemaking already provides what I believe are relatively effective tools in this area. We know that modern technologies both provide an opportunity for the public to participate in the regulatory process in a much more accessible way, and lower the cost of engaging in mass mailing and related activities that have challenged the agencies. I am looking forward to working with the agencies, GSA, the public, and others on opportunities to improve eRulemaking.

Thank you again, Chairman Portman, Chairman Lankford, Ranking Member Carper, Ranking Member Sinema, and the other Members of the Subcommittees, for inviting me here today. I look forward to your questions.

STATEMENT OF

ASHLEY BOIZELLE
DEPUTY GENERAL COUNSEL
FEDERAL COMMUNICATIONS COMMISSION

HEARING ON REVIEW OF E-RULEMAKING COMMENT SYSTEMS

BEFORE THE

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS AND THE SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

U.S. SENATE

OCTOBER 24, 2019

Chairmen Portman and Lankford, and Ranking Members Carper and Sinema, thank you for the opportunity to testify today. I serve as Deputy General Counsel at the Federal Communications Commission (FCC) and am here today to address how the FCC collects and reviews public comments in its rulemakings. My testimony will focus on the role the FCC's "Electronic Comment Filing System" (ECFS) plays in this process. I am providing this testimony from the perspective of a senior FCC lawyer responsible for defending the agency's actions in federal appellate courts and ensuring that the Commission's rulemakings comply with our legal obligations.

The Administrative Procedure Act – Basic Legal Requirements

Like other federal agencies, the FCC adheres to the rulemaking framework Congress established in the Administrative Procedure Act (APA) of 1946. In modern practice, the FCC conducts its rulemaking under the "notice-and-comment" or "informal" rulemaking procedures set forth in section 553 of the APA. This process consists of three steps:

1) The agency publishes a notice of proposed rulemaking;

2) The agency offers the public ("interested parties") an opportunity to comment on its proposal; and

3) The agency publishes a final rule that includes a statement explaining the basis and purpose of the rule.

ECFS Plays an Important Role in Facilitating the Intake and Posting of Comments from the Public

ECFS is the tool the FCC uses to manage the second stage of this process – the point at which the public submits comments regarding our proposed rules. ECFS was created in 1998 and has been modified incrementally over time in response to the increased emphasis on electronic filing and the changing needs of the Commission. The Commission adopted the second generation of ECFS (ECFS 2.0) in 2009 and the third generation of ECFS (ECFS 3.0) in 2016.

Throughout its history, ECFS has been designed to maximize public participation in rulemakings by making the submission and posting of comments as easy and inclusive as possible. This fundamental feature of ECFS – its openness – is not animated exclusively by the FCC's efforts to comply with the APA, which requires that agencies afford the public a meaningful opportunity to comment on the agency's proposals. It is also the product of many decades of practical rulemaking experience at the FCC, the lesson of which is that the policymaking process benefits from vigorous, on-the-record exchanges between parties with different views and that the FCC can improve accountability and transparency through an open rulemaking process.

To facilitate this discourse, ECFS is available 24 hours a day, seven days a week to anybody who wishes to submit a comment, or to search for and review comments that other members of the public have submitted. It accepts comments made in most file formats (although not executable files), scans those filings for viruses and quarantines infected attachments, and posts comments at regular intervals via an automated process. ECFS provides an easy, web-based form for parties who wish to submit brief comments (called "express" comments), but also gives parties the ability to submit comments with voluminous supporting materials, such as technical analyses and expert reports (called "standard" comments).

In its current form, technically sophisticated users can access ECFS through an "application programming interface" (API). The API can be used for various purposes, including the submission of "bulk" comments on behalf of groups and extracting large numbers of comments from the system for content analysis.

ECFS is also an adaptable, "scalable" system. It was designed to manage both rulemakings on technical subjects that may attract only a handful of comments and high-profile proceedings that generate headlines and millions of comments, such as the FCC's 2017 "Restoring Internet Freedom" proceeding. Since 2016, ECFS has been hosted on a cloud computing platform, which has improved the FCC's ability to manage surges of comments such as those experienced in 2017.

In addition to facilitating comment intake and posting submissions to the public docket, ECFS's user interface organizes information to enable members of the public to find and respond

to other comments in the record. It does so by making it possible for individuals to locate specific proceedings and filings by running full-system searches via proceeding number, FCC bureau, author, type of filing, or date ranges, among other things. For those without such information, ECFS contains a page highlighting popular proceedings with links to the agency's most active dockets. Once an individual selects a specific proceeding, ECFS provides shortcuts to the most popular comments by linking to submissions from the top filers and authors. Through the combination of its interface and its features, ECFS plays an important role in providing the public with a meaningful opportunity to weigh in on the agency's proposed actions.

ECFS Facilitates the Agency's Review of Comments

ECFS also plays an essential role in the third step of the APA rulemaking process – the point at which the FCC analyzes the contents of the rulemaking record and prepares its final rule. Staff in the FCC's Bureaus and Offices use ECFS to review the public comments submitted in a proceeding. The goal of this review is to identify and summarize comments that raise significant factual, policy, and legal arguments. Attorneys in the FCC's Bureaus and Offices then use the comments and summaries to ensure that the agency responds to relevant evidence, analysis, and arguments in the record, and to organize and draft the documents that eventually become final Commission rules and orders.

The FCC Focuses on the Content of Comments in Satisfying its Obligation to Respond to Significant Factual, Legal, and Policy Arguments in the Record

Agency rulemaking is the process by which federal agencies propose and promulgate regulations. When adopting any final rule, the Commission is required to address important aspects of whatever problem it is attempting to solve, offer reasoned explanation for its decisions, and consider and respond to significant substantive legal and policy arguments in the record. Compliance with these legal obligations necessitates a platform like ECFS that enables agency staff to create a complete administrative record and to accept, search, retrieve, and review the comments that constitute that record.

Guided by our statutory obligations and case law interpreting and applying the APA, we focus on the content of comments, rather than the number that advance a specific position. Courts have made clear that we are not required to tally the number of comments for or against our proposed action; a rulemaking is not a public opinion survey. Likewise, the identity of a filer, although potentially relevant if the comment purports to offer factual assertions or analysis based on expertise, is generally not critical to our analysis. It is usually the substance of a comment that matters.

By storing and preserving comment submissions and providing search and retrieval functionalities to facilitate our review, ECFS plays an integral role in our efforts to consider

relevant material, address significant issues commenters have raised, ground our decisions in record evidence, and reasonably explain our regulatory action.

We are Continuing to Make Improvements to ECFS and are Making Plans for ECFS 4.0

ECFS has been updated several times since the FCC first permitted electronic commenting in 1998. Many of those updates have been driven by the expanding role information technology plays in agency rulemakings and the growing volume of electronic comments we receive. Historically, the FCC's approach to the comment process has been to err on the side of openness and accessibility. We have generally taken the view that more robust public participation and a complete administrative record are features of rulemaking, rather than flaws. But we have always understood that there is a tradeoff involved in this approach: the easier it is for people to comment on our proposed rules, the easier it is for bad actors to abuse the system. We have endeavored to mitigate some of the opportunities for mischief by ensuring sufficient network capacity to prevent system disruptions and optimizing ECFS's search capabilities so that those looking to review and respond to substantive comments can find them.

To that end, over the past three years, the FCC's Information Technology staff has made a number of improvements to ECFS. These improvements include, among other things, optimizing search result queries to make them faster and more accurate and adding data validation checks to ECFS's web interface to ensure only permissible data is submitted into the application.

Even more importantly, we have launched a fulsome review to overhaul the system. A cross-bureau working group has been tasked with leading this effort. They are now in the process of convening roundtables with various external stakeholders to ensure that the next generation of ECFS is both accessible and secure. Among other things, we are exploring changes like the implementation of CAPTCHA to distinguish human comment filers from automated submissions, tools to authenticate identities, the creation of docket home pages that highlight comment deadlines and links to major filings, and the elimination of ECFS's open API to limit bot activity in agency proceedings.

As we move ahead with our system overhaul, the Commission will follow the guidance of the performance audit provided us by GAO and the recommendations of the FCC's Inspector General. We will also carefully consider the recommendations you have made in the report the PSI Subcommittee released this week and welcome any other suggestions you have for us today or in the future. Our objective is to use all available resources—financial and human—to ensure that the next generation of ECFS is even more accessible, secure, and resilient than our current system.

Thank you for the opportunity to testify today. I look forward to answering your questions.

United States Government Accountability Office

Testimony

Before the Permanent Subcommittee on Investigations and the Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, U.S. Senate

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FEDERAL RULEMAKING

Selected Agencies Should Clearly Communicate Public Comment Posting Practices Associated with Identity Information

Statement of Seto J. Bagdoyan, Director of Audits, Forensic Audits and Investigative Service

GAO-20-105T

GAO Highlights

Highlights of GAO-20-105T, a testimony before the Subcommittee on Investigations, and the Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, U.S. Senate

Why GAO Did This Study

Federal agencies submit on average 3,700 proposed rules yearly and are generally required to provide interested persons (commenters) an opportunity to comment on these rules. In recent years, some high-profile rulemakings have received extremely large numbers of comments, raising questions about how agencies manage the identity information associated with comments. While the APA does not require the disclosure of identifying information from a commenter, agencies may choose to collect this information.

This testimony summarizes GAO's June 2019 report on public comment posting practices (GAO-19-483). In that report, GAO examined (1) the identity information collected by comment websites, (2) the guidance agencies have related to the identity of commenters, (3) how selected agencies treat identity information, and (4) the extent to which selected agencies clearly communicate their practices associated with identity information. The agencies were selected on the basis of the volume of public comments they received on rulemakings. For this testimony, GAO obtained updates on the status of recommendations made to the selected agencies.

What GAO Recommends

In June 2019, GAO made recommendations to eight of the selected agencies regarding implementing and communicating public comment posting policies. The agencies generally agreed with the recommendations and identified actions they planned to take in response. Since the June 2019 report, one agency has implemented GAO's recommendation.

View GAO-20-105T. For more information, contact Seto J. Bagdoyan at (202) 512-6722 or bagdoyans@gao.gov.

October 24, 2019

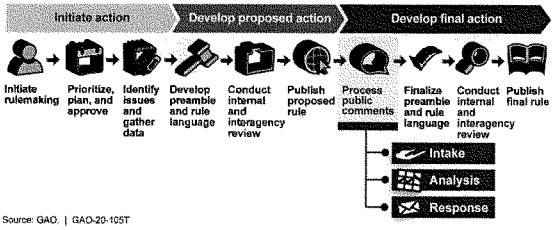
FEDERAL RULEMAKING

Selected Agencies Should Clearly Communicate Public Comment Posting Practices Associated with Identity Information

What GAO Found

The Administrative Procedure Act (APA) governs the process by which many federal agencies develop and issue regulations, which includes the public comment process (see figure).

The Rulemaking Process under the Administrative Procedure Act



Source: GAO. | GAO-20-105T

In June 2019, GAO found that Regulations.gov and agency-specific comment websites collect some identity information—such as name, email, or address—from commenters who choose to provide it during the public comment process. The APA does not require commenters to disclose identity information when submitting comments. In addition, agencies have no obligation under the APA to verify the identity of such parties during the rulemaking process.

GAO found in the June 2019 report that seven of 10 selected agencies have some internal guidance associated with the identity of commenters, but the substance varies. This reflects the differences in the way that the selected agencies handle commenter identity information internally.

GAO also found that the selected agencies' practices for posting public comments to comment websites vary considerably, particularly for duplicate comments (identical or near-identical comment text but varied identity information). For example, one agency posts a single example of duplicate comments and indicates the total number of comments received, but only the example is available to public users of Regulations.gov. In contrast, other agencies post all comments individually. As a result, identity information submitted with comments is inconsistently presented on public websites.

The APA allows agencies discretion in how they post comments, but GAO found that selected agencies do not clearly communicate their practices for how comments and identity information are posted. GAO's key practices for transparently reporting government data state that federal government websites should disclose data sources and limitations to help public users make informed decisions about how to use the data. If not, public users of the comment websites could reach inaccurate conclusions about who submitted a particular comment, or how many individuals commented on an issue.

Chairman Portman, Chairman Lankford, Ranking Member Carper, Ranking Member Sinema, and Members of the Subcommittees:

Thank you for the opportunity to discuss our work on identity information in the public comment portion of the rulemaking process. The Administrative Procedure Act (APA) establishes procedures for rulemaking, which is the process agencies follow to develop and issue regulations.[1] Agencies use regulations to carry out statutory directives to achieve public policy goals, such as protecting the health and safety of the public. Under the APA, agencies engage in three basic phases of the rulemaking process: (1) initiate rulemaking actions, (2) develop proposed rulemaking actions, or Notices of Proposed Rulemaking (NPRM), and (3) develop final rulemaking actions. Built into agencies' rulemaking processes are opportunities for internal and external deliberations, reviews, and public comments.

Federal agencies publish an average of 3,700 NPRMs each year. Most agencies utilize Regulations.gov to receive public comments on proposed rules, but some agencies have their own agency-specific websites.[2] Although the number of public comments submitted on NPRMs can vary widely, in recent years some high-profile rulemakings have received extremely large numbers of comments. For example, during the public comment period for the Federal Communications Commission's (FCC) 2017 Restoring Internet Freedom NPRM, FCC received more than 22 million comments through its public comment website.[3] Subsequently, media and others reported that some of the comments submitted to FCC were suspected to have been submitted using false identity information.[4]

[1]5 U.S.C. § 553. The APA describes two types of rulemaking, formal and informal. Most agencies use informal rulemaking, which is the type of rulemaking described in this testimony.

[2]Regulations.gov is an interactive public website providing the general public with the opportunity to access federal regulatory information and submit comments on regulatory and nonregulatory documents published in the *Federal Register*.

[3]Restoring Internet Freedom (82 Fed. Reg. 25,568 (June 2, 2017) and (83 Fed. Reg. 7,852 (Feb, 22, 2018)).

[4]Comments using false identity information include any comments submitted with identity information that does not accurately represent the individual submitting the comment in question. This could include anonymized names, such as "John Doe," fictitious character names, such as "Mickey Mouse," or improper use of identity information associated with a real person.

The APA requires agencies to allow comments on NPRMs to be submitted by any interested party (commenters). The APA does not require the disclosure of identity information from commenters, such as name, email, or address. Agencies therefore have no obligation under the APA to verify the identity of such parties during the rulemaking process. Agencies must give consideration to any significant comments submitted during the comment period when drafting the final rule.[5] However, courts have held that agencies are not required to respond to every comment individually.[6] Agencies routinely offer a single response to multiple identical or similar comments, because the comment process is not a vote. As explained by Regulations.gov's *Tips for Submitting Effective Comments*, "... 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."

My remarks today are based on our report issued in June 2019.[7] Specifically, this testimony discusses (1) the identity information selected agencies collect through Regulations.gov and agency-specific comment websites, (2) the internal guidance selected agencies have related to the identity of commenters, (3) how selected agencies treat identity information collected during the public comment process, and (4) the extent to which selected agencies clearly communicate their practices associated with posting identity information collected during the public comment process.

For our report, we selected a nongeneralizable sample of 10 agencies (selected agencies) that received a high volume of public comments for rulemaking proceedings that accepted comments from January 1, 2013, through December 31, 2017. These selected agencies included eight agencies that use Regulations.gov as their agency's comment website

[5]Courts have explained that significant comments are comments that raise relevant points and, if true or if adopted, would require a change in the proposed rule. Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1151 (9th Cir. 2002); Am. Min. Congress v. EPA, 907 F.2d 1179, 1188 (D.C. Cir. 1990).

[6]Am. Min. Congress v. EPA, 907 F.2d 1179, 1187 (D.C. Cir. 1990) (citing Thompson v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984)). *See also*, Action on Smoking and Health v. C.A.B., 699 F.2d 1209, 1216 (D.C. Cir. 1989).

[7]GAO, *Federal Rulemaking: Selected Agencies Should Clearly Communicate Practices Associated with Identity Information in the Public Comment Process*, GAO-19-483 (Washington D.C.: June 26, 2019).

("participating agencies") and two agencies that operate agency-specific comment websites ("nonparticipating agencies").[8] We surveyed 52 program offices within these agencies about their comment process and reviewed comment websites, agency guidance, and posted comment data. We also interviewed relevant agency officials. Additional information about our scope and methodology is available in our June 2019 report.[9] Since the issuance of that report, we received and reviewed additional information from selected agencies related to the actions they have taken in response to the report's recommendations.

We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

[8]Selected participating agencies are: Bureau of Land Management (within the Department of the Interior), Centers for Medicare & Medicaid Services (within the Department of Health and Human Services), Consumer Financial Protection Bureau, Employee Benefits Security Administration (EBSA) (within the Department of Labor), Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS) (within the Department of the Interior) , Food and Drug Administration (FDA) (within the Department of Health and Human Services), and Wage and Hour Division (WHD) (within the Department of Labor). Selected nonparticipating agencies are FCC and Securities and Exchange Commission (SEC).

[9]GAO-19-483.

Selected Agencies Collect Some Information from Commenters and Accept Anonymous Comments through Regulations.gov and Agency-Specific Websites

Consistent with the discretion afforded by the APA, Regulations.gov and agency-specific comment websites use required and optional fields on comment forms to collect some identity information from commenters. In addition to the text of the comment, agencies may choose to collect identity information by requiring commenters to fill in other fields, such as name, address, and email address before they are able to submit a comment. Regardless of the fields required by the comment form, the selected agencies all accept anonymous comments in practice. Further, because the APA does not require agencies to authenticate submitted identity information, neither Regulations.gov nor the agency-specific comment websites contain mechanisms to check the validity of identity information that commenters submit through comment forms.

Regulations.gov and agency-specific comment websites also collect some information about public users' interaction with their websites through application event logs and proxy server logs, though the APA does not require agencies to collect or verify it as part of the rulemaking process.[10] This information, which can include a public user's Internet Protocol (IP) address, browser type and operating system, and the time and date of webpage visits, is collected separately from the comment submission process as part of routine information technology management of system security and performance, and cannot be reliably connected to specific comments.

Most Selected Agencies Have Some Internal Guidance Related to Commenter Identity

Seven of 10 selected agencies have documented some internal guidance associated with the identity of commenters during the three phases of the public comment process: intake, analysis, and response to comments.[11] However, the focus and substance of this guidance varies by agency and phase of the comment process. As shown in table 1, for selected agencies that have guidance associated with the identity of commenters, the guidance most frequently relates to the comment intake or response to comment phases of the public comment process.

[10]Application event logs are generated by applications running on servers, end-user devices, or the web. Proxy server logs contain requests made by users and applications on a network.

[11]During the comment intake phase, agencies administratively process comments. During the comment analysis phrase, subject-matter experts analyze and consider submitted comments. During the comment response phase, agencies prepare publically available responses to the comments in accordance with any applicable requirements.

Table 1: Presence of Internal Agency Identity-Related Guidance Associated with the Public Comment Process

Agency	Comment intake	Comment analysis	Response to comments
Bureau of Land Management	No	No	No
Centers for Medicare & Medicaid Services	No	Yes	Yes
Consumer Financial Protection Bureau	Yes	No	Yes
Employee Benefits Security Administration[a]	Yes	Yes	Yes
Environmental Protection Agency	Yes	No	No
Federal Communications Commission	No	No	No
Fish and Wildlife Service	No	No	No
Food and Drug Administration	No	Yes	Yes
Securities and Exchange Commission	Yes	No	No
Wage and Hour Division[a]	Yes	Yes	Yes

Source: GAO analysis of agency data. | GAO-20-105T

[a]The Employee Benefits Security Administration and Wage and Hour Division provided GAO with Department of Labor guidance that applies to all agencies within the department.

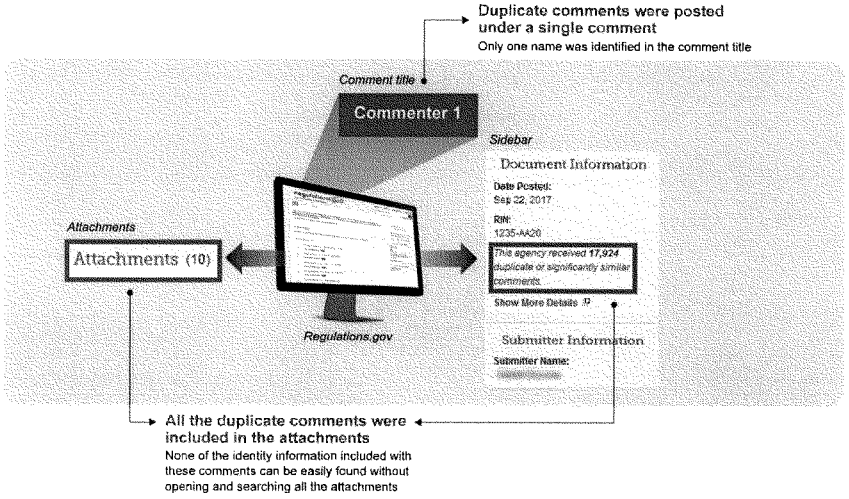
The guidance for these phases addresses activities such as managing duplicate comments (those with identical or near-identical comment text but varied identity information) or referring to commenters in a final rule. Agencies are not required by the APA to develop internal guidance associated with the public comment process generally, or identity information specifically.

Selected Agencies' Treatment of Identity Information Collected during the Public Comment Process Varies

Within the discretion afforded by the APA, the 10 selected agencies' treatment of identity information during the comment intake, comment analysis, and response to comments phases of the public comment process varies. Selected agencies differ in how they treat identity information during the comment intake phase, particularly in terms of how they post duplicate comments, which can lead to identity information being inconsistently presented to public users of comment systems. With regard to the comment intake phase in particular, the variation in how agencies identify duplicate comments and post comments results in identity information being inconsistently presented on Regulations.gov or the agency-specific websites. Generally, officials told us that their agencies either (1) maintain all comments within the comment system or (2) maintain some duplicate comment records outside of the comment system, for instance, in email file archives. For example, according to

officials of one participating agency—the Wage and Hour Division (WHD)—all duplicate comments are stored in Regulations.gov.[12] Our analysis of WHD comments did not suggest that any comments were missing from Regulations.gov. However, in one example, almost 18,000 duplicate comments were included in attachments under one individual's name in the comment title. While all of the comments are included within 10 separate attachments, none of the identity information included with these comments can be easily found without manually opening and searching all 10 attachments, most of which contain approximately 2,000 individual comments.

Figure 1: Example of How the Wage and Hour Division Posts Duplicate Comments



Source: GAO analysis of Regulations.gov information. | GAO-20-105T

[12]Although all comments are stored in Regulations.gov, according to officials, some sensitive information may not be made publicly available.

Note: We did not include the identity information associated with these comments. Instead, each unique piece of identity information is identified by a different number or letter.

Selected agencies' treatment of identity information during the comment analysis phase also varies. Specifically, program offices with the responsibility for analyzing comments place varied importance on identity information during the analysis phase. Finally, all agencies draft a response to comments with their final rule, but the extent to which the agencies identify commenters or commenter types in their response also varies across the selected agencies.

Selected Agencies' Practices Associated with Posting Identity Information Are Not Clearly Communicated to Public Users of Comment Websites

Our analysis of Regulations.gov and agency-specific comment websites shows that the varied comment posting practices of the 10 selected agencies are not always documented or clearly communicated to public users of the websites. In part to facilitate effective public participation in the rulemaking process, the E-Government Act of 2002 requires that all public comments and other materials associated with a given rulemaking should be made "publicly available online to the extent practicable."[13] Additionally, key practices for transparently reporting open government data state that federal government websites—like those used to facilitate the public comment process—should fully describe the data that are made available to the public, including by disclosing data sources and limitations.[14] We found that the selected agencies we reviewed do not effectively communicate the limitations and inconsistencies in how they post identity information associated with public comments.[15] As a result, public users of the comment websites lack information related to data availability and limitations that could affect their ability to use and make informed decisions about the comment data and effectively participate in the rulemaking process themselves.

[13]Pub. L. No. 107-347, § 206(d)(2), 116 Stat 2899, 2915–2916 (2002), codified at 44 U.S.C. § 3501 note.

[14]GAO, *Open Data: Treasury Could Better Align USAspending.gov with Key Practices and Search Requirements*, GAO-19-72 (Washington, D.C.: Dec. 13, 2018).

[15]The APA and E-Government Act do not include any requirements associated with the collection or disclosure of identity information.

Regulations.gov and Participating Agency Websites

Public users of Regulations.gov seeking to submit a comment are provided with a blanket disclosure statement related to how their identity information may be disclosed, and are generally directed to individual agency websites for additional detail about submitting comments. While additional information is provided in the Privacy Notice, User Notice, and Privacy Impact Assessment for Regulations.gov, public users are not provided any further detail on Regulations.gov regarding what information, including identity information, they should expect to find in the comment data. Additionally, there is not enough information to help public users determine whether all of the individual comments and associated identity information are posted.

Available resources on Regulations.gov direct public users to participating agencies' websites for additional information about agency-specific review and posting policies. Seven of the eight participating agencies' websites direct public users back to Regulations.gov and the *Federal Register*, either on webpages that are about the public comment process in general, or on pages containing information about specific NPRMs.[16] Three of these participating agencies—the Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS), and Food and Drug Administration (FDA)—do provide public users with information beyond directing them back to Regulations.gov or the *Federal Register*, but only FDA provides users with details about posting practices that are not also made available on Regulations.gov.[17]

The eighth participating agency—the Employee Benefits Security Administration (EBSA)—does not direct public users back to Regulations.gov, and instead re-creates all rulemaking materials for each NPRM on its own website, including individual links to each submitted comment. However, these links go directly to comment files, and do not link to Regulations.gov. While EBSA follows departmental guidance associated with posting duplicate comments, which allows some discretion in posting practices, the agency does not have a policy for how comments are posted to Regulations.gov or its own website. Further, in

[16]The *Federal Register* is the daily journal of the federal government, and is published every business day by the National Archives and Records Administration. The *Federal Register* contains federal agency regulations, proposed rules and notices of interest to the public, and executive orders, among other things.

[17]On the general FDA webpage, users are provided with a detailed explanation about a policy change the agency made in 2015 related to the posting of public comments submitted to rulemaking proceedings that was reflected in the comments.

the examples we reviewed, the content of the NPRM-specific pages on EBSA's website does not always match what is posted to Regulations.gov.

Because participating agencies are not required to adhere to standardized posting practices, Regulations.gov directs public users to participating agency websites for additional information about posting practices and potential data limitations. However, these websites do not describe the limitations associated with the identity information contained in publicly posted comments. As allowed for under the APA, all of the participating agencies in our review vary in the way in which they post identity information associated with comments—particularly duplicate comments. However, the lack of accompanying disclosures may potentially lead users to assume, for example, that only one entity has weighed in on an issue when, actually, that comment represents 500 comments. Without better information about the posting process, the inconsistency in the way in which duplicate comments are presented to public users of Regulations.gov limits public users' ability to explore and use the data and could lead users to draw inaccurate conclusions about the public comments that were submitted and how agencies considered them during the rulemaking process.

Agency-Specific Comment Sites

Both nonparticipating agencies use comment systems other than Regulations.gov and follow standardized posting processes associated with public comments submitted to their respective comment systems, but the Securities and Exchange Commission (SEC) has not clearly communicated these practices to the public. Although it appears to users of the SEC website that the agency follows a consistent process for posting duplicate comments, at the time of our June 2019 report, this practice had not been documented or communicated to public users of its website. In contrast, FCC identifies its policies for posting comments and their associated identity information in a number of places on the FCC.gov website, and on its Electronic Comment Filing System (ECFS) web page within the general website. Regarding comments submitted to rulemaking proceedings through ECFS, public users are informed that all information submitted with comments, including identity information, will be made public. Our review of ECFS comment data did not identify discrepancies with this practice.

Although the public comment process allows interested parties to state their views about prospective rules, the lack of communication with the public about the way in which agencies treat identity information during

the posting process, particularly for duplicate comments, may inhibit users' meaningful participation in the rulemaking process. While the APA does not include requirements for commenters to provide identity information, or for agency officials to include commenters' identity as part of their consideration of comments, key practices for transparently reporting open government data state that federal government websites—like those used to facilitate the public comment process—should fully describe the data that are made available to the public, including by disclosing data sources and limitations.

In our June 2019 report, we made eight recommendations. Specifically, we recommended that five of the selected agencies establish a policy for posting comments, and that those five agencies plus three others take action to more clearly communicate their policies for posting comments, particularly with regard to identity information and duplicate comments.[18] The eight agencies generally agreed with our recommendations and identified actions they planned to take in response, such as developing policies for posting duplicate comments and communicating those in various ways to public users.

Since issuing our June 2019 report, SEC has taken action that is responsive to the recommendation we made to it. Specifically, in September 2019, SEC issued a memorandum that reflects SEC's internal policies for posting duplicate comments and associated identity information. In addition, SEC has communicated these policies to public users on the SEC.gov website by adding a disclaimer on the main comment posting page that describes how the agency posts comments.

Chairmen Portman and Lankford, Ranking Members Carper and Sinema, and Members of the Subcommittees, this concludes my prepared remarks. I would be happy to answer any questions you may have at this time.

GAO Contact and Staff Acknowledgments

For further information regarding this testimony, please contact Seto J. Bagdoyan, (202) 512-6722 or bagdayan@gao.gov. In addition, contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals who made key contributions to this testimony are David Bruno (Assistant Director),

[18]GAO-19-483.

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United States Senate
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
Committee on Homeland Security and Governmental Affairs

Rob Portman, Chairman
Tom Carper, Ranking Member

ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS

STAFF REPORT

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

UNITED STATES SENATE

ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS

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I. EXECUTIVE SUMMARY

Federal agencies depend on relevant, substantive information from a wide variety of parties to assist them in developing and updating federal regulations. This information includes comments submitted by members of the public, businesses, non-profit organizations, and academics. This process, known as "notice-and-comment rulemaking," transitioned from paper to the internet in the early 2000s. As a result, the public has more opportunity than ever to engage in the federal rulemaking process by reviewing electronic regulatory dockets and submitting comments through portals like Regulations.gov and the Federal Communications Commission's ("FCC") Electronic Comment Filing System ("ECFS").

Like many popular news and social media websites, the federal government's commenting systems have at times become fora for profane, threatening, and abusive commentary. Recent high-profile agency dockets have hosted profanity and threats directed at agency officials and comments submitted falsely under another person's identity. They have even been disrupted by commenters submitting voluminous materials with the seeming intention of overloading the system and disrupting the comment period. The federal agencies that host these platforms have not yet found ways to cope with these abuses, which reduces the effectiveness of the notice-and-comment process; costs taxpayer funds to mitigate; allows identity theft-related crimes to go unaddressed; and leaves the rulemaking process vulnerable to disruptive activity.

After the FCC received nearly 24 million comments in the course of just one rulemaking proceeding in 2017 and its website crashed due to the volume of comments submitted simultaneously, the Subcommittee initiated a review of federal commenting systems to understand their flaws and develop recommendations to improve them.

II. THE SUBCOMMITTEE'S INVESTIGATION

In the course of its review, the Subcommittee surveyed the following fourteen agencies on their processes for receiving and posting comments on proposed rules: the Consumer Financial Protection Bureau ("CFPB"); the Commodities Futures Trading Commission ("CFTC"); the Securities and Exchange Commission ("SEC"); the Environmental Protection Agency ("EPA"); the FCC; and the Departments of Commerce, Energy, the Interior, Labor, Transportation, Education, Health and Human Services, Housing and Urban Development, and the Treasury. Subcommittee staff also interviewed agency personnel from twelve agencies and sub-agencies, including personnel who manage the technical aspects of receiving

and posting comments, as well as personnel who review comments and incorporate them into final rules.

The Subcommittee also requested documents and information from the EPA regarding its management of the E-Rulemaking Program Management Office, which oversees Regulations.gov and the Federal Docket Management System ("FDMS"). Subcommittee staff visited EPA headquarters for a briefing on and demonstration of Regulations.gov and FDMS. Similarly, the Subcommittee requested documents from the FCC regarding the problems the FCC experienced with ECFS in May 2017 and received a demonstration of the system. Additionally, Subcommittee staff interviewed six organizations and individuals who have studied the regulatory comment process generally, and, in some cases, the problems with the FCC ECFS specifically.[1]

It is important to note that this report focuses on issues the Subcommittee observed regarding functioning of comment platforms and ways in which the platforms are being abused; it does not comment on the substantive merits of any particular rulemaking.

III. FINDINGS OF FACT AND RECOMMENDATIONS

Findings of Fact

(1) **Most federal agencies lack appropriate processes to address allegations that people have submitted comments under fraudulent identities.** Recent reports demonstrate that individuals are using false identities to submit comments. Agencies, however, lack both the ability to determine if people submit comments under valid identities and appropriate processes to address allegations that fraud or identity theft has occurred. Only one agency contacted by the Subcommittee—the CFTC—said that it had referred suspicious activity to the Federal Bureau of Investigation ("FBI"). Other agencies, including the CFPB, the Department of Labor, and the FCC, all were aware of comments submitted under false identities regarding their rules, but took little action to address them.

[1] The Subcommittee also reviewed work done by others in this area, including a report produced by the Administrative Conference of the United States titled *Regulations.gov and the Federal Docket Management System*, incorporated as Appendix A, and a report by the Government Accountability Office ("GAO") titled *Selected Agencies Should Clearly Communicate Practices Associated with Identity Information in the Public Comment Process*, incorporated as Appendix B. The Subcommittee agrees with the Administrative Conference's and GAO's recommendations in those reports.

(2) **The FCC's process for addressing comments submitted under false identities potentially causes additional harm to victims of identity theft and the comment process as a whole.** The only remedy the FCC provides to people who allege that their identities have been used to post a comment they did not authorize is for the identity theft victims to post a separate comment to establish their own position on an issue. This adds even more comments to often-lengthy dockets, making them less useful to the public and to FCC staff. It also requires the victims to engage in a regulatory process in which they potentially have no interest in engaging.

(3) **None of the commenting systems use CAPTCHA or other technology to ensure that real people, instead of bots, are submitting comments to rulemaking dockets.** This leaves the commenting process more vulnerable to abuse by malicious actors.

(4) **Agencies do not have consistent policies regarding the screening and posting of comments.** The Subcommittee found that the variances between agencies' policies is in part driven by varying interpretations of the Administrative Procedure Act ("APA"). The FCC interprets the APA exceptionally broadly, which has resulted in agency staff posting copyrighted material, threats, personally identifiable information, and other sensitive and abusive material on its website. It has also accepted and posted executable files submitted as comments, which can contain viruses. No other agency the Subcommittee surveyed accepts executable files as comments. Members of the public who download the files may thereby be exposed to the viruses. Other agencies, like the SEC and Department of Commerce, have polices in place to screen comments for profanity, personally identifiable information, and threats to avoid posting harmful content online.

Recommendations

(1) Congress should amend the E-Government Act of 2002 to clarify that agencies should not accept or post abusive, profane, or threatening comments; irrelevant comments; or comments submitted under a false identity. Comments containing threats or abusive language, irrelevant comments, or comments sent from a fake identity should not remain available for public viewing.

(2) Congress should consider amending the APA to provide guidance to agencies on the degree to which they should consider the volume of comments they receive in favor of or against a proposed rule.

(3) In coordination with the Office of Information and Regulatory Affairs ("OIRA"), executive branch and independent agencies should develop standard protocols for reviewing and posting submitted comments and provide agency personnel with appropriate training on those protocols. Those protocols should address threats, abusive language, personally identifiable information, duplicate comments, and comments submitted under false identities. Agencies should make those protocols public to ensure commenters understand their responsibilities.

(4) The E-Rulemaking Program Executive Steering Committee, FCC, and SEC should develop uniform and appropriate limits on duplicative comments and technological means to reduce the number of duplicate comments in their dockets. They should require commenters to submit individual comments directly through their platforms and develop policies to encourage organizations to collect signatures on one comment, rather than submitting thousands of individual identical comments.

(5) The E-Rulemaking Program Executive Steering Committee, FCC, and SEC should consider using technology like CAPTCHA to ensure that only real human beings are commenting on rules.

(6) Federal comment platforms should allow commenters the option to submit anonymously or under their real names, but not under false identities. If commenters enter a name, the platforms should require commenters to confirm that the name is their own and that they understand that criminal penalties may attach if they falsify their identity.

(7) Federal agencies should refer allegations of identity theft to the appropriate law enforcement agencies.

IV. BACKGROUND AND LEGAL FRAMEWORK

A. Overview of the Rulemaking Process

In the U.S. system of government, the Constitution is the ultimate authority. It assigns the legislative authority to Congress[2] and the executive power to the President[3]. Using its legislative authority, Congress created executive branch and

[2] U.S. CONST. art. I, § 1.
[3] U.S. CONST. art. II, § 1, cl. 1.

independent regulatory agencies.[4] When Congress writes laws, it can delegate authority to the appropriate regulatory agency to implement those laws.[5] The agencies implement those laws in a variety of ways, including through the rulemaking process—that is, "the agency process for formulating, amending, or repealing a rule."[6] Those rules affect everything from the standards for automobile emissions, to the safety of the food supply and vaccines, to governance of financial institutions, to how the internet works.

In 1946, Congress codified the processes by which agencies make rules in the APA.[7] One of the main ways agencies make rules under the APA is through informal rulemaking. Under that process, an agency publishes a general notice of proposed rulemaking in the Federal Register and an online docket to notify the public of the agency's intentions and invite comments.[8] Although not required under the APA, for more complex rules, agencies sometimes opt to publish a request for information or an advance notice of proposed rulemaking ("ANPRM") to allow the public early opportunities to offer comments. Additionally, some statutes require agencies to publish ANPRMs in specific contexts.[9]

In a notice of proposed rulemaking, the agency sets a comment period long enough to provide the public an adequate opportunity to submit comments. The public then may submit comments through a variety of mechanisms, which may include, depending on the agency, an online portal, email, postal mail, and fax. Today, the large majority of comments are submitted through one of three main online commenting systems—Regulations.gov, which most federal agencies use; the FCC's ECFS; and the SEC's website. As discussed further below, agencies then must review the comments, respond to significant comments, and, as appropriate, incorporate the comments into the final rule. In most cases, the APA requires agencies to publish the final rule at least 30 days before its effective date.[10]

Today, agencies receive a varying number of comments on each proposed rule. Some rules receive only a handful of comments, some rules receive hundreds or thousands, and a few rules receive millions. The FCC's Restoring Internet Freedom rulemaking proceeding in 2017 broke the record with almost 24 million comments.[11] As discussed further below, when rules receive a high number of

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[4] For further reading on the creation of executive branch agencies and the organization of government, *see* JARED P. COLE, CONG. RESEARCH SERV., LSB10158, ORGANIZING EXECUTIVE BRANCH AGENCIES: WHO MAKES THE CALL? (2018).
[5] *Id.*
[6] 5 U.S.C. § 551(5) (2018).
[7] Pub. L. 79–404, 5 U.S.C. § 500 *et seq* (2018).
[8] *See* TODD GARVEY, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW (2017).
[9] *See id.*
[10] 5 U.S.C. § 553(d) (2018).
[11] FCC Docket No. 17–108, Restoring Internet Freedom, https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-108&sort=date_disseminated,DESC.

comments, many of those comments are not unique, individual responses to the rule proposal. Many tend to be duplicates or near-duplicates of each other. In some cases, interest groups directly send agencies hundreds or thousands of form letters signed by their members. In other cases, interest groups mask their own identities and send comments on behalf of their members in order to create the appearance of grassroots support for or opposition to a proposed rule (a practice called "astroturfing").[12] Furthermore, automated computer programs called bots can generate thousands of repetitive comments. Those comments may appear to be submitted by specific individuals, or they may contain nonsensical information in the identification fields.[13]

B. History of Public Comment in Rulemaking

Public engagement in the agency rulemaking process has been a cornerstone of administrative procedure for as long as agencies have existed—which is to say, for as long as the country has existed. Even before enactment of the APA, agencies regularly solicited input from stakeholders before promulgating rules through consultation, commissions, hearings, and investigations.[14]

In 1939, President Franklin Roosevelt directed Attorney General Frank Murphy to undertake a "thorough and comprehensive study . . . of existing practices and procedures . . ." in administrative law "with a view to detecting any deficiencies and pointing the way to improvements."[15] That review ultimately provided the foundation for the APA—in particular, its notice-and-comment provisions.[16] The Attorney General's 1941 report explained that an agency's "knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulations will affect."[17] It continued: "Participation by these groups [of people affected by regulations] in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests."[18] The report instructed that agency procedures "should be adapted to giving adequate opportunity to all persons affected to present

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[12] The online version of *Merriam-Webster* defines astroturfing as "organized activity that is intended to create a false impression of a widespread, spontaneously arising, grassroots movement in support of or in opposition to something (such as a political policy) but that is in reality initiated and controlled by a concealed group or organization (such as a corporation)." *Astroturfing*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/astroturfing.

[13] *See* Cheryl Bolen, *New Government Fear: Bots May Disrupt Regulatory Deliberations*, BLOOMBERG GOV'T, Oct. 10, 2018.

[14] Final Rep. of Attorney General's Comm. on Admin. Procedure, Letter of Submittal (Jan. 22, 1941).

[15] Final Rep. of Attorney General's Comm. on Admin. Procedure 103–17 (Jan. 22, 1941).

[16] *See* S. REP. NO. 1944–46, at 19–20 (1946) (The Administrative Procedure Act's Senate report draws its explanation of notice-and-comment provisions entirely from quotations from the Attorney General's 1941 report).

[17] Final Rep. of Attorney General's Comm. on Admin. Procedure 102 (Jan. 22, 1941).

[18] *Id.* at 103.

their views, the facts within their knowledge, and the dangers and benefits of alternative courses."[19]

The report's recommendations underpin the requirements of today's APA for informal, notice-and-comment rulemaking (by far, the most frequently used form of rulemaking[20]). Those notice-and-comment requirements provide:

> General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . . . .
>
> *****
>
> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.[21]

Attorney General Murphy's 1941 report detailed the various ways stakeholders in the 1930s and 1940s engaged with agencies, including informal consultation processes; formal advisory commissions; testimony at adversarial and non-adversarial hearings; and investigations.[22] The report did not contemplate mass letter-writing campaigns or the volume of emails and internet website submissions commenters send today.

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[19] *Id.* at 102.

[20] TODD GARVEY, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW (2017).

[21] 5 U.S.C. § 553(b)–(c) (2018). The original version of these provisions reads:

> General notice of proposed rulemaking shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) . . . .
>
> After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose.

Administrative Procedure Act, Pub. Law No. 79–404, § 4(a)–(b), 60 Stat. 237 (1946).

[22] Final Rep. of Attorney General's Comm. on Admin. Procedure 103–11 (Jan. 22, 1941).

C. Laws Governing Notice-and-Comment Rulemaking

Since the 1946 enactment of the APA, Congress, federal courts, and presidents have further defined what it means for agencies to give interested persons the opportunity to participate in rulemaking and for agencies to incorporate their views into rules. Specifically, they have provided direction on: (1) how much opportunity the public should have to engage in the rulemaking process; (2) the level of response agencies owe the public in their final rules; and (3) how agencies should use new technologies to improve the notice-and-comment process.

1. Meaningful Opportunity to Comment

Both court decisions and presidential executive orders have directed agencies to ensure that the public has a meaningful opportunity to participate in the regulatory comment process. Agencies must give adequate notice of a proposed rule—a requirement they generally can fulfill by publishing a proposed rule in the Federal Register.[23] Under Executive Order 12,866, President Bill Clinton directed agencies to ensure that commenters have sufficient time to submit their comments. The executive order instructs that agencies must "provide the public with meaningful participation in the regulatory process," including a "meaningful opportunity to comment on any proposed regulation, which, in most cases should include a comment period of not less than 60 days."[24]

2. Agency Duty to Respond to Significant Comments

The Supreme Court has held that agencies "must consider and respond to significant comments received during the period for public comment."[25] The U.S. Court of Appeals for the D.C. Circuit has defined "significant comments" as those comments "significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern."[26] It has further elaborated that significant comments are ones "which, if true, raise points relevant to the agency's decision," and, "if adopted, would require a change in an agency's proposed rule," and therefore "cast doubt on the reasonableness of a position."[27] The court has stressed that "there must be an exchange of views, information, and criticism between interested persons and the agency."[28] The court continued: "a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."[29]

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[23] *See, e.g., Forester v. Consumer Prod. Safety Comm'n*, 559 F.2d 774, 777–78 (D.C. Cir. 1977).
[24] Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note (Supp. 1993)
[25] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2014).
[26] *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973).
[27] *Home Box Off. v. F.C.C.*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977).
[28] *Id.* at 35.
[29] *Id.*

As the U.S. Court of Appeals for the Fourth Circuit has stated, "during notice and comment proceedings, the agency is obligated to identify and respond to relevant, significant issues raised during those proceedings." [30] An agency can satisfy its obligation to respond to comments either by modifying its proposed rule to reflect its consideration of the comments or by explaining why it did not change its proposed rule in the final version.[31]

3. Agencies Must Provide an Online Commenting Process

At the start of the 21st century, Congress directed federal agencies to create online dockets and means to comment on proposed rules. In the E-Government Act of 2002, Congress recognized that "[t]he use of computers and the Internet is rapidly transforming societal interactions and the relationships among citizens, private businesses, and the Government."[32] Further, the "Federal Government has had uneven success in applying advances in information technology to enhance governmental functions and services, achieve more efficient performance, increase access to Government information, and increase citizen participation in Government."[33]

Congress explained that it sought to "improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency" and "enhance public participation in Government by electronic means," consistent with the APA.[34] Congress directed that, "[t]o the extent practicable," "each agency . . . shall ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register . . . ."[35] It also directed agencies to accept public comments on proposed rules electronically and to ensure that a "publicly accessible Federal Government website contains electronic dockets for rulemakings . . ." that includes comment submissions and other materials included in the rulemaking docket.[36]

Ever since Congress enacted the E-Government Act of 2002, scholars questioned whether the push toward e-rulemaking would ultimately undermine the

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[30] *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 769 (4th Cir. 2012).
[31] *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir.1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393–94 (D.C. Cir. 1973), *cert. denied* 417 U.S. 921, 94 S. Ct. 2628 (1974).
[32] E-Government Act of 2002, Pub. L. No. 107-347 § 2(a)(1) codified at 44 U.S.C. § 3601 note (2018).
[33] E-Government Act of 2002, Pub. L. No. 107-347 § 2(a)(2), codified at 44 U.S.C. § 3601 note (2018).
[34] E-Government Act of 2002, Pub. L. No. 107-347 § 206(a)(1)–(2), codified at 44 U.S.C. § 3601 note (2018).
[35] E-Government Act of 2002, Pub. L. No. 107-347 § 206(b), codified at 44 U.S.C. § 3501 note (2018).
[36] E-Government Act of 2002, Pub. L. No. 107-347 § 206(c)–(d), codified at 44 U.S.C. § 3501 note (2018).

purpose of public comment.[37] For example, in 2004, Emory University School of Law Professor Beth Noveck cautioned:

> Automating the comment process might make it easier for interest groups to participate by using bots—small software "robots"—to generate instantly thousands of responses from stored membership lists. Moving from longstanding agency traditions to a rationalized online system levels the playing field and lowers the bar to engagement. Suddenly, anyone (or anything) can participate from anywhere. And that is precisely the potential problem.
>
> Increased network effects may not improve the legitimacy of public participation. For without the concomitant processes to coordinate participation, quality input will be lost; malicious, irrelevant material will rise to the surface, and information will not reach those who need it. In short, e-rulemaking will frustrate the goals of citizen participation.[38]

Similarly, in 2004, Cardozo Law Professor Michael Herz observed:

> In an e-rulemaking world, because so many people are aware of pending rulemakings and commenting is so easy, agencies can be quickly swamped with thousands, or hundreds of thousands of comments. This is the flip side of 'transparency' and 'increased participation.' What can realistically be expected of an agency dealing with a million comments, thousands of which duplicate each other?[39]

He continued: "Increasing the number of comments without giving rule writers and agency officials the tools to manage them pays lip service to participation while setting up the conditions to undermine [public participation] effectiveness."[40]

Despite these concerns, e-rulemaking became a critical part of the rulemaking process. In 2011, President Obama issued Executive Order 13,563 requiring executive agencies, "[t]o the extent feasible and permitted by law," to provide the public with a "meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least

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[37] *E.g.*, Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893 (2006); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 465 (Spring 2004).
[38] Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 441–42 (Spring 2004).
[39] Michael Herz, *E-Rulemaking*, DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2002–2003, 149–51 (Jeffrey S. Lubbers ed., 2004).
[40] *Id.*

60 days."[41] It also directs agencies to provide for proposed and final rules "timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded."[42] In Executive Order 13,579, President Obama extended those requirements to independent agencies, as well, "[t]o the extent permitted by law."[43]

***

Thus, today, agencies must offer a rulemaking docket online and give the public a "meaningful" opportunity to comment on proposed rules through electronic means, generally for at least 60 days. Once they receive comments, agencies must review all of the comments to determine which are "significant." The agencies then must address those significant comments in the final rule, either by changing the substance from the proposed rule or by explaining why they did not change the proposed rule.

Much as Attorney General Murphy's 1941 report contemplated, the notice-and-comment process continues to serve several important functions to this day. It allows agencies to collect vital information from a wide variety of sources—particularly from parties the proposed rule will affect directly. It enables agencies to base their rules on the best information possible. It offers commenters a chance to be heard by their federal government. And it gives the public confidence that agencies write rules based on robust, accurate information that the public can review for itself online. The abuse of online comment systems and agencies' lack of processes to address that abuse, however, are increasingly undermining those benefits.

V. AGENCY METHODS OF PROVIDING NOTICE AND RECEIVING COMMENTS

Federal agencies accept comments through some combination of postal mail, fax, hand-delivery, email, and online portals. But today, the vast majority of the notice-and-comment process takes place online. Most federal agencies use Regulations.gov and the FDMS to host their online commenting process. A handful of agencies manage their own systems. For example, the FCC hosts the ECFS, and the SEC receives comments through its website.[44] This section describes the general background, management, and uses of each system.

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[41] Exec. Order 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).
[42] *Id.*
[43] Exec. Order 13,579, 76 Fed. Reg. 41585 (July 11, 2011).
[44] The Commodities Futures Trading Commission also uses its own comment portal to receive comments, but has received comparatively few comments in recent years. Letter from the Hon. J. Christopher Giancarlo, Chairman, Commodities Futures Trading Comm'n, to the Hon. Rob Portman,

A. E-Rulemaking Program: Regulations.gov and the Federal Docket Management System

Almost all agencies and subdivisions of agencies—221 as of the date of this report[45]—participate in the federal government's E-Rulemaking Program, which has two components: Regulations.gov and the FDMS. Regulations.gov maintains public regulatory dockets that allow interested parties to submit comments electronically. The FDMS is a non-public database most partner agencies use to manage rulemaking dockets and to populate Regulations.gov.[46]

After Congress passed the E-Government Act in 2002, some agencies launched their own processes for receiving comments online, and others had no means by which to receive comments electronically at all.[47] According to the E-Rulemaking Program Management Office ("PMO") personnel, the agencies realized that they needed a single point of contact for the public to post comments. The E-Rulemaking PMO mission is to provide that resource.[48]

1. Management and Budget of the E-Rulemaking Program

From its inception until September 30, 2019, the EPA hosted the E-Rulemaking PMO. On October 1, the PMO shifted from the EPA to the General Services Administration ("GSA").[49] Forty-three of the partner agencies manage the E-Rulemaking Program through an Executive Steering Committee.[50] The Office of Management and Budget ("OMB") and GSA co-chair the Executive Steering Committee.[51] Each partner agency pays to participate in the E-Rulemaking Program based on the amount of materials they each host on FDMS, including the number of proposals the agency issues, the number of comments it receives, and the amount of storage space it occupies.[52] Agency payments have a $1 million ceiling and a $10,000 floor. Most agencies pay a medium to low amount—for example, the U.S. Courts and the Library of Congress each pay about $10,000. Larger agencies, like the EPA, the Department of Health and Human Services, the Department of

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Chairman, U.S. Senate Permanent Subcomm. on Investigations, and the Hon. Tom Carper, Ranking Member, U.S. Senate Permanent Subcomm. on Investigations (Mar. 16, 2018).

[45] Email on file with the Subcommittee.

[46] Staff Interview of Environmental Protection Agency E-Rulemaking Program Management Office personnel, including Director of the E-Rulemaking Program Ed Cotrill; Regulations.gov Lead Tobias Schrader; Federal Docket Management System Lead Aaron Myers; *et al.* (Jan. 9, 2018) [hereinafter EPA interview, Jan. 9, 2018].

[47] *Id.*

[48] *Id.*

[49] Email from EPA personnel to Subcommittee staff (Aug. 19, 2019) (on file with the Subcommittee).

[50] EPA interview, Jan. 9, 2018.

[51] Staff telephone interview with OMB personnel (Aug. 27, 2019). GSA replaced EPA as a co-chair of the steering committee when it assumed responsibility for hosting the E-Rulemaking Program Office on October 1, 2019.

[52] EPA interview, Jan. 9, 2018.

Transportation, and the Department of Housing and Urban Development are "high-comment" agencies that pay amounts closer to the $1 million ceiling.[53] The Program's annual budget ranges from about $7.7 to $8 million.[54] Its Fiscal Year 2020 budget is $7.9 million.[55]

2. E-Rulemaking Program and Agency Roles

The E-Rulemaking Program and the partner agencies have distinct roles with regard to the FDMS and Regulations.gov. The Program provides the system platforms, but each individual agency has control over what materials it places on the FDMS and Regulations.gov and the various platform settings. The Director of the E-Rulemaking Program analogized that the Program provides the vehicle, but the agencies themselves drive the car—meaning that the Program Office manages the technology, and each agency sets its own policies about how it uses the FDMS and Regulations.gov.[56]

Each day, the E-Rulemaking Program receives the Federal Register through an application programming interface ("API"). The Program staff identify rule proposals and set up proposed dockets for each agency—basically, "empty folder[s]" agencies can populate as they see fit.[57]

The largest agencies have their own offices, usually called docket centers, which manage the FDMS dockets. The agencies determine if a proposed docket should be an active docket. Once an agency activates a docket, it can enter documents into the docket, open the docket for comment, set the length of the comment period, and make documents, such as comments, public on Regulations.gov.[58]

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[53] *Id.*
[54] *Id.*
[55] Email from EPA personnel to Subcommittee staff (Aug. 19, 2019) (on file with the Subcommittee).
[56] EPA interview, Jan. 9, 2018.
[57] *Id.*
[58] *Id.*

Agency staff can use the FDMS to review submitted comments. The FDMS incorporates a de-duplication application staff can use to sift through thousands of comments to determine which ones are identical or near-duplicates and avoid unnecessary review.[59] Agency staff can set the level of similarity the deduplication software will use to determine whether to count a comment as a duplicate or near-duplicate.[60]

B. The Federal Communications Commission's Electronic Comment Filing System

Neither the FCC nor the SEC participate in the E-Rulemaking Program. The FCC hosts its own comment platform, the ECFS, which allows commenters to submit filings in several ways. Its most basic "Express Comment" option allows commenters to complete contact information fields and type their comments directly into a box on a screen labeled "Brief Comments." The Brief Comments box does not require commenters to submit a minimum amount of information, nor does it limit the amount of information that commenters can type into the field. FCC personnel said that "average citizens" typically use the Express Comment option.[61] Users who wish to submit more complex comments may do so in a "Standard Filing," which requires commenters to complete contact information fields and then upload a file containing their comments.[62] Finally, people may submit multiple comments on behalf of others through a bulk filing mechanism.[63]

FCC personnel then typically use the same public-facing ECFS website to access the comments, run searches, and review the comments.[64] They also have access to tools to de-duplicate comments to avoid having to review numerous comments that are substantially the same.[65] The FCC automatically posts all comments on ECFS four times a day, at 11 a.m., 1 p.m., 3 p.m., and 5 p.m., at least two hours after a commenter submits a comment. For example, if a commenter submits a comment at 10:55 a.m., the FCC likely will post the comment at 1 p.m. to give the commenter a grace period to remove or edit the comment.[66]

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[59] *Id.*
[60] *Id.*
[61] Staff interview with FCC General Counsel Tom Johnson, Special Counsel Kristine Fargotstein, and Director of Legislative Affairs Tim Strachan (Dec. 20, 2017) [hereinafter FCC interview, Dec. 20, 2017].
[62] *Id.*
[63] *See* ECFS Public API Documentation, https://www.fcc.gov/ecfs/help/public_api.
[64] FCC interview, Dec. 20, 2017.
[65] Staff interview with FCC Managing Director Mark Stephens, Deputy Chief Information Officer of Technology and Resilience Christine Calvosa, Senior Strategic Advisor Tony Summerlin, and Director of the Office of Legislative Affairs Tim Strachan (Nov. 29, 2017) [hereinafter FCC interview, Nov. 29, 2017].
[66] Staff telephone interview with FCC personnel (Feb. 16, 2018).

When asked why the FCC does not participate in the E-Rulemaking Program, an FCC senior advisor—who helped develop Regulations.gov in 2003—opined that Regulations.gov has "sh[redacted]ty infrastructure."[67] In 2014, he reviewed whether the FCC should consider joining the E-Rulemaking Program, but he said it was impossible for several reasons: (1) the FCC lawyers built their own requirements into ECFS that are not compatible with Regulations.gov; (2) Regulations.gov restricts submission of some comments in ways that do not comply with FCC rules; (3) ECFS provides more functions than Regulations.gov; and (4) Regulations.gov does not allow the rule writing staff the same access to data behind the comments that ECFS does.[68]

Furthermore, he said that it would be prohibitively expensive for the FCC to join the E-Rulemaking Program because the FCC receives substantially more comments than other agencies.[69] He estimated it would cost $3 million to set up the FCC on the platform, which still would not allow for legacy migration.[70] He said that each year, it would cost the FCC an additional $2 million for maintenance plus a varying amount for each comment period based on the number of comment submissions.[71]

ECFS indicates that from January 1, 2013, to December 31, 2018, the FCC received more than 27 million comments. The FCC told the Subcommittee that it devoted roughly 18,000 man-hours to collecting and reviewing comments on 160 rulemakings over that timeframe.[72]

C. The Securities and Exchange Commission's Web Operations Group

The SEC's Web Operations Group hosts the SEC's own electronic comment form on the SEC's website and also displays submitted comments on its website. The SEC provides a link to its web form under each notice of proposed rulemaking.[73] The SEC also receives comments via email and postal mail; SEC personnel estimated that they receive about 50 percent of comments via email, which are then posted to the website.[74] SEC rule writing personnel access the

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[67] FCC interview, Nov. 29, 2017.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] Letter from the Hon. Ajit Pai, Chairman, Fed. Commc'ns Comm'n, to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations, and the Hon. Tom Carper, Ranking Member, U.S. Senate Permanent Subcomm. on Investigations, May 29, 2018.
[73] Staff interview with SEC Sec'y of the Comm'n Brent Fields; Ass't General Counsel Steve Jung; and Deputy Dir. of Legislative Affairs Anne Kelley (Jan. 8, 2018) [hereinafter SEC interview, Jan. 8, 2018].
[74] *Id.*

comments via the SEC website, just as the public does. In addition, the Web Operations Group emails the relevant comments to the rule writing team.[75]

Until September 11, 2017, the E-Rulemaking Program also received comments on SEC rule proposals through Regulations.gov and transmitted them to the SEC, but the E-Rulemaking Program discontinued that service.[76] The Web Operations Group personnel Subcommittee staff interviewed did not know why the SEC uses its own online comment system.[77]

VI. LACK OF AGENCY POLICIES TO ADDRESS COMMENTS SUBMITTED UNDER FALSE IDENTITIES

No agency surveyed by the Subcommittee required commenters to validate their name, email address, or other contact information associated with their comments. All agencies allowed commenters to submit their names and contact information, and some agencies required commenters to provide text in those fields.[78] But commenters can provide any information they wish in those fields, including the word "Anonymous"; a nonsensical string of characters; or a fictitious or a fraudulent name, in some cases associated with fraudulent contact information.

In interviews, agencies emphasized the importance of anonymous comments to the information-gathering process.[79] Agencies told the Subcommittee that requiring commenters to provide their actual identities might dissuade some people, such as government and corporate whistleblowers who wish to remain anonymous, from providing information at all.[80]

In December 2017, the *Wall Street Journal* released a report demonstrating that thousands of comments on regulatory comment platforms were associated with fake identities.[81] In a random sample of 2,757 comments on the FCC's Restoring Internet Freedom proposal, the *Journal* found that 72 percent of alleged

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[75] *Id.*
[76] SEC interview, Jan. 8, 2018; Staff telephone interview with SEC personnel (Feb. 26, 2018).
[77] *Id.*
[78] *E.g.*, Staff interview with U.S. Dep't of Transp. Ass't General Counsel for Regulation Jonathan Moss; Deputy Ass't General Counsel Jonathan Dols; Docket Operations Program Manager Cheryl Collins, *et al.* (Mar. 22, 2018); Letter from Eric J. Fygi, Deputy General Counsel, U.S. Dep't of Energy, to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations (Mar. 13, 2018).
[79] *E.g.*, FCC interview, Dec. 20, 2017; Staff interview with SEC Sec'y of the Comm'n Brent Fields; Ass't Gen. Counsel Steve Jung; and Chief Information Officer Pam Dyson (Feb. 2, 2018) [hereinafter SEC interview, Feb. 2, 2018].
[80] *Id.*
[81] James V. Grimladi & Paul Overberg, *Millions of People Post Comments on Federal Regulations. Many are Fake*, WALL ST. J. (Dec. 17, 2019, 2:13 PM), https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188.

commenters had not submitted the comments associated with their names and addresses. It is a federal crime to "knowingly and willfully" make "any materially false, fictitious, or fraudulent statement or representation" to the federal government, punishable by a fine or up to five years in prison, or both.[82] Agencies surveyed by the Subcommittee, however, reported that they do not verify the source of comments. For example, the Department of Housing and Urban Development stated:

> The Department has no way of determining whether a commenter has filed a comment under someone else's identity . . . HUD has received comments from commenters that identify themselves as "Mickey Mouse," "Donald Duck," and "John Q. Public." These comments have not been so numerous as to adversely affect the Department's efforts to review and summarize public comments. Generally, these comments are not substantive and are given appropriate weight.[83]

Agencies also described taking little action if they discovered fraudulent comments on their proposed rules. Only one agency contacted by the Subcommittee—the CFTC—said that it had referred fraudulent activity to the FBI.[84] Other agencies, including the CFPB, the Department of Labor, and the FCC, were aware of comments regarding their rules submitted under false identities, but took little, if any, action to address them.

A. Consumer Financial Protection Bureau

When asked how it addresses comments submitted under fake identities, the CFPB, which is an E-Rulemaking Program partner agency, told the Subcommittee:

> The Bureau does not currently take steps to validate or confirm the identity, email address, or nationality of a commenter, nor does the Bureau take steps to detect or prevent automated activities. The Bureau is therefore not aware of specific comments that may have been filed under someone else's identity, other than those referenced in a recent *Wall Street Journal* article.[85]

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[82] 18 U.S.C. § 1001(a) (2018).
[83] Letter from Len Wolfson, Ass't Sec'y for Congressional & Intergovernmental Relations, U.S. Dep't of Housing & Urban Dev., to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations (Mar. 5, 2018).
[84] Letter from the Hon. J. Christopher Giancarlo, Chairman, Commodities Futures Trading Comm'n, to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations, and the Hon. Tom Carper, Ranking Member, U.S. Senate Permanent Subcomm. on Investigations (Mar. 16, 2018).
[85] Letter from the Hon. Mick Mulvaney, Acting Director, Consumer Fin. Prot. Bureau, to the Hon. Rob Portman, Chairman, U. S. Senate Permanent Subcomm. on Investigations, and the Hon. Tom Carper, Ranking Member, U.S. Senate Permanent Subcomm. on Investigations (Feb. 26, 2018).

In the course of its investigation, the *Wall Street Journal* emailed 13,000 surveys to people who had posted comments to the CFPB; about 120 people completed the surveys. Forty percent of those people said they had not posted the comment associated with their names.[86] When asked by the Subcommittee what it did with those comments, CFPB personnel stated that they did not believe that any of the people mentioned in the article contacted the CFPB directly regarding the comments, which limited their ability to address those particular comments.[87]

The CFPB personnel noted, however, that since then, the agency has updated its policies to anonymize, redact, or remove comments, or to take other steps, on a case-by-case basis, if it becomes aware that particular comments may have been filed using someone else's identity or are otherwise suspicious.[88] CFPB personnel said that they are aware that they have the option to refer any suspicious activity to its Office of Inspector General, the CFPB Office of Security, or law enforcement, and they would do so as appropriate.[89]

B. Department of Labor

The *Wall Street Journal* also found that 40 percent—or 20 people—who responded to a survey of commenters on the Department of Labor's "fiduciary rule" proposal stated that they did not submit the comments posted under their names.[90] The Department of Labor, another E-Rulemaking Program partner agency, told the *Journal* that the "agency removes fraudulent comments brought to the agency's attention."[91]

The Department told the Subcommittee, however, that, in the case of the comments identified in the *Journal* article, "the name and identifying information of the commenters were removed (and the commenters were treated as anonymous), but the content remains posted."[92] In its response to the Subcommittee, the Department identified three such comments,[93] although the *Journal* reported that it had identified 20. When the Subcommittee asked the Department of Labor about

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[86] James V. Grimaldi & Paul Overberg, *Millions of People Post Comments on Federal Regulations. Many are Fake*, WALL ST. J. (Dec. 12, 2017, 2:13 PM), https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188.
[87] Staff telephone interview with CFPB personnel (Aug. 15, 2019).
[88] *Id.*
[89] *Id.*
[90] James V. Grimaldi & Paul Overberg, *Many Comments Critical of 'Fiduciary" Rule are Fake*, WALL ST. J. (Dec. 17, 2017, 2:13 PM), https://www.wsj.com/articles/many-comments-critical-of-fiduciary-rule-are-fake-1514370601.
[91] *Id.*
[92] Letter from Katherine B. McGuire, Ass't Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor, to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations (Mar. 8, 2018).
[93] *Id.*

the discrepancy, the Department confirmed that it anonymized the three comments of which it was aware. It did not ask the *Journal* to provide information regarding the other allegedly fraudulent comments or take other steps to identify those comments.[94]

The Department provided the response it gave to the *Journal* to the Subcommittee, which stated:

> The Department of Labor removes fraudulent comments that are brought to its attention. There are criminal penalties for the submission of fraudulent statements or representations to the federal government. Individuals who believe a comment has been fraudulently attributed to them are welcome to call 1-800-347-3756 or visit https://www.oig.dol.gov/hotlinecontact.htm.[95]

The Department also noted that after the *Journal* article was published, it cooperated with two U.S. Attorneys offices that contacted the Department about the article, as well as with the Government Accountability Office on a study of the comment process, which raised issues discussed in the article.[96] Like other agencies, the Department commented that it "does not have the resources to investigate each public comment to confirm the identity of each commenter."[97]

C. Federal Communications Commission

FCC Chairman Ajit Pai has acknowledged that during the Restoring Internet Freedom comment period, nearly eight million comments came from email addresses associated with fakemailgenerator.com and more than 500,000 came from Russian email addresses.[98] In an interview with Subcommittee staff, FCC Commissioner Jessica Rosenworcel cited a New York Attorney General investigation that estimated that more than two million comments submitted to the proceeding used stolen identities.[99] She said that of those two million, 81,000 used Ohioans' identities; 6,000 used Delawareans' identities; 78,000 used Pennsylvanians' identities; 176,000 used Texans' identities; and 130,000 used Floridians' identities.[100]

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[94] Staff telephone interview with Dep't of Labor personnel (Aug. 16, 2019).
[95] Email from Department of Labor personnel to Subcommittee staff (Oct. 18, 2019) (on file with the Subcommittee).
[96] *Id.*
[97] *Id.*
[98] *In the Matters of Nicholas Confessore and Jeremy Singer-Vine, FOIA Control No. 2017-764; FOIA Control No. 2018-204*, 33 FCC Rcd. 11808 (18) (Dec. 3, 2018).
[99] Staff interview with FCC Commissioner Jessica Rosenworcel (Apr. 11, 2018).
[100] *Id.*

Furthermore, a search of the FCC ECFS for famous names[101] yielded a number of comments from celebrities and historic figures—including some who are deceased. FCC Chairman Ajit Pai and President Trump appeared to comment frequently, as demonstrated by the chart below:

Name	Number of FCC Filings
Ajit Pai	1,434
Donald Trump	327
Barack Obama	53
LeBron James	43
Adolf Hitler	41
Mike Pence	38
Richard Nixon	23
Ronald Reagan	21
Elvis Presley	10
Kim Kardashian	6

In the Restoring Internet Freedom docket, the Subcommittee found the following comment, purportedly authored by many of the then-sitting U.S. Senators:

[101] Searches current as of October 16, 2019.

	Burr,Thom Tillis,John Hoeven,Heidi Heitkamp,Sherrod Brown,Rob Portman,Jim Inhofe,James Lankford,Ron Wyden,Jeff Merkley,Bob Casey Jr.,Pat Toomey,Jack Reed,Sheldon Whitehouse,Lindsey Graham,Tim Scott,John Thune,Mike Rounds,Lamar Alexander,Bob Corker,John Cornyn,Ted Cruz,Orrin Hatch,Mike Lee,Patrick Leahy,Bernie Sanders,Mark Warner,Tim Kaine,Patty Murray,Maria Cantwell,Joe Manchin,Shelley Moore Capito,Ron Johnson,Tammy Baldwin,Mike Enzi,John Barrasso		
Type of Filing	COMMENT	**Filing Status**	DISSEMINATED
Viewing Status	Unrestricted		
Date Received	Jul 12, 2017	**Date Posted**	Jul 13, 2017
International Address			
Brief Comment	Hey, net neutrality is good, please don't get rid of it.		

Senate Majority Leader Mitch McConnell also appears to have commented on the proposed rule independently—but his office confirmed to the Subcommittee that he did not send the comment submitted under his name.[102]

[102] Email from the office of the Hon. Mitch McConnell, Majority Leader, U.S. Senate, to Subcommittee staff (Aug. 5, 2019) (on file with the Subcommittee).

Filing Detail

ID	10603770307700	**Proceeding**	17-108
Name of Filer	Mitch Mcconnell		
Type of Filing	COMMENT	**Filing Status**	DISSEMINATED
Viewing Status	Sunshine		
Date Received	May 23, 2017	**Date Posted**	Jun 2, 2017
Address	250 United Way	**City**	Leitchfield
State	KY	**ZIP**	42754

Brief Comment FCC commissioners, I would like to comment on the FCC rules on the Internet. I want to encourage you to undo Tom Wheeler's order to regulate broadband. Internet users, not so-called experts, should be empowered to buy whatever products we choose. Tom Wheeler's order to regulate broadband is a perversion of net neutrality. It reversed a market-based approach that functioned fabulously smoothly for two decades with nearly universal approval.

And, seemingly, Elvis Presley posthumously submitted ten comments regarding FCC rule proposals:

Filings 10 results (112.611ms) RSS

25 50 100 Date Posted:Descending

Elvis Presley 17-108
...The current FCC regulatory scheme known as "Title...
Received:8/15/2017 Posted:8/22/17 Express COMMENT

Elvis Presley 17-108
...Before leaving office, the Obama Administration...
Received:8/7/2017 Posted:8/10/17 Express COMMENT

Elvis Presley 17-108
...Before leaving office, the Obama Administration...
Received:8/7/2017 Posted:8/10/17 Express COMMENT

Elvis Presley 17-108
...The FCC's Open Internet Rules (net neutrality...
Received:7/19/2017 Posted:8/1/17 Express COMMENT

Elvis Presley 17-108
...The Obama-era FCC regulations known as "Title II"...
Received:7/28/2017 Posted:7/28/17 Express COMMENT

Like other federal agencies, the FCC does not proactively ensure that comments come from the individuals who claim to send them. When asked about the allegations that people had fraudulently used others' identities to post comments during the Restoring Internet Freedom rulemaking, the FCC stated, "The Commission is aware of claims that comments were filed under false names . . . . The Commission, however, does not independently verify such claims."[103]

The FCC does not independently verify claims of identity theft or report them to law enforcement. Instead, the FCC sends anyone who complains that their name was used inappropriately a letter.[104] The FCC sent out 32 such letters during the Restoring Internet Freedom rulemaking.[105] The FCC letter explained that once a comment is filed in the record, "there are limits on the agency's ability to delete, change, or otherwise remove comments from the record. Doing so could undermine the FCC's ability to carry out its legal obligation, which is to respond to all significant issues raised in the proceeding." The FCC then encouraged the identity theft victim to submit his or her own comments to "ensure that the record reflects your views."

[103] Letter from the Hon. Ajit Pai, Chairman, Fed. Commc'ns Comm'n, to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations, and the Hon. Tom Carper, Ranking Member, U.S. Senate Permanent Subcomm. on Investigations (Mar. 15, 2018).
[104] The SEC told the Subcommittee that it followed a similar course in one case, but consulted with the individual whose identity had been misappropriated before posting the letter contesting the original comment's authorship. SEC interview, Jan. 8, 2018.
[105] Email from FCC personnel to Subcommittee staff (Oct. 10, 2019) (on file with the Subcommittee).

Federal Communications Commission
Washington, D.C. 20554

[redacted]

Dear [redacted]:

Thank you for contacting us about comments filed under your name in the FCC's *Restoring Internet Freedom* proceeding. You have stated that these comments were not filed by you. We want to make it clear that the FCC does not condone anyone impersonating someone else's identity.

The comments you reference were filed in the proceeding via the FCC's electronic comment filing system (ECFS). ECFS is an open system intended to promote widespread participation in FCC proceedings. To avoid imposing obstacles that might otherwise prevent, limit, or discourage participation and the expression of views, ECFS allows filers to enter the relevant data fields themselves.

Once filed in the FCC's rulemaking record, there are limits on the agency's ability to delete, change, or otherwise remove comments from the record. Doing so could undermine the FCC's ability to carry out its legal obligation, which is to respond to all significant issues raised in the proceeding.

To that end, we continue to encourage you and all members of the public to submit comments to the FCC via ECFS that include accurate identifying information. This will ensure that the record reflects your views. You are welcome to include your correspondence on this matter—including a statement that the comments you reference were not filed by you—in ECFS for the public record.

The FCC has set up a webpage providing detailed and easy to follow instructions that can help you submit your comments via ECFS. That webpage can be found here: https://www.fcc.gov/restoring-internet-freedom-comments-wc-docket-no-17-108

Sincerely,

G. Patrick Webre

G. Patrick Webre, Acting Chief
Consumer & Governmental Affairs Bureau
Federal Communications Commission

There is no means to link the initial fraudulent comment and the clarifying comment together. Further, the FCC's response to the Subcommittee suggests that there is no process for the identity theft victim to have the fraudulent comment removed, even if the person expressed a desire not to be involved in the rulemaking process at all.

In August 2019, the FCC told the Subcommittee that it is looking for solutions to some of these problems and plans to create a new comment platform. It is examining various possibilities, including the use of CAPTCHA technology and

the ability for frequent filers to opt into creating a log-in so the FCC staff can easily identify their comments.[106]

VII. PUBLICATION OF COMMENTS

Across the federal government, agencies take different approaches to the publication of comments. In part, some of the differences are driven by varying interpretations of APA requirements; in other cases, varying agency procedures lead to differing results across agencies. Some agency procedures and policies make public engagement with comments difficult, and, in some cases, can violate copyrights and lead to the disclosure of personally identifiable information.

The question of whether agencies should publish every single comment they receive is complex. The law requires agencies to create a public docket,[107] and executive orders direct agencies to post comments online[108]. But, as with almost all open online fora, agency comment systems have become subject to abuse.

The Subcommittee identified the following key problems:

- Publication of comments including personally identifiable information, such as Social Security numbers, of the commenters themselves and other individuals;
- Publication of comments including profanity;
- Publication of comments including copyrighted information;
- Publication of comments that include massive amounts of data irrelevant to the topic at hand; and
- Publication of thousands of duplicate or near-duplicate comments that make a docket difficult or impossible for the public to review the docket for substantive information.

Some agencies use their discretion to screen the information they post on their comment systems; others do not. The SEC, Department of Commerce, and the FCC offer examples of the varying approaches.

Example 1: The Securities and Exchange Commission

Some agencies screen comments for a variety of factors. The SEC has one of the stricter protocols reviewed by the Subcommittee.[109] The Secretary of the Commission, who is responsible for posting comments, explained to the

[106] Staff telephone interview with FCC personnel (Aug. 20, 2019).
[107] E-Government Act of 2002, Pub. L. No. 107-347 § 206(b), codified at 44 U.S.C. § 3501 note (2018).
[108] Exec. Order 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).
[109] SEC interview, Jan. 8, 2018.

Subcommittee that the SEC redacts all personally identifiable information in comments, and that it does not post copyrighted material,[110] pornography, threats, or material determined to be "spam"—which he defined as materials not related to the rulemaking.[111] The SEC's policies state that SEC staff "should not post comment letters on the Commission's website:

- that contain obscene language;
- that contain racial, religious, or gender slurs;
- that contain security threats;
- with no substantive content related to the pending proposal, release, notice, or order;
- that are the subject of a confidential treatment request
- that are clearly 'prank' letters; or
- that constitute 'tips or complaints' rather than comments on a rule proposal."[112]

The SEC told the Subcommittee that its information technology staff conducts a first level review of comments, and when they identify a comment they believe is spam, they email it to the rule writing staff in charge of the substance of that rule to determine whether the comment will be posted.[113] If the rule writing staff determines that the comment is unrelated to the rulemaking, the comment

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[110] The SEC provided an internal memorandum to the Subcommittee regarding the posting of comments, which states: "[C]onsistent with copyright laws, OS staff should redact known or obviously copyrighted material from comment letters posted on the website; however, such material will not be redacted from the version placed in the Records Management file." Memorandum from Elizabeth Murphy, *et al.* to Simon Park, *et al.*, regarding Policies for Posting/Removal of Comment Letters on the Commission's Public Website (Nov. 3, 2011).

[111] SEC interview, Jan. 8, 2018.

Likewise, the CFPB reported that "[a]t times, the Bureau has exercised discretion to redact particularly sensitive or offensive information prior to posting." Letter from the Hon. Mick Mulvaney, Acting Dir., Consumer Fin. Prot. Bureau, to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations, and the Hon. Tom Carper, Ranking Member, U.S. Senate Permanent Subcomm. on Investigations (Feb. 26, 2018). Similarly, the Department of Energy reported that it "will withhold any public disclosure of comments that are marked as 'confidential business information' or similar notations, and will also redact any obscene or foul language." Letter from Eric J. Fygi, Deputy Gen. Counsel, U.S. Dep't of Energy, to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations, and the Hon. Tom Carper, Ranking Member, U.S. Senate Permanent Subcomm. on Investigations (Mar. 13, 2018). And the Department of Labor redacts or does not post comments containing "threats to the government or others, sensitive personally identifiable information, obscenities, trade secrets, or confidential business information." Letter from Katherine B. McGuire, Ass't Sec'y of Labor for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor, to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations, and the Hon. Tom Carper, Ranking Member, U.S. Senate Permanent Subcomm. on Investigations (Mar. 8, 2018).

[112] Memorandum from Elizabeth Murphy, *et al.* to Simon Park, *et al.*, regarding Policies for Posting/Removal of Comment Letters on the Commission's Public Website (Nov. 3, 2011).

[113] SEC interview, Jan. 8, 2018.

still will be included in the rulemaking file available to SEC staff, but the SEC will not post it in the online file available to the public.[114]

The SEC's review process is not foolproof, however: a search of the website yielded four comments that contained the word "f[redacted]k."[115] After the Subcommittee called these comments to the SEC's attention, the SEC redacted them.[116]

The SEC staff told the Subcommittee it has a strict protocol for form comments—that is, comments containing the same or very similar text, but signed by different people. The information technology staff provides one sample of each form comment to the rule writing staff and tells them how many of each form comment the SEC received.[117] Similarly, the information technology staff then posts only one sample of the form comment on the SEC website with a notation of how many instances of that comment the SEC received.[118]

Example 2: The Department of Commerce

The Department of Commerce, an E-Rulemaking Program partner agency, has a policy that gives Department staff discretion to screen comments. In a letter to the Subcommittee, the Department stated that it generally posts all comments, but "retains the discretion to post comments that are not clearly relevant to the rulemaking; comments that may compromise the privacy or security of any Federal employee, contractor, constituent or private citizen; or comments that include offensive or clearly inappropriate language." It continued: "For inappropriate or offensive comments, [the National Oceanic and Atmospheric Administration ("NOAA"), a Commerce component agency] in particular notes in the public docket for the proposed rule that such a comment was received, describes why it is not being posted, and identifies how many such comments were received."[119]

Although the Department of Commerce recognizes that it has discretion to remove inappropriate comments, a search of its comments demonstrates it does not

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[114] *Id.*; Memorandum from Elizabeth Murphy, *et al.* to Simon Park, *et al.*, regarding Policies for Posting/Removal of Comment Letters on the Commission's Public Website (Nov. 3, 2011).
[115] Search of the SEC website current as of October 17, 2019.
[116] Staff telephone interview with SEC personnel (Oct. 17, 2019).
[117] SEC interview, Jan. 8, 2018. Other agencies take a similar approach. For example, the CFPB reported to the Subcommittee: "When the Bureau determines that comments are substantially identical, the Bureau generally posts only a representative sample to Regulations.gov, with the total number of comments received reflected in the docket entry." Letter from the Hon. Mick Mulvaney, Acting Dir., Consumer Fin. Prot. Bureau, to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations, and the Hon. Tom Carper, Ranking Member, U.S. Senate Permanent Subcomm. on Investigations (Feb. 26, 2018).
[118] SEC interview, Jan. 8, 2018; SEC interview, Feb. 2, 2018.
[119] Letter from the Hon. Wilbur Ross, Sec'y, U.S. Dep't of Commerce, to the Hon. Rob Portman, Chairman, U.S. Senate Permanent Subcomm. on Investigations (Mar. 23, 2018).

always exercise that discretion. For example, a search under comments to NOAA proceedings on Regulations.gov yields 55 that include the word "f[redacted]k."

regulations.gov
Your Voice in Federal Decision-Making

55 results for "f[redacted]k"

Filter Results By...
Comment Period
Open (0)
Closed (0)
Document Type
Clear Filter
Notice (0)
Proposed Rule (0)
Rule (0)
Supporting & Related Material (0)
Other (0)
Public Submission (0)
Posted
Search All
Comments Due
Search All
Agency
View All
Narrow By Agency
Selected Agencies:
× NOAA
Category

Results per page: 25

Comment from Hellie Templeton
- Please accept the attached comments opposing any changes to the Coastal Zone Management Act, from Friends of the Earth and 27,776 of our members and activists.
Public Submission to NOAA on 04/26/2019 ID: NOAA-NOS-2018-0107-3085

Comment from David Lipstreu
- I oppose ANY offshore drilling. I oppose continued development of hydrocarbon resources, the use of which is, and has been, killing the planet for many years. The greatest crisis...
Public Submission to NOAA on 04/12/2019 ID: NOAA-NOS-2018-0107-1206

Comment from Casey HEATON
- I am submitting this public comment in opposition to NOAAs proposed streamlining of the federal consistency process under the Coastal Zone Management Act (CZMA). The feder...
Public Submission to NOAA on 04/09/2019 ID: NOAA-NOS-2018-0107-0452

Comment from Peter Fugazzotto
- Attachment Contents : _ dead body will oil rigs be drilling anywhere near the CA coast!! F[redacted]K DRUMPF!!!!! helen salyers 94942 CA claire de corinck 03800 nt giuseppe corbinovis
Public Submission to NOAA on 08/28/2017 ID: NOAA-NOS-2017-0066-98043

Comment from J. Kirchner
- Attachment Contents : _ i e. A. Hitler, V. Putin, H. Clinton, B. Obama, etc), mother f[redacted]... you sick [redacted]k. There is no democracy and there is no law...
Public Submission to NOAA on 08/28/2017 ID: NOAA-NOS-2017-0066-97352

Comment from Kyle Hinson
- Dear Wilbur Ross, A review of these marine parks and sanctuaries to engender greater profits for resource extraction is colossally short-sighted, immeasurably selfish when put...
Public Submission to NOAA on 08/28/2017 ID: NOAA-NOS-2017-0066-93757

Example 3: Federal Communications Commission

The FCC has an open policy regarding what comments it will accept and post on its comment system. The FCC told the Subcommittee that it has a general policy that it should accept and post online all comments it receives,[120] including duplicates and near-duplicates, and comments containing copyrighted, profane, and irrelevant material.[121] The FCC has also accepted and posted executable files submitted as comments, which may contain viruses.[122] Posting these comments exposes the public to these viruses.

In an interview, the FCC General Counsel stated that the FCC policy regarding the posting of comments comes from a desire to avoid creating grounds

[120] FCC interview, Dec. 20, 2017.
[121] FCC interview, Nov. 29, 2017.
[122] Staff interview with FCC Commissioner Jessica Rosenworcel (Apr. 11, 2018); Staff interview with Pew Research Center personnel (Jan. 12, 2018).

for a lawsuit based on allegations that the FCC has not fulfilled its obligations under the APA notice-and-comment requirements.[123] This approach has led to the FCC publishing an overwhelming number of comments for two recent high-profile rulemaking proceedings—the 2014 Net Neutrality rulemaking and the 2017 Restoring Internet Freedom rulemaking. In 2014, the FCC received a record-breaking 3.7 million comments on the proposed Net Neutrality rule. The comments submitted regarding the 2017 proposed Restoring Internet Freedom totaled nearly 24 million. Almost all of those comments are published on ECFS.[124]

The number of comments posted to these two dockets raises three main concerns: (1) the volume of comments makes it difficult for the public and the agency to find substantive material; (2) some of the posted comments appear to be meant to disrupt the commenting process, not to contribute meaningful material to inform the rule—and in some cases violate copyright law; and (3) many of the comments contain significant amounts of abusive and threatening content inappropriate for publication on a government website.

First, the volume of comments the Commission received and posted made it difficult for most members of the public to review or fully understand the record. In particular, it is challenging to sift through 24 million comments—or even four million comments—to find the significant comments presenting substantive information and novel arguments that agencies must consider when engaging in a rulemaking.[125]

The challenge of searching the FCC's larger dockets like the Restoring Internet Freedom record is illustrated by the FCC's advice on its website:

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[123] FCC interview, Dec. 20, 2017.

[124] A search of ECFS for comments submitted in the Net Neutrality rulemaking, Docket 14-28, only yields about 2.2 million comments. The FCC order, however, states that the FCC received 3.7 million comments. 80 Fed. Reg. 19737, 19746 (Apr. 13, 2015). FCC personnel told the Subcommittee that they were unsure why the ECFS docket does not contain all of the comments for that proceeding. Staff telephone interview with FCC personnel (Oct. 22, 2019).

[125] It is important to note that nothing in the APA or case law requires agencies to consider the number of comments received on any side of an issue. A rulemaking process is not a referendum. Every agency the Subcommittee interviewed emphasized that it does not "nose count," although some said they were at least aware of the number of comments submitted on various sides of an issue. *E.g.*, FCC interview, Dec. 20, 2017; Staff interview with U.S. Dep't of Health and Human Services personnel including Director of the Center for Faith-Based and Neighborhood Partnerships Shannon Royce; Centers for Medicare and Medicaid Services Director of the Off. Of Strategic Operations and Regulatory Affairs Kathleen Cantwell; Centers for Medicare and Medicaid Services Deputy Director of the Off. Of Strategic Operations and Reg, Affairs Olen Clybourn; Director of Oversight and Investigations Sean Hayes, *et al.* (Feb. 10, 2018).

Parties interested in exploring the entire record of filings for the *Restoring Internet Freedom* Notice of Proposed Rulemaking, WC Docket No. 17-108, are encouraged to download the compilation described in Public Notice DA 17-1089, released November 7, 2017. The Public Notice includes links to three .zip files that contain a complete set of filings submitted as of November 3, 2017.

Thus, to review the whole docket, members of the public need to download three large .zip files containing millions of comments. Further, thousands of the comments submitted during the Restoring Internet Freedom rulemaking period are duplicates or near-duplicates of each other. The Pew Research Center found that seven unique comments accounted for 38 percent of all submissions.[126] It also found that only six percent of all comments were unique and that "the other 94% were submitted multiple times—in some cases, hundreds of thousands of times."[127]

Second, the FCC's open acceptance and posting policy results in posting of comments that disrupt the commenting process, and, in some cases, violate copyright law. For example, numerous people who commented on the Restoring Internet Freedom rulemaking posted the entire script of Paramount Pictures' *Bee Movie*.[128] The FCC has allowed the script to remain on its comment system because of its open policies, even though it is aware that the script is posted on the system, is under copyright, and does not relate to the rulemaking.[129]

Similarly, during the FCC's Net Neutrality rulemaking, commenters submitted the entire text of *War and Peace*[130] and *Les Miserables*[131]. Although no longer under copyright, these submissions are irrelevant to the proceeding, and FCC staff suggested that commenters submitted them in order to slow down the FCC's system.[132] Indeed, other commenters threatened to crash ECFS during both the Net Neutrality and Restoring Internet Freedom commenting periods. For example, a commenter calling himself Allan Gonzalez submitted the following comment:

> YOU LITTLE F[redacted]ING C[redacted]TS BETTER NOT GET RID OF NET NEUTRALITY IF YOU LITTLE F[redacted]G CASH GRABBING WHORES BETTER GO GRAB YOUR BALLS RATHER THE THE [*sic*] MONEY

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[126] Paul Hitlin, *et al.*, *Public Comments to the Federal Communications Commission about Net Neutrality Contain Many Inaccuracies and Duplicates*, PEW RESEARCH CENTER (Nov. 29, 2017).
[127] *Id.*
[128] FCC interview, Dec. 20, 2017; *see, e.g.*, FCC Proceeding 17-108, filing nos. 10508109765584 (May 9, 2017), 1071252488994 (Jul. 12, 2017), 12152174019177 (Dec. 15, 2017).
[129] FCC interview, Dec. 20, 2017.
[130] FCC Proceeding 14-28, filing no. 6017683268 (June 6, 2014).
[131] FCC Proceeding 14-28, filing no. 6017702293 (June 3, 2014).
[132] FCC interview, Nov. 29, 2017.

> FROM OUR POCKET WE ALREADY PAY FOR THAN $60 DOLLARS FROM A F[redacted]G PROVIDER AND IM NOT GOING TO BE PAYING MORE THAN THAT S[redacted]T YOU LITTLE F[redacted]G PIECES OF S[redacted]T.THIS IS FOR NET NEUTRALITY YOU LITTLE C[redacted]TS AND WE WILL BE ABLE TO CRASH THIS S[redacted]Y A[redacted] WEBSITE AGAIN.[133]

And a commenter called Mariah Meadows stated:

> I'll say it again since this is the second time in four years that net neutrality has come under fire. PRESERVE NET NEUTRALITY AND TITLE II. And nice job updating the comment/complaints system. Be a shame if it crashed again. (Gofccyourself.com)[134]

The FCC information technology staff stated that although it would be "easy," from a technological perspective, to filter those comments, FCC rules do not allow them to do so.[135]

Third, the FCC's policies allow public posts of vulgar and threatening comments—both that bear some relation to the rulemaking at hand (such as those including profane statements about the rulemaking, like the first example above) and those that bear no relation to the rulemaking at all. As an example of the latter category, the Restoring Internet Freedom comments include one reading:

> What the f[redacted] did you just f[redacted]ing say about me, you little b[redacted]? I'll have you know I graduated top of my class in the Navy Seals, and I've been involved in numerous secret raids on Al-Quaeda, and I have over 300 confirmed kills. I am trained in gorilla warfare and I'm the top sniper in the entire US armed forces. You are nothing to me but just another target. I will wipe you the f[redacted] out with precision the likes of which has never been seen before on this Earth, mark my f[redacted]ing words. You think you can get away with saying that s[redacted] to me over the Internet? Think again, f[redacted]er. As we speak I am contacting my secret network of spies across the USA and your IP is being traced right now so you better prepare for the storm, maggot. The storm that wipes out the pathetic little thing you call your life. You're f[redacted]ing dead, kid. I can be anywhere, anytime, and I can kill you in over seven hundred ways, and that's just with my bare hands. Not only am I extensively trained in unarmed combat, but I have access to the entire arsenal of the United States Marine Corps and I will use it to its full extent to wipe your miserable a[redacted] off the face of the continent, you little s[redacted]. If only you could have known what unholy retribution your little "clever" comment was about to bring down upon you, maybe you would have held your f[redacted]ing tongue. But you couldn't, you didn't, and now you're paying

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[133] FCC Proceeding 17-08, filing no. 109061407823029 (Sept. 6, 2018).
[134] FCC Proceeding 17-08, filing no. 121430841297 (Dec. 14, 2017).
[135] FCC interview, Nov. 29, 2017.

> the price, you g[redacted]d[redacted] idiot. I will s[redacted] fury all over you and you will drown in it. You're f[redacted]ing dead, kiddo.[136]

The docket also includes threats against FCC Chairman Ajit Pai specifically and the Commission generally. For example:

> F[redacted] you FCC, you are piece of s[redacted]s. Kill yourselves RN. Ajit pai literally go kill yourself you f[redacted]in virgin.[137]

And the Net Neutrality proceeding includes this comment:

> BLOODY WANKERS. YOU ARE GONNA DESTROY DA INTERNET. WE DESERVE TO HAVE AN INTERNET THAT HAS FREEDOM FOR ALL THE STUFF WE WANT TO WATCH. YOU SHOULD ALL GO DIE IN A BLOODY HOLE WITH YOUR FINGERS STUCK IN YOUR NETHER REGIONS. YOU ARE CAPITALIST PIGS WANTING MORE MONEY FOR NO GOOD REASON. GO SNORT SOME GLUE IT WOULD MAKE YOU SMARTER. F[redacted]N C[redacted]K SUCKERS. D[redacted]N BACKWARDS CORPORATES. F[redacted]K YOU AND ALL YOUR STUPID BULLS[redacted]T.[138]

These comments and others reviewed by the Subcommittee on the FCC's public ECFS website include language the FCC likely would be able to fine a radio or television station for broadcasting. The FCC has banned radio and television stations it licenses from broadcasting "obscene" material and has limited what it determines to be "indecent" material to the hours between 10:00 p.m. and 6:00 a.m.[139] A website that can be used to file complaints with the FCC about prohibited programming or language includes a link to a fact sheet that provides definitions of what constitutes obscene and indecent content. According to that document, obscene content is something that appeals to a person's "prurient interest" and must "depict or describe sexual conduct in a patently offensive way" and lacks "serious literary, artistic, political or scientific value."[140] Indecent content is described as content that is not obscene but "portrays sexual or excretory organs or activities."[141] A range of fines can be levied on stations that broadcast indecent content.[142] As recently as 2004, the FCC sanctioned NBC for a single use of the word "f[redacted]king" during a broadcast, stating that "[t]he 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English

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[136] *See, e.g.*, FCC Proceeding 17-108, filing no. 1128086021052 (Nov. 28, 2017).
[137] FCC Proceeding 17-108, filing no. 1215505125342 (Dec. 15, 2017).
[138] FCC Proceeding 14-28, filing no. 60001010077 (Jan. 21, 2015).
[139] 47 C.F.R. § 73.3999.
[140] *Obscene, Indecent and Profane Broadcasts*, FED. COMMC'NS COMM'N (Sept. 13, 2017), https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts.
[141] *Id.*
[142] 47 C.F.R. § 180(b)(1).

language."[143] The Subcommittee's review of ECFS comments found that "the F-Word" and other profane and sexually explicit words were posted tens of thousands of times.

Words/Phrases	Total FCC ECFS Results	Total Regulations.gov Results[144]
H[redacted]L	117,296	565
F[redacted]K	23,381	31
S[redacted]T	13,213	84
D[redacted]N	5,924	163
A[redacted]HOLE	4,182	1
C[redacted]T	899	40[145]
C[redacted]K	673	0[146]
P[redacted]Y	236	0[147]
I will kill myself / I will literally kill myself	114	0
Go kill yourself	11	0

VIII. CONCLUSION

The advent of online commenting on regulations has brought more transparency to government proceedings and gives the public greater input in the rules that govern everything from energy companies and drug manufacturers to fisheries and national parks. Although the internet has provided a more convenient means for commenting, it has not changed the purpose of notice-and-comment rulemaking—to gather relevant, substantive information about a regulatory proposal for an agency's consideration, rather than a headcount of opposing viewpoints. For online commenting to be beneficial to both the agencies and the public, online dockets must contain substantive, relevant information that is easy to identify. They should not contain abusive material or comments submitted under false identities, and agencies should take appropriate action against commenters who abuse the process. The Administration and Congress must work together to remedy these issues going forward.

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[143] *In re Complaints Against Various Broad. Licenses Regarding the Airing of the "Golden Globe Awards" Program*, 19 F.C.C. Rcd. 4975, 4979 (2004) (*Golden Globes* Order).

[144] The Regulations.gov results require searching for variations of words separately (*e.g.*, separate searches for s[redacted]t and sh[redacted]ty). ECFS, on the other hand, automatically searches for variations of words.

[145] Many of these references appear to be typographical errors.

[146] Although some instances appear on Regulations.gov, none of them appear to be used in a profane context.

[147] Although some instances appear on Regulations.gov, none of them appear to be used in a profane context.

Appendix A

Administrative Conference of the United States

REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM

December 1, 2018

Todd Rubin
Administrative Conference of the United States

This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendations expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

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Introduction

Federal regulations (hereinafter "rules") affect nearly all aspects of our lives. The Administrative Procedure Act, the statute that governs a large part of the federal rulemaking process, generally requires agencies to give the public notice of, and the opportunity to comment on, rules they are considering issuing.[1] The main purposes of this mandated opportunity for public input are to facilitate agencies' access to widely dispersed information and, if necessary, to help regulators rethink critical assumptions about rulemaking proposals, all with the goal of improving the quality of rulemaking.

To submit an informed comment, potential commenters need to be able to at least: 1) access the proposed rule and the agency's justification for it; 2) access materials upon which the agency substantially relied to develop the proposed rule; and 3) understand the rationale by which the agency made its decision.[2] Commenters should also be able to access other comments that may have been submitted on the proposed rule in time to submit responsive comments, to the extent this is possible. Members of the public, especially those who are subject to the rule, should be able easily to determine whether further action has been taken on the proposed rule and, when a final rule has been issued, to access the rule and all materials, including public comments, that informed its development.

Historically, it has been a challenge for many people to understand the rulemaking process and to access these rulemaking materials. Before the internet was widely available, members of the public interested in reading materials in a rulemaking docket (e.g., supporting materials and other comments submitted) needed to go to the agency and schedule an appointment to inspect the paper files on site. Even being able to find a copy of the *Federal Register* to read the rulemaking proposal required sophistication and resources that many members of the public did not have.[3] Such logistical barriers weeded out many from intelligently participating in the rulemaking process.

Today, because of several statutes and executive branch initiatives, nearly all agency primary rulemaking documents (e.g., notices of proposed rulemaking and final rules) are online.[4] A member of the public interested in viewing proposed and final rule documents can go to Federalregister.gov. To submit a comment on a proposed rule, view other comments, and read supporting materials, a member of the public can go to Regulations.gov, either directly or by a link from Federalregister.gov. Online accessibility therefore has the potential to allow more people to participate in the rulemaking process in an informed, intelligent way. To some extent,

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[1] *See* 5 U.S.C. § 553.

[2] Of course, even these elements are not enough if the agency's rationale for the proposed rule is not written in language accessible to the relevant audience.

[3] Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 362 (2004) (discussing how access to the *Federal Register* and Code of Federal Regulations was limited).

[4] *See id.* at 363–66 (detailing administrative efforts starting with the Clinton Administration's call to federal agencies to increase the "use of IT in developing and implementing regulations"). *See generally* Cynthia R. Farina, Reporter, *Achieving the Potential: The Future of Federal E-Rulemaking, Report of the Committee on the Status and Future of Federal e-Rulemaking*, 62 ADMIN. L. REV. 279 (2010) (reporting on the development of and potential in eRulemaking).

it has advanced that goal.[5] However, it has yet to fulfill its potential, for a variety of reasons that will be discussed in this report.

Part I of this report discusses the process that federal agencies use to conduct rulemaking online. Part II discusses how Regulations.gov/the Federal Docket Management System (FDMS) is governed and funded. Part III discusses how it came into being. Part IV discusses the specific legal requirements that it helps agencies fulfill. Part V examines some of its key problems. Finally, Part VI offers some solutions.

Part I. What FDMS/Regulations.gov Looks Like and Its Core Functionalities

Any member of the public can go to Regulations.gov and, once there, search for rulemaking materials, including notices, public comments, and supporting materials. There are several ways that visitors can search for these materials. First, they can enter terms into a search box, just as one would do if searching for materials on a search engine, such as Google. Often, however, this basic search function will yield too many results for visitors to easily sift through to find the desired material. Regulations.gov therefore permits users to perform an "Advanced Search," which allows them to narrow the results by searching fields such as "Document Type" (e.g., "Notice," "Proposed Rule," or "Other"), "Agency," and "Docket Type" ("Rulemaking" or "Nonrulemaking.")

To submit a comment, visitors click on a "Comment Now" button that appears next to a notice. Doing so pulls up a text box with a maximum character count of 5,000 and an option to include attachments. People who wish to submit comments that exceed the character count can type "See Attached" (or similar language) in that text box and upload a longer comment. Depending on the agency, there may be fields within the comment page that require visitors to enter certain information about themselves, such as first name, last name, and contact information (e.g., city, state, and country). Some agencies only ask for this information if a commenter indicates that he or she is submitting a comment on behalf of another.

FDMS is where agency officials create the electronic rulemaking dockets (e-dockets), designated elements of which are viewable on Regulations.gov. An "e-docket" is simply a virtual folder that contains materials relevant to a particular rulemaking, including the notice, supporting materials, and comments. Regulations.gov is the public-facing website that allows people to access materials in the e-dockets. Agencies create and manage the e-dockets and their contents through FDMS.gov, a password-protected site that can be accessed only by authorized agency personnel.

All rulemaking notices that are published in the *Federal Register automatically* appear on Regulations.gov. This includes materials from agencies that do not participate in Regulations.gov, such as the Federal Communications Commission (FCC) and the Securities and

[5] Congress has also taken a strong interest in advancing this goal. The recently-introduced GOOD Act (or "Guidance Out of Darkness Act") would require agencies to post guidance documents on Regulations.gov and to provide hyperlinks to the posting on the agency website. *See* S. 2296, 115th Cong. (2018).

Exchange Commission (SEC). This is because there is an automated, "behind the scenes" link between Federalregister.gov and FDMS whereby each day, all of the contents of Federalregister.gov are sent to FDMS. Because the FCC and the SEC (and all other non-participating agencies) submit their rulemaking materials to the Federal Register, their materials are published on Federalregister.gov and are sent to FDMS, where they then become publicly visible on Regulations.gov.

For the majority of rulemaking agencies that participate in FDMS, once a rulemaking notice arrives in FDMS, an agency user will assign it to an e-docket.[6] With respect to supporting materials, such as Regulatory Flexibility Act analyses, studies, or cases that informed a rule's development but that do not appear on Federalregister.gov, agency officials must first manually upload these to FDMS and then associate them with an e-docket. Once they associate them with an e-docket, they must then designate such items as publicly viewable in order for them to appear on Regulations.gov. Furthermore, assigning documents to a docket allows rulemaking materials to be associated with one another. This association is important for enabling users to find a rulemaking document. It also allows Regulations.gov to include key documents in the history of the rulemaking.

Likewise, comments submitted through Regulations.gov do not automatically appear on Regulations.gov (except if an agency requests this, which very few do). Rather, comments are added to the docket queue on FDMS and an agency official must affirmatively decide whether to associate them with an e-docket, thereby rendering them publicly viewable on Regulations.gov.[7] This gives agencies the chance to review comments for, among other characteristics, profanity, spam, confidential business information, and personally identifiable information.

Part II. How FDMS/Regulations.gov is Governed and Funded

FDMS/Regulations.gov is governed by an Executive Steering Committee (Committee) that consists of officials from dozens of federal agencies. The Committee is co-chaired by the Deputy Administrator of the Office of Information and Regulatory Affairs (OIRA) and the Chief Information Officer (CIO) of the Environmental Protection Agency (EPA). It makes decisions about the design, operations, maintenance, and budgeting of FDMS/Regulations.gov upon advice in these areas from several smaller, lower-tiered bodies. These bodies include a Change Control Board, an Advisory Board, and a Budget Working Group.

EPA is considered the "managing partner" of FDMS/Regulations.gov. As such, it is responsible for implementing changes to the system that have been approved by the Committee. To facilitate this responsibility, the EPA created a Project Management Office (PMO), which consists of a small staff of experts in online docket management technology.

There is no direct appropriated funding for FDMS/Regulations.gov. Rather, the system is funded through what eRulemaking officials term a "shared services model." Agencies that participate in eRulemaking fund the system through contributions, decided by a formula. The

[6] The independent commissions that have their own eRulemaking systems do not create dockets in FDMS.
[7] Agency officials have the option to upload a large batch of comments.

formula for contributions is based, in part, on: 1) the size of the agencies' budgets; 2) the average annual number of rules and non-rule items that agencies publish; and 3) the average annual number of comments agencies receive.[8]

Part III. How FDMS/Regulations.gov Came Into Being

In July 2001, President George W. Bush identified "expansion of eGovernment" as one of five priorities of the President's Management Agenda.[9] To support this priority, the Office of Management and Budget (OMB) put in place an implementation strategy for eRulemaking.[10]

In May 2002, the OMB Director issued a memorandum to the heads of agencies stating that OMB would "consolidate redundant IT systems related to rulemaking." OMB initially named the U.S. Department of Transportation (DOT), and then the EPA, the lead agency for this initiative. Both agencies had been operating sophisticated online rulemaking systems for years before FDMS/Regulations.gov was put into place.[11]

Regulations.gov was launched in January 2003.[12] At that time, the public was able to view rulemaking materials available for comment and to submit comments. However, the rulemaking dockets themselves (along with, for example, supporting material and public comments) were not available. In September 2003, EPA, as managing partner of the eRulemaking Program, awarded a contract to Lockheed Martin to integrate various online rulemaking systems with the Regulations.gov portal. EPA and OMB considered three general designs for a new government-wide rulemaking docketing system. The first was a single, centralized system that would replace all existing agency online docketing systems. The second would have allowed agencies with existing online rulemaking dockets to keep those dockets, but they would be linked to a main system used by agencies without their own dockets. The final plan was a "tiered system," which was a hybrid of the two models above.[13]

In February 2004, the Executive Steering Committee, by a vote of 15-2, decided to adopt the first approach.[14] This decision was based on perceived cost savings and ease of searching a centralized system compared to the other two options.[15] In May 2005, agencies began migrating their rulemaking dockets to FDMS. In September 2005, Regulations.gov was updated to allow the public to search and access rulemaking docket contents (e.g., supporting materials and public comments).[16]

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[8] CURTIS COPELAND, CONG. RESEARCH SERV., RL34210, ELECTRONIC RULEMAKING IN THE FEDERAL GOVERNMENT 17 (2008).
[9] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-777, PROGRESS MADE IN DEVELOPING CENTRALIZED E-RULEMAKING SYSTEM 6 (2005).
[10] *See* Farina, *supra* note 4, at 280.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] COPELAND, *supra* note 8, at 12–13.
[15] *Id.* at 13.
[16] *Id.* at 14.

By July 2006, seven agencies had migrated to FDMS, and over the ensuing years, more and more agencies did so. Today, all cabinet-level and freestanding Executive Branch agencies (e.g., the EPA) are considered "Participating Agencies" of FDMS/Regulations.gov. This means they maintain their rulemaking and, in some cases, non-rulemaking (e.g., adjudication) dockets on Regulations.gov, and accept comments through the comments feature on the website. To date, there are 184 such "Participating Agencies." Several independent regulatory agencies, such as the Bureau of Consumer Financial Protection and the Federal Trade Commission, are also "Participating Agencies." However, most independent regulatory agencies, such as the FCC, do not participate. Although their rulemaking materials do appear on Regulations.gov, due to the link between Federalregister.gov and FDMS, comments submitted to them do not appear on Regulations.gov, and they do not have e-dockets on Regulations.gov. Several of these non-participating agencies maintain their own websites where the public can access a rulemaking docket and comment on a proposed rule.

Part IV. Participation in FDMS/Regulations.gov Facilitates Compliance with the E-Government Act of 2002

Under the E-Government Act of 2002, agencies must, "[t]o the extent practicable . . . accept submissions under section 553(c) of title 5, United States Code [written data, views, or arguments from interested persons], by electronic means."[17] Furthermore, agencies must "[t]o the extent practicable, as determined by the agency in consultation with the Director [of OMB] . . . ensure that a publicly accessible Federal Government website contains electronic dockets for rulemakings under section 553 of title 5, United States Code ["informal rulemaking"]."[18]

These electronic dockets "shall make publicly available online to the extent practicable, as determined by the agency in consultation with the [OMB] Director . . . all submissions under section 553(c) of title 5, United States Code; and other materials that by agency rule or practice are included in the rulemaking docket under section 553(c) of title 5, United States Code, whether or not submitted electronically."[19]

Although the statute does not require that agencies participate in FDMS/Regulations.gov, participation in FDMS/Regulations.gov allows agencies to fulfill their obligations under the statute. First, when an agency participates in FDMS/Regulations.gov, it maintains an e-docket on FDMS, which appears publicly on Regulations.gov. This fulfills its obligation to "ensure that a publicly accessible Federal Government website contains electronic dockets for . . . [informal rulemaking]."[20] When an e-docket in FDMS/Regulations.gov contains and makes publicly accessible all the materials that the agency normally includes in the rulemaking docket for that rulemaking, and contains public submissions, the docket requirement component of the statute is satisfied. Finally, when agencies participate in FDMS/Regulations.gov, it means they accept

[17] E-Government Act of 2002, Pub. L. No. 107-347, § 206(c), 116 Stat. 2899, 2916 (included as a note in 44 U.S.C. § 3501 (2018)).
[18] *Id.* § 206(d)(1), 116 Stat. at 2916.
[19] *Id.* § 206(d)(2)(B), 116 Stat. at 2916.
[20] *Id.*

comments from the public, thus fulfilling their obligations to "accept submissions under section 553(c) of title 5, United States Code, by electronic means."[21]

Part V. The Key Challenges Underlying Regulations.gov

Before delving into the challenges underlying Regulations.gov, it is useful to first take a step back and keep in mind the extremely tedious work that eRulemaking officials completed to make online rulemaking a reality. The magnitude of this achievement cannot be overstated. Achieving the goal of centralized online rulemaking required tackling an extremely complex information management problem, and eRulemaking officials have managed to make important rulemaking information substantially more accessible to the public than in the era before the existence of FDMS/Regulations.gov.

The limitations of the website, which will be explored below, are not in any way a criticism of the dedication of eRulemaking officials. They are, rather, a byproduct of a system designed to store an amazing variety and quantity of rulemaking materials from nearly 200 agencies (and counting) in one place, and one in which all of these agencies are responsible for their own submissions and docket management.[22] However, with the appropriate resources and prioritization, the challenges can be overcome.

To understand the main challenges with FDMS/Regulations.gov, it is helpful to again consider its purpose. It was created to make it easier for the public to participate in the notice-and-comment process in an informed way and to readily access materials that reveal the status and outcome of the rulemaking process. The eRulemaking Program envisioned that it would do so by allowing the public to 1) access the text of the Notice of Proposed Rulemaking (NPRM) and, if existent, final rule and accompanying explanation; 2) access materials upon which the agency substantially relied to develop the proposed rule; 3) submit comments online and review the comments others have submitted; and 4) follow the course of a rulemaking to determine whether the NPRM has been supplemented, finalized, withdrawn, etc. However, many users of Regulations.gov have found that the system does not allow people to consistently and reliably: a) search for and find all documents related to a particular rulemaking and b) access supporting materials and other relevant information about rulemakings, for reasons that will be discussed below.[23]

To uncover some of the major flaws with Regulations.gov, I extensively used the site to attempt to find rulemaking materials and consulted with academics who have written on the

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[21] *Id.*

[22] Organizations wishing to engage in comprehensive analyses of public participation in rulemaking are hampered by the fact that although most agencies participate in Regulations.gov, several do not, making it an onerous process to include those agencies' data. *See, e.g.*, apendleton, *Regulations.gov Continues to Improve, but Still Has Potential for Growth*, The Sunlight Foundation (Apr. 9, 2013, 11:21 AM), https://sunlightfoundation.com/2013/04/09/regulations-gov-continues-to-improve-but-still-has-potential-for-growth/.

[23] Another problem that non-agency users have pointed out is that a user cannot reliably determine how many comments were submitted on a rulemaking and whether the comments visible on Regulations.gov are all the comments the agency received.

subject. I also had numerous discussions with members of the public who use Regulations.gov regularly.

A. Users Find It is Difficult to Consistently and Reliably Search for Rulemaking Materials

One reason it is difficult to reliably and consistently find rulemaking materials is because agencies sometimes create multiple e-dockets for the same rulemaking. For example, if an agency's rulemaking has gone from an NPRM to a final rule, the agency sometimes creates a separate e-docket for the final rule, instead of maintaining a single e-docket to which all documents related to the rulemaking are assigned. A user who tries to find this rule might come across the first e-docket the agency created and conclude incorrectly that there has been no final rule issued.[24] Sometimes, this "multiple e-docket" problem happens because a sub agency (e.g., the Occupational Safety and Health Administration) issued the NPRM and created the initial docket, and the parent agency (e.g., Department of Labor) issued the final rule and created the second docket. In any case, in many instances, there are at least two e-dockets, each containing documents that are part of a single rulemaking.[25] At best, this is confusing. At worst, it misleads the user as to the status of the rulemaking if her search does not locate both dockets and enable her to recognize the relationship between them.

Another reason it is difficult to search for rulemaking materials is because the "Advanced Search" feature on Regulations.gov in many instances does not helpfully narrow down the number of results that come up in a search. The purpose of an "Advanced Search" is to allow users to search by different filters (e.g., date range, type of source, author, and so on), reduce the number of search results, and therefore increase the likelihood of finding what the user is looking for.

For example, suppose someone would like to use Google to find an article she read about robotics, and she recalls that she read the article in 2006. If she were to search Google for this particular article without using an advanced search, she would likely have to sift through millions of results before she came across what she was looking for. However, if she were to use Google's "Advanced Search" feature, she could select the date range as "1/1/2006-12/31/2006," thereby drastically decreasing the number of results that come up and increasing the likelihood that she will find the relevant article.

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[24] Other agency practices sometimes compound the problem of finding all documents related to a rulemaking. In many instances, the title of the final rule does not match the title of the proposed rule, especially if time has passed and there have been, for example, supplemental NPRMs or other shifts in the focus of the rule. Sometimes agencies "reuse" titles, so that it becomes difficult to identify the documents for which the user is looking.

[25] Each e-docket has a unique docket number assigned by FDMS. Docket numbers begin with an alphabetic prefix unique to the agency. So, for example, OSHA's dockets begin "OSHA" and the Department of Labor's dockets begin "DOL." The remaining components of a typical e-docket number are a four-digit date and a three or four-digit number that is the docket number. Each document in the docket is identified by a *document number* that is the docket number plus an additional three (or more) digit number that is the sequential order in which that document was added to the docket. Hence, the document number is the unique identifier of each document and integrally links it with its home docket and, in turn, all the other documents in that docket.

In contrast, many of the filters that appear on Regulations.gov's "Advanced Search" feature do not helpfully narrow down relevant results. One of the first search filters that a user encounters on the Advanced Search page is "Document Type." The options presented here are: "Notice"; "Proposed Rule"; "Rule"; "Supporting & Related Materials"; "Other"; and "Public Submission." One problem presented by these options is that they are not mutually exclusive. A "Proposed Rule" and a "Rule" are both "Notices." If I am interested in commenting on a particular NPRM, and I go to this Advanced Search page to find that NPRM, it is not clear whether I should select "Notice" or if I should select "Proposed Rule." Similarly, if I am interested in commenting on a particular advanced notice of proposed rulemaking (ANPRM), it is not clear whether I should select "Notice," "Proposed Rule," or "Other."[26]

The second problem presented by this filter is that it is not comprehensive. Section 553 of Title 5, U.S. Code (Section 553) governs informal rulemaking, but it establishes only minimal procedural requirements, thereby effectively obscuring the complexity of the rulemaking process.[27] Looking only at Section 553, one might think that agencies publish only two documents during the course of a rulemaking: an NPRM and a final rule.[28] In reality, however, agencies publish a remarkable variety of documents during the course of a rulemaking.[29] Each such document reflects an additional action or step taken by the agency in rulemaking, revealing a more complex and nuanced process than that which is suggested by Section 553.[30]

For example, agencies may engage the public before proposing a rule by issuing an ANPRM or a "notice of inquiry."[31] They may propose rules by publishing a "notice of intent to grant a rulemaking petition" or seek additional public input through a "supplemental notice of proposed rulemaking" or a "notice of extension of the comment period."[32] Agencies may choose, or be statutorily required, to hold public hearings on the proposed rule, and notices of these hearings, agendas, etc. often appear on Regulations.gov.[33] The rulemaking may generate a Paperwork Reduction Act submission that the agency notices and takes comments on. Moreover, agencies routinely promulgate a variety of rules in addition to final rules, including "temporary rules," "interim final rules," and "direct final rules," among others. All of these documents—and many more besides—fit within the basic structure of informal rulemaking as set forth in Section 553 of Title 5.[34]

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[26] It is worth emphasizing that this confusion is not confined to the public user. At the time that documents are uploaded to FDMS and assigned to dockets, the agency must supply appropriate categorizations. Hence, the person doing data entry must also decide if, for example, an ANPRM or a notice of extension of the comment period should be categorized as a "Proposed Rule," a "Notice," or "Other." Understandably, inconsistent categorization often occurs, within the same agency as well as across agencies.
[27] Memorandum from Emily Bremer 2 (Mar. 14, 2013) (on file with author).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

Compounding this complexity is the issue of guidance.[35] Section 553 exempts interpretive rules, guidance, policy statements, and other documents from notice-and-comment requirements. Such documents may thus be viewed as technically not part of the rulemaking process encompassed by FDMS/Regulations.gov. On the other hand, agencies often voluntarily elect to craft guidance documents through notice and comment and in some instances are required to seek comment under OMB's Good Guidance Practices directive. There is great variety in the terminology agencies use to describe these documents. The upshot of this extraordinary complexity is that the list of "Document Type" options, as currently structured, makes it difficult for the visitor to appreciate just what, exactly, is out there.[36]

In addition to the foregoing problems presented by the "Document Type" filter, agencies do not use the "Document Type" categories in a consistent manner. For example, some agencies, when uploading documents to FDMS, tag an ANPRM as a "Proposed Rule." Others tag it as a "Notice." And still others tag it "Other." Some agencies, when uploading a notice of public meeting within a rulemaking, tag the document as a "Proposed Rule," and some tag it as a "Notice." Even within a single agency, inconsistency may occur in the use of these categories.

For these reasons, in order to derive any benefit from using the "Document Type" filter, a visitor, at a minimum, must be aware of the particular methods of "Document Type" tagging from the agency of interest. Even then, the visitor cannot reliably select a single "Document Type" to aid their search, due to the possibility of inconsistent categorization at the point of data entry. The "Document Type" filter is therefore often not helpful in narrowing search results and may create the misleading impression that the document sought does not exist.

In addition to the "Document Type" filter (for which, recall, the options are "Notice;" "Proposed Rule;" "Rule;" "Supporting & Related Materials;" "Other;" and "Public Submission"), there is a "Document Subtype" filter. This filter can only be used if the user has selected an "Agency" (the "Agency" filter will be discussed below). As is the case with "Document Type," when an agency uploads a document to FDMS (or associates a document with a docket), the data entry person may identify the document as belonging to a particular "Document Subtype." However, unlike with "Document Types," agencies are not required to designate a "Subtype." If an agency elects to use "Document Subtypes," however, the agency's FDMS Agency Administrator configures a standardized dropdown menu of subtypes that are available to that agency's FDMS users. The subtypes available for inclusion in an agency's dropdown menu must be selected by the FDMS Agency Administrator from a finite list of shared, standardized subtypes maintained by the eRulemaking PMO. If an agency requires a new subtype, it must first submit the subtype to the eRulemaking PMO for approval. Examples of "Document Subtypes" are: "Advanced Notice of Proposed Rulemaking," "NEPA Documentation," "Final Rule," and "Supplemental Notice of Proposed Rulemaking."

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[35] Under the Administrative Procedure Act, a specific kind of guidance document, called an "interpretative rule," is considered a rule. *See* 5 U.S.C. § 553(b)(3)(A).

[36] The GOOD Act, currently under consideration by the U.S. Senate, would require agencies to publish guidance documents on Regulations.gov and provide a hyperlink to the publication on their own. The bill defines "guidance document" broadly to include such things as blog posts, news releases, etc. *See* S. 2296, 115th Cong. (2018).

Although the eRulemaking PMO's role in the process provides some measure of uniformity, agency discretion to opt out of using "Document Subtype" designations, draft agency-specific "Docket Subtype" menus, and request the creation of new "Document Subtypes" appears to have resulted in significant variation among agency practices and contributed to an overwhelming number of "Document Subtypes" in use on Regulations.gov.[37] Because it offers greater levels of specificity, the "Document Subtype" filter can potentially help solve the non-comprehensiveness problem discussed above with respect to "Document Type." However, inconsistent practices with respect to its use undermines its effectiveness.

The next filter that a visitor encounters on the "Advanced Search" page is "In these date ranges." The options here are: "Comment Due Date;" "Comment Start Date;" "Creation Date;" "Posted Date;" and "Received Date." The first two are fairly straightforward: they simply refer to the date that comments are due, and the dates that the agency first accepted comments on the rulemaking. The last three are not intuitive. While these terms may make perfect sense to the agency at the point a document is uploaded or a comment is released for public visibility, the public user is unlikely to understand the difference between "Creation," "Posted," and "Received," and the page does not define these terms.

Immediately below this filter, the user can search by "Agency." This seems fairly straightforward upon first glance. However, as with many of the other filters, visitors who use this may be misled. The problem here is that selecting a parent agency as the "Agency" does not include results for sub agencies. For example, suppose visitors are interested in reading and submitting a comment on the recently posted "Request for Comments on the Cross-Agency Priority Goal: Leveraging Data as a Strategic Asset." Perhaps they came across that document on the *Federal Register* website. If they did, they would see that the agency that issued this particular notice is listed as "Department of Commerce." When the prospective commenters go to Regulations.gov to try to find and comment on the document, they would, quite sensibly, select "Department of Commerce" as the "Agency." However, if they do so, they will not be able to find the document. This is because the "Agency" that created the docket in FDMS was, in this instance, a sub agency of the Department of Commerce: the Bureau of the Census. Searching by "Department of Commerce" will not pull up the document. Visitors who use this filter and select a parent agency may erroneously conclude that a particular document has not been published.

One of the next filters on the "Advanced Search" page is "Docket Type." Here, the user may select "Rulemaking" and "Nonrulemaking." Given that the name of the website is "Regulations.gov," and "regulation" is often used synonymously with "rulemaking," the appearance of "Nonrulemaking" as a "Docket Type" may cause confusion. Some agencies include non-binding guidance materials under the "Nonrulemaking" "Docket Type." Some agencies, such as the U.S. Department of Transportation, include their adjudication dockets under "Nonrulemaking." Regulations.gov does not define the term "Nonrulemaking," but this would be very helpful information for a member of the public to know before searching.

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[37] *See* Bremer, *supra* note 27, at 5.

There are additional complexities that one will encounter if one decides to use the "Docket Type" filter. For example, a visitor who selects "Nonrulemaking" as the "Docket Type," and "Proposed Rule" and "Rule" as "Document Types," will get 23,328 results. On its face, it is difficult to comprehend how it can be the case that there are any instances in which a "Proposed Rule" or a "Rule" can be part of a "Nonrulemaking" docket. It is possible that some agencies' adjudication dockets contain "Proposed Rules" and "Rules" as "Supporting and Related Materials." That would be a sensible explanation for a "Proposed Rule" and a "Rule" being part of a "Nonrulemaking docket." However, it appears that in most instances in which a "Proposed Rule" and a "Rule" are part of a "Nonrulemaking Docket," the "Proposed Rule" or "Rule" is the primary document. This means that either the agency official incorrectly labeled the docket "Nonrulemaking," or incorrectly labeled, say, an adjudication order (or other kind of "Nonrulemaking document") as a "Proposed Rule" or a "Rule."

An additional problem with the "Docket Type" filter is that if a user selects *either* "Rulemaking" or "Nonrulemaking" as the "Docket Type," Regulations.gov displays materials that are not associated with *any* docket at all (e.g., documents from agencies that do not participate in FDMS/Regulations.gov). It could be confusing for a member of the public to see a freestanding document (say, an order from the SEC) to come up in a search of "Docket Types."

In addition to the "Docket Type" filter, there is a "Docket Subtype," as well as a "Docket Subtype Level 2" filter. The "Docket Subtype" filter can only be used if the visitor has selected an "Agency," and the "Docket Subtype Level 2" filter can only be used if the visitor has selected an "Agency" *and* a "Docket Subtype." As is the case with "Document Subtype," agency officials *can* identify dockets as belonging to a particular "Docket Subtype" and "Docket Subtype Level 2," but they are *not required* to use these designations. Most agencies use the "Docket Subtype" without using "Docket Subtype Level 2." As with "Document Subtypes," if an agency elects to use "Docket Subtype" and "Docket Subtype Level 2," the agency's FDMS administrator configures a standardized dropdown menu of subtypes that will be available to that agency's FDMS users. Examples of "Docket Subtypes" are: "Consultations Rulemaking," "Statistics," and "Health Rulemaking." Examples of "Docket Subtypes Level 2" are: "101- Balloons, Kites, Rockets/Free Balloons," "Ultralight Vehicles," and "Airport Security."

As is the case with "Document Subtypes," agency discretion to opt out of using "Docket Subtype" and "Docket Subtype Level 2" designations, draft agency-specific subtype menus, and request the creation of new subtypes appears to have resulted in significant variation among agency practices and contributed to an overwhelming number of "Docket Subtypes" and "Docket Subtypes Level 2" in use on Regulations.gov. This results in the same problems discussed above with respect to Document Subtypes and therefore further hinders the ability of visitors to use "Advanced Search" to find relevant results.

B. E-Dockets Are Not Reliably Informative

Many e-dockets on Regulations.gov do not contain all relevant Unified Agenda[38] information (e.g. whether it was published in the fall or spring edition; whether it is a "Major Rule," and whether there are "federalism implications"). Others do include this information. The piece of information that allows FDMS to link a rulemaking e-docket to the appropriate Unified Agenda entry is the Regulation Identifier Number (RIN). In some instances, the absence of Unified Agenda information may indicate that the rulemaking was not included in the Unified Agenda, but more frequently the problem is that agencies are not required to enter a RIN when a new rulemaking e-docket is created—and do not do so. Executive Order 12,866 requires that all regulatory actions have a RIN.[39] In practice, a RIN is generated when an agency submits information for a new rulemaking action to the Regulatory Information Services Center (RISC) for inclusion in the Unified Agenda. The RIN is eight digits, the first four of which are unique to the agency, and the second four of which are unique to the particular rulemaking action. When an agency official enters a RIN for a docket in FDMS, the Unified Agenda information is automatically included in the e-docket displayed on Regulations.gov. This occurs because there is a behind the scenes link between FDMS and the Unified Agenda.

In some instances, a RIN may not be in existence at the time the e-docket is created. However, the far more common problem appears to be simply the failure to enter a RIN in the appropriate field at the time the e-docket is created—or to amend the docket description at the time when a document having a RIN is added. In many instances when a RIN is not displayed on Regulations.gov (and hence no Unified Agenda information is linked), the RIN can be found in the online *Federal Register* version of the document and/or in the text of the document itself. Extremely inconsistent agency practice with respect to providing the RIN exacerbates search problems: users who are sophisticated enough to try to search by RIN (which, for example, they found in the *Federal Register* notice) may not find documents that are in fact part of the relevant rulemaking.[40]

Yet another problem with respect to e-dockets is they do not always contain supporting materials that are visible to the public. If a visitor opens an e-docket that does not have supporting material, the visitor would see, under "Supporting Documents," "No documents available." As discussed above, there are good, practical reasons for agencies to include supporting materials within their e-dockets. Doing so helps boost the quality of public comments. It might be consistent with the e-Government Act for the agency not to include any supporting materials (the e-Government Act, after all, only requires inclusion of these materials if "practicable" and if the agency, by rule or practice, includes them in their rulemaking dockets). However, leaving the "Supporting Documents" section of the e-docket without materials may diminish the public's ability to adequately comment.

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[38] The Unified Agenda is a semi-annual publication of significant regulatory actions that agencies plan to take in the short and long term. The Unified Agenda requires agencies to indicate, among other things, whether a rule has federalism implications, creates unfunded mandates, or affects small entities.

[39] *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (Section 4(b)).

[40] Additional problems exist with RINs, including the use of a single RIN for multiple rulemakings and the assignment of multiple RINs to a single rulemaking.

Part VI. Solutions

Improving Regulations.gov/FDMS calls for a combination of changes to the system and changes to individual agency practices in using the system. Of course, the system's design and agency practices in using the system affect each other synergistically.

As a first step, the eRulemaking Program should work with the Office of the Chairman of the Administrative conference to provide, on an ongoing basis, resources to help identify and meet user needs in navigating and finding materials on Regulations.gov, both in its current form and as it continues to evolve. As part of this process, it should implement a method for allowing users easily to find definitions of important and potentially confusing terms used in the search process. It should then consider implementing the changes suggested below.

Problem: Agencies Sometimes Create Separate E-Dockets for the Same Rulemaking

Solution:

The eRulemaking Program should configure FDMS/Regulations.gov so that it warns an agency user of FDMS and a public user of Regulations.gov when it appears that there are multiple dockets for the same rulemaking. When multiple e-dockets are detected, a warning message should be sent to the relevant agencies on FDMS. It would ultimately be up to the agencies to decide how to respond to the message, though agencies should take them seriously and strongly consider merging all dockets that pertain to a single rulemaking. A warning message should also appear on Regulations.gov, informing the public that another e-docket may contain relevant information. The other e-docket should be identified by docket number, name, and any other relevant identifying information so the public can easily access that e-docket and determine whether there is, in fact, any relevant information.

Problem: The "Advanced Search" Feature Creates Complexities for Users of Regulations.gov

Solution:

The eRulemaking Program should consider enlisting government and private sector experts in rulemaking, information technology, data management, and organization to work closely with one another at all stages of whatever process is ultimately adopted to help improve the "Advanced Search" feature. The process suggested below could be among those that this group of experts considers using. Whether the group ends up adopting the process below, or some other process, it will likely be a large, resource-intensive process. No single agency or office (e.g., the PMO) alone should be expected to undertake it.

First, the "Notice" option under "Document Type" should be marked for elimination so that the remaining options are mutually exclusive. "Other" should also be marked for elimination. Then, all of the "Document Subtypes," "Docket Subtypes," and "Docket Subtypes Level 2" should be laid out and organized by agency. Any option that includes another (e.g., "Notice" includes "Advanced Notice of Proposed Rulemaking") should be marked for elimination so that all of the subtype options within an agency are mutually exclusive.

Additionally, "catch all" categories such as "Other" and "Miscellaneous" should be marked for elimination.

Next, a random, sufficiently large sample of all documents on Regulations.gov should be generated. Each one of these documents should be carefully analyzed to determine, among other factors, the nature of the underlying agency process that led to the document, the role the document played in the process, the public response sought by the agency (if any), and the practical consequences that might flow from the document's publication.

Based on the analysis of these documents, the "Document" and "Docket" "Type" and "Subtype" options should be revised. The revised options should sufficiently capture the diversity of documents available on Regulations.gov, should be mutually exclusive, and should be specific (i.e., there should be no open-ended options such as "Miscellaneous"). Additionally, the set of options should be manageable in number and understandable to the general public (with accompanying guidance material). Each of the revised options should include several specific examples. Additionally, depending on the results, there should be openness to the possibility of marking for elimination the "Subtype" filters entirely.

In selecting and analyzing the different kinds of materials on Regulations.gov, the eRulemaking Program can draw upon the research of Professor Emily Bremer. Professor Bremer, when she was an attorney at the Conference, undertook a comprehensive examination of this sort, and created categories, which could serve as a prototype for a revised set of "Document Types" and "Document Subtypes." The Appendix displays an excerpt of Professor Bremer's work.

After a revised classification scheme for document and docket types and subtypes is settled upon, the public should be given the opportunity to comment on the proposed new scheme, and changes should be considered based on these comments. The Executive Steering Committee should then vote on the scheme. If it is adopted, the eRulemaking Program should publish it on Regulations.gov and widely disseminate it to agency officials. FDMS should then be reconfigured to present this approved list of tags as the choices from which agencies may select when they create e-dockets or upload documents. The eRulemaking Program should offer training on how documents and dockets are to be classified under the new scheme.

There are at least two approaches the eRulemaking Program can take with respect to the mechanics of how documents are to be classified under the new scheme. Under one approach, agency officials would be responsible for selecting types or subtypes within FDMS, just as they do now. There would be some questions posed to the person entering the data to help ensure that she applies the correct categorization (e.g., "What is the purpose of this document? Is it to solicit input on a rulemaking proposal? If so, consider using one of these labels: [x], [y], [x].") Alternatively, the eRulemaking Program could, subject to available technology, incorporate the revised scheme into FDMS's decision logic. Under this approach, agency officials would no longer be responsible for selecting types or subtypes within FDMS. Rather, after they upload documents to FDMS, or associate a document with a docket (as in the case of a rulemaking document that has been sent to FDMS via the *Federal Register*), FDMS would "read" the

document and automatically tag it with the appropriate type or subtype based on the software's analysis of the document's text. An automated approach of this sort should seriously be considered, given that there are millions of documents on Regulations.gov, many of which need to be reclassified.

Under either approach, FDMS users should have the ability to override an initial classification if they believe it is an error. Furthermore, agency officials and members of the public should be given the opportunity to easily flag for review any documents and dockets they believe the system tagged in a way that is inconsistent with the revised classification scheme.

As this new classification scheme is being rolled out, there should be a way to preserve historical data. Suppose an automated approach is employed to reclassify the millions of existing documents on Regulations.gov. What happens to the original classifications? There might very well be some reason why a member of the public might want to know, say, how many documents were tagged as "Notices" in 2012. If, under the new classification scheme, "Notices" is no longer a category, and there was no preservation of the original classification data, that person would not be able to answer the question. eRulemaking officials should therefore contemplate ways to preserve the original classifications as the new classification scheme is deployed.

eRulemaking officials should also consider how to remedy the errors with respect to the "Docket Type" filter. They should ensure that NPRMs, final rules, and other kinds of rulemaking documents do not appear in a search of "Nonrulemaking" dockets if they are the "Primary Documents" within those dockets. They should also consider ensuring that freestanding documents, such as those from non-participating agencies, do not appear in any search of "Dockets," whether "Rulemaking" or "Nonrulemaking."

The final issue identified above with respect to "Advanced Searching" is the "Search by Agency" filter. Recall that a visitor who searches by parent agency may miss all documents posted by a sub agency. To remedy this problem, Regulations.gov should display a message whenever a visitor searches by an agency for which there are participating sub agencies. The message should ask the searcher whether she has found what she was looking for and, if not, whether she wishes to run the search again "in related agencies" or some similar language.

Problem: Unified Agenda Information Does Not Appear Within All E-Dockets

Solution:

The eRulemaking Program should ensure that if a RIN appears in the heading of a *Federal Register* page associated with a document, or is identified within the text of a document itself, it is also included within the Regulations.gov e-docket. Recall that including the RIN in the e-docket automatically causes Unified Agenda information to be displayed within the docket. If no RIN is included in the e-docket, no Unified Agenda information is displayed.

To ensure that if a RIN exists, it appears within the relevant Regulations.gov e-docket, the eRulemaking Program should collaborate with GSA's Regulatory Information Services Center to establish common standards for sharing RIN information over the internet. The

eRulemaking Program should also consider establishing RIN as a mandatory field in FDMS, unless a docket manager confirms that the docket does not have a corresponding RIN. Docket managers should be presented with a list of available RINs from ROCIS/RegInfo, and make a positive confirmation of which one to use. There should also be an automatic cross-check to identify which RINs have not been assigned to a docket. Through a combination of notifications and workflow actions, the eRulemaking Program should take proactive steps to find these "orphan" RINs a docket "home." For all documents for which no RIN has been generated, FDMS should automatically cause a message to be displayed within the e-docket that states: "Unified Agenda Information Not Available Because No RIN Has Been Generated."

Under this approach, agency officials would still be responsible for including the RIN as they create a docket. The technology would merely serve as a check on agency officials' work so as to reduce human error. As with "Document Type" and "Docket Type" classifications, agency officials and members of the public should be given the opportunity to easily flag any RINs they believe are incorrect, or incorrectly omitted.

Problem: Agencies Do Not Always Include Supporting and Related Materials Within E-Dockets

Solution:

The eRulemaking Program should ensure that agencies receive prompts that alert them to any dockets that do not have supporting and related materials. The prompt should state something to the effect of: "This docket must by law include, to the extent practicable, all materials that by agency rule or practice are included in the rulemaking docket, whether or not submitted electronically." Agency officials would be responsible for deciding how to respond to the message, if at all.

Acknowledgments

I am deeply grateful to Cynthia Farina and Cary Coglianese, both of whom offered expert feedback on this report and who contributed enormously to the project overall. I am also indebted to numerous professionals throughout the federal government and private sector who offered extraordinarily helpful feedback on this report, and with whom I have worked collaboratively on this project. Without their creativity and open-mindedness, this project would not have been possible.

Appendix

Note: The following is an excerpt from a memorandum written by Emily Bremer while she was an attorney at the Conference.

As previously explained, I have organized the rulemaking documents identified through my review of document subtypes. It bears noting that for purposes of this discussion, I define "rulemaking documents" as documents used by agencies to conduct the informal rulemaking process. In keeping with this process-based focus, the documents are organized first into four broad categories, based on the stage of the rulemaking process during which the documents are used. These categories include pre-rulemaking, rulemaking, rules, and post-rulemaking. Within these broad, stage-based categories, documents are further categorized based on their specific purpose or role in that stage of the process. For each individual document, the name of the document is provided, along with the identity of the agency or agencies that published the particular example document(s) I relied upon, and (in parentheses) the section of the *Federal Register* in which the example document is published, if at all. This part concludes with a few other observations and analysis of issues identified during my review.

It bears noting that this is probably not an exhaustive list of rulemaking documents. Although I identified most of these documents through my thorough examination of the documents pulled through searches of Regulations.gov and the *Federal Register* using information provided in the subtype data set, and some of document names listed here are also used as names for subtypes that have been approved for use on FDMS, this is not a list of document *subtypes* per se. I anticipate adding to the list as I complete the remaining research and identify additional documents used by agencies as vehicles of the informal rulemaking process.

A. Pre-Rulemaking Documents

1. Requests for Information that May Support or Inform a Proposed Rule

- *Advance Notice of Proposed Rulemaking*—Treasury (proposed rules)
- *Notice of Inquiry*—FCC (not published in the *Federal Register*)
- *Request for Information*—Labor ESA (proposed rules; combined with extension of comment period)

2. Requests for Further Pre-Rule Public Input

- *Notice of Hearing*—Labor OSHA (notices; seeking input on regulatory agenda and priorities)
- *Notice of Extension of Comment Period*—Treasury (proposed rules), CPSC (proposed rules)

3. Negotiated Rulemaking Documents

- *Notice of Intent to Form a Negotiated Rulemaking Committee*—Interior (proposed rules; consolidated with Request for Nominations)
- *Notice of Establishment*—HHS (notices)
- *Request for Nominations*—Interior (proposed rules; consolidated with Notice of Intent to Form a Negotiated Rulemaking Committee)

B. Rulemaking Documents

1. Proposed Rules for Public Comment

- *Notice of Proposed Rulemaking*—5 U.S.C. § 553(b)
- *Supplemental Notice of Proposed Rulemaking*—EPA (proposed rules; combined with an extension of the comment period)
- Prepublication Posting of Proposed Rules and Other Documents
    - *Prepublication Display*—CMS (refers to prepublication posting on Regulations.gov or the agency's website of a NPRM (or other document) that has been submitted to the *Federal Register* for publication)
    - *Signed Federal Register Document*—EPA (used for the same purpose as "prepublication display")
- *Subject Matter Based Subtypes Used for NPRMs and SNPRMs*—For FWS and EPA in particular, the eRulemaking PMO has approved subtype designations based on the subject matter of a proposed rule, which the agency routinely includes in the title of its *Federal Register* documents.[41] In some cases, these subtypes that have been approved for use are based on subjects that are subsidiary to a larger subject. In such cases, both the primary and subsidiary subjects are typically included in the title of document(s) published in the *Federal Register*.
    - *Migratory Bird Hunting*—Interior FWS (proposed rules; examples are actually SNPRMs)
    - *Approval and Promulgation of State Implementation Plans*—EPA (proposed rules)
    - *Public Hearings and Submission of Plans*—EPA (proposed rules)
    - *Endangered and Threatened Wildlife and Plants*
        - *Proposed Critical Habitat Designation*—Interior FWS (proposed rules)
        - *Proposed Species Listing*—Interior FWS (proposed rules)
        - *Proposed Species Reclassification*—Interior FWS (proposed rules)
        - *Proposed Establishment of Nonessential Experimental Population*—Interior FWS (proposed rules)

[41] The subtype data set included rulemaking subtypes that have been approved for use on FDMS. In some cases, agencies have requested and secured approval for a subtype, but have not configured the subtype for use, and are therefore not actively using the subtype to categorize documents on FDMS.

  - *Migratory Bird Subsistence Harvest in Alaska*—Interior FWS (proposed rules)
  - *Injurious Wildlife Species*—Interior FWS (proposed rules)
  - *Taking and Importing Marine Mammals*—Commerce NOAA (proposed rules)
  - *Refuge-Specific Regulations*—Interior FWS (proposed rules)
  - *Eagle Permits*—Interior FWS (proposed rules)
  - *Migratory Bird Permits*—Interior FWS (proposed rules)
- Petitions for Rulemaking
  - *Notice of Receipt of Petition for Rulemaking*—NRC (proposed rules)
  - *Notice of Availability and Request for Comments*—DHS Coast Guard (proposed rules)

2. Requests for Further Public Input on Proposed Rules

- *Notice of Extension of Comment Period*—Interior (proposed rules); Defense (rules and regulations)
- *Reopening of Comment Period*—EPA (proposed rules)
- *Request for Comments*—FCC (proposed rules; requesting comments on a new development relevant to an ongoing rulemaking)
- *Notice of Data Availability*—EPA (proposed rules; giving notice that new data relevant to an ongoing a rulemaking is available and providing an opportunity for the public to comment on it)
- *Notice of Public Meetings*—DOT FTA (notices)
  - *Notice of Stakeholder Meeting*—EPA (notes from meeting posted on regs.gov suggest meetings are sometimes used to engage the public on proposed rules).
  - *Notice of Meeting*—NRC (proposed rules)
- *Notice of Public Hearing*—Copyright Office (proposed rules); OSHA (proposed rules, though identified on Regulations.gov as notices); FMCSA (proposed rules; called a "Notice of Change in Hearing Structure," updating previously announced plan for public hearing on proposed rule)

3. Proposed Changes to Promulgated Rules

- *Notice of Proposed Extension of Effective Date*—OPM (proposed rules; combined with proposal to revoke previously published final rule)

4. Non-Promulgation Termination of a Rulemaking Proceeding

- Notice of Termination
  - *Notice of Termination*—DHS Coast Guard (proposed rules)
  - *Notice of Termination of Proceeding*—DOT (proposed rules)
  - *Notice of Termination of Rulemaking*—DOT NHTSA (proposed rules)

  - *Notice of Termination of Proposed Rule*
- Withdrawal
  - *Withdrawal*—EPA (proposed rules)
  - *Withdrawal of Proposed Rule*—VA (proposed rules); HUD (proposed rules)
  - *Withdrawal of Proposed Rule and Closure of Petition for Rulemaking*—NRC (proposed rules)
- Denial of Petition
  - *Denial of Petition for Rulemaking*—NRC (proposed rules)
- Resolution
  - *Resolution and Closure of Petition Docket*—NRC (proposed rules)

C. Rules

1. Temporary Rules

- *Temporary Rule*—Commerce NOAA (rules and regulations; also identified as an emergency action)
- *Temporary Interim Rule*—DHS Coast Guard (rules and regulations)

2. Interim Rules

- *Notice of Tentative Final Order*—FDA (older documents; not clear how published in *Federal Register*)
- *Tentative Final Regulation*—FDA (rules and regulations)
- Interim Final Rules
  - *Supplemental Interim Final Rule*—Commerce ITC (rules and regulations)
  - *Interim Final Rule with Request for Comments*—HHS (rules and regulations)
- *Emergency Airworthiness Directive*—FAA (rules and regulations)

3. Direct Final Rules

- *Direct Final Rule*—EPA (rules and regulations)
- *Giving Effect to Consent Decree*—EPA (rules and regulations)
- *Airworthiness Directives*—FAA (rules and regulations)
- *State Implementation Plans*—EPA (rules and regulations)

4. Final Rules

- *Prepublication Display*—EPA (rules and regulations; refers to the pre-publication posting on Regulations.gov of a final rule or other document after it has been submitted to the *Federal Register* for publication)
- *Final Rule*—Commerce NOAA (rules and regulations)

- *Final Rule with Request for Comments*—FAA (rules and regulations; airworthiness directive)
- *Affirmation of Interim Rule*—Agriculture APHIS (rules and regulations)
- *Subject Matter Based Subtypes Used for Final Rules*—As with proposed rules, FWS and EPA have secured approval to use subtype designations based on the subject matter of a final rule.
    - *Endangered and Threatened Wildlife and Plants*
        - *Species Listing*—Interior FWS (rules and regulations)
        - Establishment of Nonessential Experimental Population—Interior FWS (rules and regulations)
        - *Species Reclassification*—Interior FWS (rules and regulations)
        - *Species Delisting*—Interior FWS (rules and regulations)
        - *Critical Habitat Designation*—Interior FWS (rules and regulations)
    - *Injurious Wildlife Species*—Interior FWS (rules and regulations)
    - *Incidental Take of Marine Mammals*—Commerce NOAA (rules and regulations)
    - *Refuge-Specific Hunting and Sport Fishing Regulations*—Interior FWS (rules and regulations)
    - *Migratory Bird Subsistence Harvest in Alaska*—Interior FWS (rules and regulations)
    - *Migratory Bird Hunting*—Interior FWS (rules and regulations)

5. Actions Related to Effective Dates of Previously Published Rules

- *Delay of Effective Date*—DoD/GSA/NASA (rules and regulations); FDA (rules and regulations)
- *Confirmation of Effective Date*—FAA (rules and regulations)
- Notice of Confirmation of Effective Date
    - *Confirmation of Effective Date of Direct Final Rule*—DOT PHMSA (rules and regulations)
    - *Direct Final Rule; Confirmation of Effective Date*—FDA (rules and regulations)
- *Notice of Stay of Action*—FDA (rules and regulations); EPA (rules and regulations)
- *Extension of Compliance Date*—FDA (notices), TSA (rules and regulations)

D. Post-Rulemaking Documents

1. Special Permissions or Limited Modifications of Regulatory Requirements

- *Temporary Permit*—FDA (notice; also pre-rulemaking, as it is used to evaluate potential need for changes to existing regulations; granted to class via individual)
- *Notice of Variance*—Energy (notices)
- *Petition for Modification*—MSHA (notices)

- *Equivalency Determination*—Coast Guard (notices)

2. Solicitation of Public Input at the Enforcement Stage

- *Request for Data, Information, and Views*—FDA (notices)
- *Stakeholder Meeting*—OSHA (notices)
- *Town Hall Meeting*—CMS (notices)

3. Notice of Challenge to Rule

- *Notice of Appeal*

4. Guidance

- *Request for Information*—FDA (notices; combined with a Notice of Availability of draft guidance)
- *Proposed Guidance with Request for Comment*—Treasury OTS (notices)
- *Proposed Statement of Policy*—FEC (proposed rules)
- *Proposed Guidelines*—NHTSA (notices)
- *Notice of Proposed Interpretation*—DHS (notices)
- *Proposed Interpretative Statement*—CFTC (proposed rules)
- *Notice of Availability*—DOT FTA (notices)
- *Proposed Generic Communication*—NRC (notice; *Federal Register* action identified as "Notice of Opportunity for Public Comment")

Agencies similarly use a variety of documents to issue final guidance:

- *Final Statement of Policy*—FDIC (notices)
- *Final Policy Statement*—NRC (rules and regulations)
- *Notice Policy Statement*—FAA (notices)
- *GDL Guidance*—FDA (not published in *Federal Register*)
- *Technical Support Document*—EPA
- *Final Supervisory Guidance*—Treasury FDIC (notices)
- *Industry Guidance*—FCC (notices; identified as "policy statement")
- *Notice of Final Interpretations*—Education (notices)
- *Notice of Significant Guidance*—USDA (notices)
- *Notice of Republication of Policy Guidance With Request for Comment*—DHS (notices)
- *Policy Guidance*—State (notices)
- *Notice of Policy Guidance*—DOT (rules and regulations)
- *Management Directives*—DHS (not published in *Federal Register*); NRC

Appendix B

United States Government Accountability Office

Report to Congressional Requesters

June 2019

FEDERAL RULEMAKING

Selected Agencies Should Clearly Communicate Practices Associated with Identity Information in the Public Comment Process

GAO-19-483

GAO Highlights

Highlights of GAO-19-483, a report to [illegible]

Why GAO Did This Study

Federal agencies publish on average 3,700 proposed rules yearly and are generally required to provide interested persons (commenters) an opportunity to comment on these rules. In recent years, some high-profile rulemakings have received extremely large numbers of comments, raising questions about how agencies manage the identity information associated with comments. While the APA does not require the disclosure of identifying information from a commenter, agencies may choose to collect this information. This report examines (1) the identity information collected by Regulations.gov and agency-specific comment websites, (2) the guidance agencies have related to the identity of commenters, (3) how selected agencies treat identity information, and (4) the extent to which selected agencies clearly communicate their practices associated with identity information.

GAO selected a nonrandomizable sample of 10 federal agencies on the basis of large comment volume. GAO surveyed 52 program offices within these agencies about their comment process, and reviewed comment websites, agency guidance, and posted comment data. GAO also interviewed relevant agency officials.

What GAO Recommends

GAO is making a total of eight recommendations to the selected agencies to more clearly communicate to the public their policies for posting comments and associated identity information to Regulations.gov and agency-specific comment websites. The selected agencies generally agreed with the recommendations.

For more information, contact Kay J. Daughton at (202) 512-2700 or daughtonk@gao.gov.

June 2019

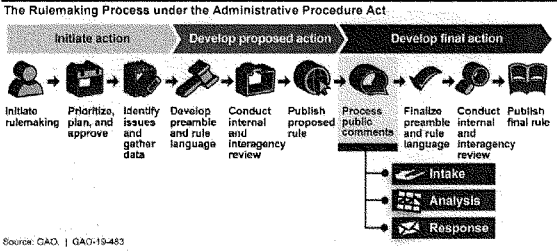
FEDERAL RULEMAKING

Selected Agencies Should Clearly Communicate Practices Associated with Identity Information in the Public Comment Process

What GAO Found

The Administrative Procedure Act (APA) governs the process by which many federal agencies develop and issue regulations, which includes the public comment process (see figure below).

The Rulemaking Process under the Administrative Procedure Act



Source: GAO. | GAO-19-483

Regulations.gov and agency-specific comment websites collect some identity information—such as name, email, or address—from commenters who choose to provide it during the public comment process. The APA does not require commenters to disclose identity information when submitting comments. In addition, agencies have no obligation under the APA to verify the identity of such parties during the rulemaking process.

GAO found that seven of 10 selected agencies have some internal guidance associated with the identity of commenters, but the substance varies, reflecting the differences among the agencies. The guidance most frequently relates to the comment intake or response to comment phases of the public comment process.

With the discretion afforded by the APA, selected agencies' treatment of commenters' identity information varies, particularly when posting duplicate comments (identical or near-identical comment text but varied identity information). Generally, officials told GAO that their agencies (1) post all comments within the comment system; or (2) maintain some comments outside of the system, such as in email file archives. For instance, one agency posts a single example of duplicate comments and indicates the total number of comments received. However, within these broad categories, posting practices vary considerably—even within the same agency—and identity information is inconsistently presented on public websites.

Selected agencies do not clearly communicate their practices for how comments and identity information are posted. GAO's key practices for transparently reporting government data state that federal government websites should disclose data sources and limitations to help public users make informed decisions about how to use the data. As a result, public users of the comment websites could reach inaccurate conclusions about who submitted a particular comment, or how many individuals commented on an issue.

United States Government Accountability Office

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Abbreviations

APA	Administrative Procedure Act
API	application programming interface
BLM	Bureau of Land Management
CFPB	Consumer Financial Protection Bureau
CIO	Chief Information Officer
CMS	Centers for Medicare & Medicaid Services
CSV	comma separated values
DOL	Department of Labor
EBSA	Employee Benefits Security Administration
ECFS	Electronic Comment Filing System
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FDMS	Federal Docket Management System
FWS	Fish and Wildlife Service
IP	Internet Protocol
NPRM	Notice of Proposed Rulemaking
PDF	Portable Document Format
PMO	Program Management Office
SEC	Securities and Exchange Commission
URL	Uniform Resource Locator
WAF	web application firewall
WHD	Wage and Hour Division

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GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

June 26, 2019

Congressional Requesters

Regulations are the means by which federal agencies establish legally binding requirements and are rooted in agencies' statutory authority. Typically, regulations require regulated parties to take specified actions or prohibit them from taking certain actions. Agencies use regulations to carry out statutory directives to achieve public policy goals such as protecting the health and safety of the public and the environment and facilitating the effective functioning of financial markets. The Administrative Procedure Act (APA) governs the process by which many federal agencies develop and issue regulations.[1] The APA establishes procedures and broadly applicable federal requirements for informal rulemaking, also known as notice-and-comment rulemaking.[2] Federal agencies publish an average of 3,700 proposed rules, or Notices of Proposed Rulemaking (NPRM), each year as part of informal rulemaking pursuant to the APA.

Among other things, the APA generally requires agencies to publish an NPRM in the *Federal Register* and provide interested persons (commenters) an opportunity to comment on the proposed rule.[3] Agencies must give consideration to any significant comments submitted during the comment period when drafting the final rule. This process provides, among other things, the public an opportunity to present information to agencies on the potential effects of a rule, or to suggest alternatives. To fulfill the notice-and-comment process requirements of

[1]5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521. The APA was originally enacted into law in 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946). In addition to the requirements under the APA, an agency may also need to comply with requirements related to rulemaking imposed by other statutes.

[2]The APA describes two types of rulemaking, formal and informal. Formal rulemaking includes a trial-type "on-the-record" proceeding, when rules are required by statute to be made on the record after opportunity for an agency hearing. In such cases, requirements under 5 U.S.C. §§ 556–557 apply. Most federal agencies use the informal rulemaking procedures outlined in 5 U.S.C. § 553, which include notice-and-comment rulemaking. The rulemaking process described in this report is informal rulemaking.

[3]The *Federal Register* is the daily journal of the federal government, and is published every business day by the National Archives and Records Administration. The *Federal Register* contains federal agency regulations, proposed rules and notices of interest to the public, and executive orders, among other things.

the APA, agencies may rely on Regulations.gov or their own comment websites to receive public input on proposed rules.[4] During the course of the notice-and-comment process, agencies may choose to collect information associated with the identity of the commenters, such as name, email, or address (identity information).[5]

In recent years, some high-profile rulemakings have received extremely large numbers of comments. For example, during the public comment period for an Environmental Protection Agency (EPA) 2014 rulemaking on greenhouse gas emissions, the agency reported that it received more than 4 million total comments.[6] Similarly, during the public comment period for the Federal Communications Commission's (FCC) 2017 Restoring Internet Freedom NPRM, FCC received more than 22 million comments through its public comment website.[7] Subsequently, media and others reported that some of the comments submitted to FCC were suspected to have been submitted using false identity information.[8]

You asked us to review issues related to identity information associated with public comments on proposed rulemakings. This report examines (1) the identity information selected agencies collect through Regulations.gov and agency-specific comment websites, (2) the internal guidance selected agencies have related to the identity of commenters, (3) how

[4]Regulations.gov is an interactive public website providing the general public with the opportunity to access federal regulatory information and submit comments on regulatory and nonregulatory documents published in the *Federal Register*.

[5]As discussed later in this report, other information may be collected by the comment websites that can be used to identify the source of comments, such as Internet Protocol (IP) addresses.

[6]Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (79 Fed. Reg. 34,830 (June 18, 2014) and 80 Fed. Reg. 64,662 (Oct. 23, 2015)).

[7]Restoring Internet Freedom (82 Fed. Reg. 25,568 (June 2, 2017) and (83 Fed. Reg. 7,852 (Feb. 22, 2018)).

[8]Comments using false identity information include any comments submitted with identity information that does not accurately represent the individual submitting the comment in question. This could include anonymized names, such as "John Doe," fictitious character names, such as "Mickey Mouse," or improper use of identity information associated with a real person. As an example of the interest in such comments, the Office of the New York State Attorney General has established a specific website that allows members of the public to search FCC's comment website for comments that may have misused identity information and, if any such instances are identified, to file a consumer submission to the Attorney General's office.

selected agencies treat identity information collected during the public comment process, and (4) the extent to which selected agencies clearly communicate their practices associated with posting identity information collected during the public comment process.

To address these objectives, we selected 10 agencies (selected agencies) as case studies that received a high volume of public comments during the course of rulemaking proceedings from January 1, 2013, through December 31, 2017, including eight agencies that use Regulations.gov as their agency's comment website ("participating agencies") and two agencies that operate agency-specific comment websites ("nonparticipating agencies"). We identified agencies based on the lists of participating and nonparticipating agencies provided on Regulations.gov. Six of the selected agencies are component agencies within a larger department, as indicated below. The selected agencies are as follows:

Participating Agencies

- Bureau of Land Management (BLM), Department of the Interior;
- Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services;
- Consumer Financial Protection Bureau (CFPB);
- Employee Benefits Security Administration (EBSA), Department of Labor (DOL);
- Environmental Protection Agency (EPA);
- Fish and Wildlife Service (FWS), Department of the Interior;
- Food and Drug Administration (FDA), Department of Health and Human Services and;
- Wage and Hour Division (WHD), DOL.

Nonparticipating Agencies

- Federal Communications Commission (FCC); and
- Securities and Exchange Commission (SEC).

All 10 agencies were selected based on the total number of rulemaking comments that Regulations.gov and other agency-specific comment websites reported they received from January 1, 2013, through December

31, 2017. We selected this period to include comments submitted to rulemakings across two presidential administrations and five complete calendar years. At the time our review began, 2017 was the most recent complete calendar year. The selected agencies represent a nongeneralizable sample, and findings from this report cannot be generalized to all agencies that receive public comments as part of their rulemaking proceedings. However, as reported by Regulations.gov, the comments submitted to the eight participating agencies we selected represent more than 90 percent of all comments submitted to all participating agencies during the 5-year period.[9]

To select participating agencies, we obtained publicly available data from Regulations.gov for all agencies that had rulemaking dockets—the repository of documents related to a particular rulemaking—where comments were submitted from January 1, 2013, through December 31, 2017.[10] On the basis of the comment numbers reported by the website, we selected the eight participating agencies with more than 500,000 comments submitted to dockets that accepted comments during this time. As of March 2018, there were 128 nonparticipating agencies, most of which issued less than one NPRM per year during the 5-year period. To identify nonparticipating agencies that received a high volume of comments, we obtained a list of rules submitted to GAO for review under the Congressional Review Act from January 1, 2007, through December

[9]We made our selection of participating agencies to include agencies that received a high volume of comments based on the total number of comments as reported by Regulations.gov. We determined that the data from Regulations.gov are sufficiently reliable for the purposes of this report, to include providing us with a relative comparison of comment volume between participating agencies for the purposes of case study selection. However, in working with these data, we found that, in some cases, the total numbers as reported by Regulations.gov do not accurately reflect the total number of comments submitted to an agency. Therefore, we are not including these total numbers in this report.

[10]Dockets that accepted comments from January 1, 2013, through December 31, 2017, may have also received comments outside of this date range. These comments are included in the total comment count used to select participating agencies.

31, 2017.[11] We identified four agencies with more than 10 rules submitted during the period (at least one rule per year). We then contacted these agencies to determine how many total comments were submitted to the agencies from January 1, 2013, through December 31, 2017, on all rulemakings. Two of the four agencies were unable to provide us with the total number of comments received over the 5-year period; accordingly, we selected the two that provided us with comment numbers, FCC and SEC. Both FCC and SEC received a number of comments comparable to the selected participating agencies. Within the 10 selected agencies, we identified 52 program offices with regulatory responsibilities and sent them survey questionnaires related to the public comment process in October 2018. All 52 program offices responded to the questionnaire, but the responses cannot be generalized to program offices outside of the selected agencies. For additional detail about the program offices we identified and survey development and administration, see appendix I.

To determine what identity information the selected agencies collect during the public comment process, we reviewed the data fields agencies require to be submitted with public comments and the optional data fields available to commenters on Regulations.gov and the agency-specific comment systems. We reviewed relevant system documentation for Regulations.gov and the agency-specific comment systems, such as user guides, system architecture documentation, and system logs. We also reviewed documentation associated with system modernization or reengineering efforts. In addition, we interviewed relevant information technology officials from the eRulemaking Program Management Office (PMO), FCC, and SEC and surveyed program offices about the information that is collected from public users of the comment systems as well as agency practices associated with anonymous comments.[12] Public

[11]Congressional Review Act, Pub. L. No. 104-121, title II, subtitle E, § 251, 110 Stat. 847, 868 (Mar. 29, 1996), codified at 5 U.S.C. §§ 801–808. The statute requires all federal agencies to submit a report on each new "rule" to both houses of Congress and to the Comptroller General before it can take effect. 5 U.S.C. § 801(a)(1)(A). For purposes of the Congressional Review Act, a "rule" is defined under § 804(3). The agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process. Id. § 801(a)(1)(B).

[12]The eRulemaking PMO leads the eRulemaking Program and is responsible for the development and implementation of Regulations.gov, the public-facing comment website, and the Federal Docket Management System (FDMS), which is the agency-facing side of the comment system used by participating agencies.

users are members of the public interested in participating in the rulemaking process via Regulations.gov or agency-specific websites. They may or may not submit a comment.

To determine what internal guidance selected federal agencies have related to the identity of commenters in the federal rulemaking process, we first determined whether each of the selected agencies had any documented policies, procedures, or guidance associated with each phase of the comment process generally. For those agencies that did, we reviewed these documents to determine whether they explicitly included requirements associated with identity information. We also included questions about guidance in our survey of program offices. On the basis of the responses, we followed up directly with program offices to obtain additional informal guidance that is used at the program office level, rather than agency-wide.

To determine how selected agencies treat identity information associated with public comments, our survey of all 52 program offices with regulatory responsibilities included questions about their practices associated with comment intake (including identifying duplicate comments and posting comments to the public website), comment analysis (including reviewing comments and considering their content), and response to comments. We obtained comment data for all rulemakings within the 10 selected agencies that accepted comments from January 1, 2013, through December 31, 2017, and reviewed them to determine the ways in which agencies treat the identity information submitted with comments. To assess the reliability of these data, we reviewed related documentation, interviewed knowledgeable agency officials, and traced selections to the source documents. We determined these data to be reliable for the purposes of selecting case study agencies and identifying comments that could help us understand how the selected agencies publicly post comments. We also interviewed relevant officials at the selected agencies, as well as officials from the eRulemaking PMO, to better understand the data; Regulations.gov and FDMS; and agency-specific comment systems.

To determine the extent to which the selected agencies clearly communicate their practices associated with posting identity information collected during the public comment process, we reviewed Regulations.gov, agency-specific comment websites, and the selected agencies' websites for any information provided to public users. We then

compared this information to key practices for transparently reporting open government data.[13] We also interviewed relevant officials from the eRulemaking PMO and the selected agencies about how they communicate with public users.

We conducted this performance audit from February 2018 through June 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

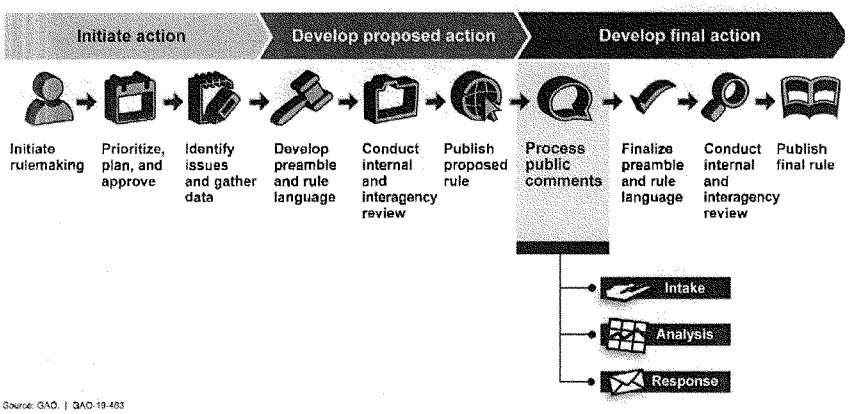
Background

The Rulemaking Process under the APA

Under the APA, agencies engage in three basic phases of the rulemaking process: they initiate rulemaking actions, develop proposed rulemaking actions, and develop final rulemaking actions. Built into agencies' rulemaking processes are opportunities for internal and external deliberations, reviews, and public comments. Figure 1 provides an overview of the rulemaking process.

[13]GAO, *Open Data: Treasury Could Better Align USAspending.gov with Key Practices and Search Requirements*, GAO-19-72 (Washington, D.C.: Dec. 13, 2018).

Figure 1: The Rulemaking Process under the Administrative Procedure Act



Source: GAO. | GAO-19-483

Note: Not all agencies are required to participate in all steps for all rulemaking proceedings.

The public comment portion of the rulemaking process generally comprises three phases:

1. **Comment Intake:** During this phase, agencies administratively process comments. This may include identifying duplicate comments (those with identical or near-identical comment text, but unique identity information), posting comments to the agency's public website, and distributing comments to agency subject-matter experts within responsible program offices for analysis.

2. **Comment Analysis:** During this phase, subject-matter experts analyze and consider submitted comments. This may include the use of categorization tools within FDMS or outside software systems.[14]
3. **Comment Response:** During this phase, agencies prepare publicly available responses to the comments in accordance with any applicable requirements. Agencies are required to provide some response to the comments in the final rule, but in some cases, an agency may also prepare a separate report to respond to the comments.

Legal Requirements for Public Comments

As illustrated in figure 1 above, the public has the opportunity to provide input during the development of agencies' rules. Among other things, the APA generally requires agencies to

- publish an NPRM in the *Federal Register*;
- allow any interested party an opportunity to comment on the rulemaking process by providing "written data, views, or arguments";
- issue a final rule accompanied by a statement of its basis and purpose; and

[14]Categorization tools can include manual coding using common software such as Excel, or automated software that can group comments by issue area or keywords.

- publish the final rule at least 30 days before it becomes effective.[15]

The APA requires agencies to allow any interested party to comment on NPRMs. The APA does not require the disclosure of identifying information from an interested party that submits a comment. Agencies therefore have no obligation under the APA to verify the identity of such parties during the rulemaking process. Instead, the APA and courts require agencies to consider relevant and substantive comments, and agencies must explain their general response to them in a concise overall statement of basis and purpose, which in practice forms part of the preamble of the final rule.[16] Courts have explained that significant comments are comments that raise relevant points and, if true or if adopted, would require a change in the proposed rule.[17] However, courts have held that agencies are not required to respond to every comment individually.[18] Agencies routinely offer a single response to multiple identical or similar comments. As explained by Regulations.gov's "Tips for Submitting Effective Comments," "the comment process is not a vote," and "agencies make determinations for a proposed action based on sound reasoning and scientific evidence rather than a majority of votes. A

[15]The APA allows agencies to issue final rules without the use of an NPRM under various exceptions, such as those dealing with military or foreign affairs and agency management or personnel. 5 U.S.C. § 553(a). APA requirements to publish a proposed rule generally also do not apply when an agency finds, for "good cause," that those procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b). In such cases, agencies may solicit comments through the *Federal Register* when publishing a final rule without an NPRM, but the public does not have an opportunity to comment before the rule's issuance, nor is the agency obligated to respond to comments it has received. In 2012, we reported that agencies did not publish an NPRM, enabling the public to comment on a proposed rule, for about 35 percent of major rules (generally those rules with an annual impact on the economy of $100 million or more) and about 44 percent of nonmajor rules published during 2003 through 2010. See GAO, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-21 (Washington, D.C.: Dec. 20, 2012).

[16]5 U.S.C. § 553(c). Pursuant to 1 C.F.R. § 18.12(c), an agency may include in the preamble, as applicable: a discussion of the background and major issues involved; any significant differences between the final rule and the proposed rule; a response to substantive public comments received; and any other information the agency considers appropriate.

[17]Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1151 (9th Cir. 2002); Am. Min. Congress v. EPA, 907 F.2d 1179, 1188 (D.C. Cir. 1990).

[18]Am. Min. Congress v. EPA, 907 F.2d 1179, 1187 (D.C. Cir. 1990) (citing Thompson v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984)). *See also*, Action on Smoking and Health v. C.A.B., 699 F.2d 1209, 1216 (D.C. Cir. 1989).

single, well-supported comment may carry more weight than a thousand form letters."

The APA includes provisions on the scope of judicial review that establishes the bases under which a court shall find an agency's action unlawful.[19] Among these APA bases are when the court finds that agency action, findings, and conclusions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "without observance of procedure required by law."[20] How an agency managed and considered public comments may be relevant during judicial review. For example, one basis for a court's reversal of an agency action has been that, upon review of the statement of basis and purposes, the court concludes the agency failed to consider or respond to relevant and significant comments.[21] Conversely, courts have upheld agency rules when the courts have found the statement of basis and purposes demonstrate the agency considered the commenter's arguments.[22]

The E-Government Act of 2002

The E-Government Act of 2002 requires agencies, to the extent practical, to accept comments "by electronic means" and to make available online the public comments and other materials included in the official rulemaking docket.[23] Executive Order 13563 further states that regulations should be based, to the extent feasible, on the open exchange of information and perspectives. To promote this open exchange, to the extent feasible and permitted by law, most agencies are required to provide the public with a meaningful opportunity to participate in the regulatory process through the internet, to include timely online

[19]5 U.S.C. §§ 701–706. The APA provisions govern judicial review unless the enabling statute for a particular regulatory program specifies a different standard.

[20]5 U.S.C. § 706(2)(A), (D).

[21]Indep. U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 919 (D.C. Cir. 1982); La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003).

[22]City of Waukesha v. EPA, 320 F.3d 228, 258 (D.C. Cir. 2003).

[23]Pub. L. No. 107-347, § 206, 116 Stat 2899, 2915–2916 (2002), codified at 44 U.S.C. § 3501 note.

access to the rulemaking docket in an open format that can be easily searched and downloaded.[24]

Most agencies meet these responsibilities through Regulations.gov, a rulemaking website where users can find rulemaking materials and submit their comments, but all agencies are not required to use that platform. In October 2002, the eRulemaking Program was established as a cross-agency E-Government initiative and is currently based within EPA. The eRulemaking PMO leads the eRulemaking Program and is responsible for developing and implementing Regulations.gov, the public-facing comment website, and FDMS, which is the agency-facing side of the comment system used by participating agencies.[25]

As of March 2018, Regulations.gov identified 180 participating and 128 nonparticipating agencies. These agencies may be components of larger departmental agencies. Some nonparticipating agencies, including FCC and SEC, have their own agency-specific websites for receiving public comments. The comment systems within the scope of this report are as follows:

- **FDMS and Regulations.gov:** FDMS is federal government-wide document management system structured by dockets (or file folders) that offer an adaptable solution to service a wide range of regulatory activities routinely performed by federal agencies.[26] The public-facing website of FDMS is Regulations.gov, which is an interactive website that allows the public to make comments on regulatory documents, review comments submitted by others, and access federal regulatory information. Regulations.gov allows commenters to submit comments to rulemakings by entering information directly in an electronic form on the Regulations.gov website. This form also allows commenters to attach files as part of their comment submission, and can be

[24]Exec. Order No. 13,563, § 2(b), 76 Fed. Reg. 3,821 (Jan. 18, 2011). However, this Executive Order does not apply to independent regulatory agencies such as the FCC, SEC, and CFPB.

[25]According to the Director of the PMO, as of January 2019, efforts are under way to move the PMO from EPA to the General Services Administration, though the overall governance structure will remain unchanged. The Director of the PMO expects the transition to be completed by October 1, 2019.

[26]Many of the eRulemaking partner agencies rely on FDMS and Regulations.gov to support a number of activities beyond rulemaking for public viewing or to solicit public comment such as publication of guidance documents, agency directives, policy interpretations, and Paperwork Reduction Act notices.

customized by each participating agency. Appendix II provides an example of one comment form from Regulations.gov. Additionally, all participating agencies allow comments to be submitted by mail or hand delivery. At their discretion, some participating agencies also allow comments to be submitted via email. See table 1.

Table 1: Acceptable Comment Submission Types for Selected Participating Agencies

Agency	Regulations.gov	Email	Mail or hand delivery
Bureau of Land Management (Department of the Interior)	Yes	No	Yes
Centers for Medicare & Medicaid Services (Department of Health and Human Services)	Yes	No	Yes
Consumer Financial Protection Bureau	Yes	Yes	Yes
Employee Benefits and Security Administration (Department of Labor)	Yes	Yes	Yes
Environmental Protection Agency	Yes	Yes	Yes
Fish and Wildlife Service (Department of the Interior)	Yes	No	Yes
Food and Drug Administration (Department of Health and Human Services)	Yes	No	Yes
Wage and Hour Division (Department of Labor)	Yes	No	Yes

Source: GAO. | GAO-19-483

- **FCC's Electronic Comment Filing System (ECFS):** ECFS is a web-based application that allows anyone with access to the internet to submit comments to FCC rulemaking proceedings. ECFS allows commenters to submit comments to rulemakings through two main avenues: brief text comments submitted as Express filings, and long-form comments submitted as Standard filings.[27] Both types of filings

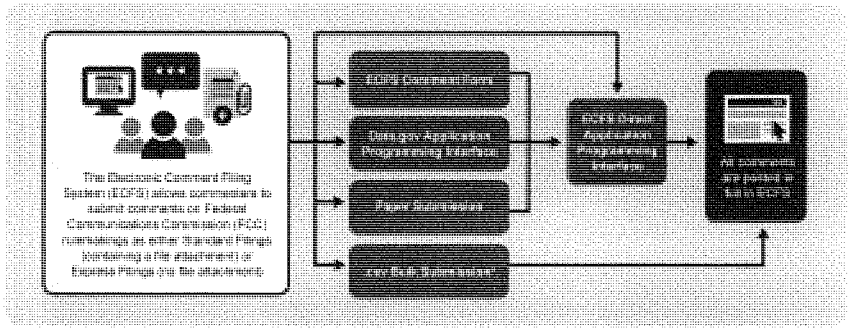
[27]FCC's ECFS also accepts comments that are not part of the rulemaking process. In addition to Express and Standard filings, users can submit Non-Docketed filings in response to certain FCC proceedings that have not been assigned a docket number or rulemaking number.

can be submitted through an ECFS comment form, which requires commenters to enter information directly into an electronic form on the ECFS website. See appendix III for examples of the comment forms used by ECFS. Additionally, interested parties with the appropriate technical capabilities can submit either type of filing directly to ECFS via a direct application programming interface (API) or through a public API that is registered with the website Data.gov.[28] Filing comments through an API allows interested parties the ability to file a large number of comments without having to submit multiple individual comment forms. Finally, to accommodate a large volume of comment submissions for the 2015 Open Internet rulemaking, FCC allowed interested parties to submit Express comment filings in bulk through formatted CSV files that were submitted via a dedicated email address and then uploaded into ECFS.[29] Similarly, for the 2017 Restoring Internet Freedom rulemaking, FCC allowed commenters to submit Express comment filings in bulk through a dedicated file-sharing website, and the comments were then uploaded into ECFS. With the exception of these two rulemakings, FCC does not allow comments to be submitted electronically outside of ECFS. Figure 2 shows how ECFS facilitates public commenting by using the processes discussed above.

[28]An API sets up machine-to-machine communication and allows users to connect directly with a website to provide or access data. Data.gov is a data catalog for a variety of U.S. government data sets, managed and hosted by the General Services Administration's Technology Transformation Service.

[29]CSV, or comma separated values, is a simple format for representing a rectangular array (matrix) of numeric and textual values. It is a delimited data format that has fields/columns separated by a comma character and records/rows/lines separated by characters indicating a line break.

Figure 2: The Federal Communications Commission's Public Comment Submission Process as of April 2019



Source: GAO analysis of FCC information. | GAO-19-483

[a]This option was only available for two proceedings: the 2015 Open Internet rulemaking and the 2017 Restoring Internet Freedom rulemaking. CSV, or comma separated values, is a simple format for representing a rectangular array (matrix) of numeric and textual values.

- **SEC's Comment Letter Log:** When SEC requests public comments on SEC rule proposals, the public can submit comments to rulemakings through an online form, which requires commenters to enter information in an electronic form on SEC's website. This form also allows commenters to attach files as part of their submission. When commenters submit a comment, it is sent to SEC staff as an email. SEC also allows comments to be submitted via email and mail. After review, staff upload the comment and any associated data into the Comment Letter Log, which is the internal database that SEC staff use to manage the public comment process, and post the comment to the public website. See appendix IV for an example of a comment form on SEC's website.

Selected Agencies Collect Some Information from Commenters and Accept Anonymous Comments through Regulations.gov and Agency-Specific Websites

Selected Agencies Collect Some Identity Information through Comment Forms

Consistent with the discretion afforded by the APA, Regulations.gov and agency-specific comment websites use required and optional fields on comment forms to collect some identity information from commenters. In addition to the text of the comment, each participating agency may choose to collect identity information from the Regulations.gov comment form by requiring commenters to fill in other fields, such as name, address, and email address before they are able to submit a comment. Participating agencies may also choose to collect additional identity information through optional fields.[30] For example, while EPA does not make any fields associated with identity information available to commenters, CFPB makes all fields available and requires that commenters enter something into the first name, last name, and organization name fields before a comment can be submitted. Table 2 shows the fields on Regulations.gov in which each of the participating agencies we analyzed require commenters to enter information and the optional fields available for commenters to voluntarily enter information.

[30]As of April 2019, the eRulemaking Advisory Board is considering modifications to Regulations.gov comment form requirements as part of a broader modernization effort. Specifically, according to PMO officials, one goal for the modernized Regulations.gov/FDMS will be to include a standardized comment form for use by all participating agencies. As of April 2019, this new form is being internally tested by the eRulemaking PMO, and also requires commenters to choose whether they are an individual, an organization, or an anonymous entity before they are able to submit the comment. However, the PMO is expected to transition its operational programs from its current home in EPA to the General Services Administration in the fall of 2019. As a result, PMO officials stated that proposed modifications from the modernization will likely not be addressed until after the PMO operational transition is complete.

Table 2: Required and Optional Comment Form Fields on Regulations.gov by Agency as of December 2018

	Agency							
Field	**Bureau of Land Management**	**Centers for Medicare & Medicaid Services**	**Consumer Financial Protection Bureau**	**Employee Benefits Security Administration**	**Environmental Protection Agency**	**Fish and Wildlife Service**	**Food and Drug Administration**	**Wage and Hour Division**
Comment	Required	Required	Required	Required	Required	Required	Required	Required
First Name	Optional	Optional	Required	Optional	n/a	Optional	Optional	Required
Middle Name	Optional	n/a	Optional	Optional	n/a	Optional	Optional	Optional
Last Name	Optional	Optional	Required	Optional	n/a	Optional	Optional	Required
Mailing Address	Optional	n/a	Optional	Optional	n/a	Optional	n/a	Required
City	Optional	Optional	Optional	Optional	n/a	Optional	n/a	Required
State or Province	Optional	Required	Optional	Optional	n/a	Optional	n/a	Required
Zip/Postal Code	Optional	Required	Optional	Optional	n/a	Optional	Optional	Optional
Country	Optional	Required	Optional	Optional	n/a	Optional	n/a	Required
Email Address	Optional	Optional	Optional	Optional	n/a	Optional	Optional	Optional
Phone Number	Optional	n/a	Optional	Optional	n/a	Optional	n/a	Optional
Fax Number	Optional	n/a	Optional	n/a	n/a	Optional	n/a	n/a
Upload Files	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
Submitter's Representative	Optional	n/a	Optional	n/a	Optional	Optional	Optional	n/a
Organization Name	Optional	Required	Required	Optional	Optional	Optional	Required	Optional
Government Agency Type (i.e., Federal/ State/Local)	Optional	n/a	Optional	n/a	Optional	Optional	n/a	n/a
Government Agency	Optional	n/a	Optional	n/a	Optional	Optional	n/a	n/a
Category (e.g., Academia, Consumer Group, Individual Consumer)	n/a	Optional	n/a	n/a	n/a	Optional	Required	n/a

Source: eRulemaking Program Management Office. | GAO-19-483

Note: "n/a" indicates that a field is not available to a commenter on the agency's electronic comment forms.

FCC requires that all commenters complete the following fields on both the Standard and Express comment forms in ECFS: (1) name, (2) postal address, and (3) the docket proceeding number to which they are submitting a comment.[31] The ECFS comment form also allows commenters to voluntarily provide additional information in optional fields, such as email address. Similarly, SEC's comment forms require commenters to provide (1) first and last name, (2) email address, and (3) the comment content, before a comment can be successfully submitted. The comment form also allows commenters to voluntarily provide other information in optional fields, such as their city and state.

Agencies Accept Anonymous Comments

Regardless of the fields required by the comment form, the selected agencies all accept anonymous comments in practice. Specifically, in the comment forms on Regulations.gov, ECFS, and SEC's website, a commenter can submit a comment under the name "Anonymous Anonymous," enter a single letter in each required field, or provide a fabricated address. In each of these scenarios, as long as a character or characters are entered into the required fields, the comment will be accepted. Further, because the APA does not require agencies to authenticate submitted identity information, neither Regulations.gov nor the agency-specific comment websites contain mechanisms to check the validity of identity information that commenters submit through comment forms.

As part of the Regulations.gov modernization effort, the Office of Information and Regulatory Affairs (within the Office of Management and Budget) and the Department of Justice proposed language for a disclosure statement on every comment form that would require the commenter to acknowledge that they are not using, without lawful authority, a means of identification of another person with any comment they are submitting. Commenters would be required to acknowledge their agreement with the statement before their comment could be submitted.

[31]As of April 2019, FCC is undertaking a reengineering effort to update ECFS, beginning with a discovery phase that involves, among other things, identifying system requirements that will help FCC meet APA requirements and improve the security of ECFS. According to FCC's Chief Information Officer (CIO), the discovery phase of the ECFS reengineering process began in the first quarter of fiscal year 2019 and is expected to be completed in May 2019. After the discovery phase, FCC will move to an implementation phase, which will include awarding a contract for the project, development and implementation of the new system, and going live with the new system. According to the CIO, the new system is expected to be completed by April 2020.

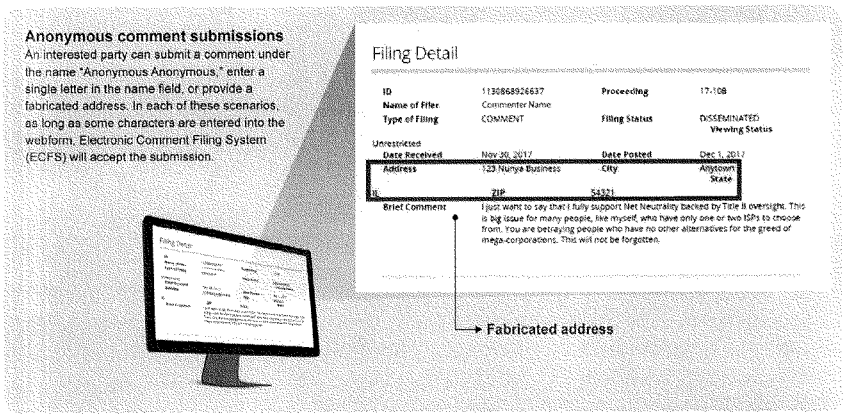
According to PMO officials, even with this disclosure statement, anonymous comments would still be permitted and accepted by Regulations.gov. This disclosure statement was proposed in response to allegations of comments being submitted to rulemakings on behalf of individuals without their permission. As of April 2019, this proposed language has not yet been approved by the Executive Steering Committee for Regulations.gov. However, the proposed disclosure statement would be provided on the Regulations.gov comment form, and it is unclear whether similar information would be made available to commenters submitting comments via email or mail.

In contrast to the other selected agencies, according to FCC officials, FCC rules require the submission of the commenter's name and mailing address, or the name and mailing address of an attorney of record. However, in March 2002, FCC initiated a rulemaking related to the submission of truthful statements to the commission.[32] Among other issues, FCC sought comment on whether rulemaking proceedings should be subject to an already existing rule that prohibited the submission of written misrepresentations or material omissions from entities that are subject to FCC regulation. In its final rule, issued in March 2003, FCC decided to continue to exempt comments to rulemakings from this rule because of the potential that such a requirement would hinder full and robust public participation in such policy-making proceedings by encouraging disputes over the truthfulness of the parties' statements.[33] According to FCC officials, to comply with APA requirements, the commission tries to minimize barriers that could prevent or discourage commenters from participating in the commenting process, and in practice accepts anonymous comments. See figure 3 for an example of an anonymous comment in ECFS.

[32]67 Fed. Reg. 10,658 (Mar. 8, 2002).

[33]68 Fed. Reg. 15,096 (Mar. 28, 2003).

Figure 3: Example of Anonymous Comment Submitted to the Electronic Comment Filing System



Source: GAO analysis of ECFS information. | GAO-19-483

Note: We did not include the identity information associated with these comments other than the address, which is obviously fabricated.

Additionally, in our survey of program offices with rulemaking responsibilities at selected agencies, 39 of 52 offices reported that they received anonymous comments on some rulemakings for which their office has been responsible since 2013. The remaining 13 offices responded that they did not receive or were unaware of receiving anonymous comments, though most of these offices do not have high levels of rulemaking activity or receive a high volume of comments.[34]

[34]Specifically, eight of the 13 program offices reported that the largest rulemaking for which they were responsible during the period received fewer than 500 comments. Further, nine of the 13 also reported that their office solicits comments on five or fewer rulemaking proceedings in a typical year.

Regulations.gov and Agency-Specific Comment Websites Collect Some Information about Public Users' Interaction

Regulations.gov and agency-specific comment websites also collect some information about public users' interaction with their websites through application event logs and proxy server logs.[35] This information, which can include a public user's Internet Protocol (IP) address, browser type and operating system, and the time and date of webpage visits, is collected separately from the comment submission process as part of routine information technology management of system security and performance. The APA does not require agencies to collect or verify this type of information as part of the rulemaking process.

Regulations.gov collects some information from commenters accessing the website but it is never linked to any specific comment. In Regulations.gov, proxy server logs capture information such as the country from which a user accesses the site, the user's browser type and operating system, and the time and date of each page visit on the website. According to PMO officials, this information is provided to the eRulemaking PMO in summary statistics that are used to assess what information is of least interest to Regulations.gov visitors, determine technical design specifications of the website, and identify system performance problems. This information is collected about all public users visiting Regulations.gov, regardless of whether they submit a comment. Further, because the PMO receives this information in the form of summary statistics, it cannot be connected to any specific comment. The eRulemaking PMO also monitors IP addresses that interact with Regulations.gov via security firewalls, but, according to PMO officials, the web application firewall (WAF) logs (a type of application event log) have never been connected to specific comments, though in some cases the

[35]Application event logs are generated by applications running on servers, end-user devices, or the web. One type of application event log is a web application firewall (WAF) log, which logs information about adverse events that triggered the firewall, including the type of threat identified by the firewall, date/time stamp, IP address, and relevant Uniform Resource Locator (URL). A proxy server log contains requests made by users and applications on a network. Proxy servers provide an application-level gateway intermediary typically between a user client web browser seeking resources from application servers. The proxy server may provide services related to, for example, implementing internet access controls such as in blocking access to websites with known security risks.

URL the blocked user was attempting to access may be captured in the log.[36]

FCC officials stated that the current ECFS application architecture does not facilitate FCC identifying the source IP address of the submitter of a specific comment filed in ECFS. FCC collects information about public users' interactions with ECFS through its web-based application proxy server logs, including the IP address from which a user accesses the site and the date and time of the user's interaction. However, ECFS does not obtain or store IP addresses as part of the comment data it collects when a public user ultimately submits a comment. Within the current architecture, ECFS would require officials to match date and time stamps from the proxy server log to the ECFS comment data to connect a given IP address to a specific comment.[37]

SEC officials stated it would be difficult to match the large number of daily hits to their general website to the much smaller number of comments submitted to their rulemaking proceedings. SEC collects information about public users' interactions with the SEC.gov website through proxy server logs, including the IP address from which a user accesses the website and the user's date, time, and URL requests. However, according to officials, a public user never directly interacts with the Comment Letter Log, and none of the information from the proxy log is included as part of the data it collects in association with comment submissions.[38] Despite this difficulty, SEC officials stated that linking the proxy log data from the general SEC.gov website to a specific comment in the Comment Letter Log could be done on a case-by-case basis.

[36]An IP address is a code that identifies a computer network or a particular device on a network, consisting of four numbers separated by periods. There are many ways to obscure IP addresses, such as by using a Virtual Private Network, which is a program that creates a safe and encrypted connection over a less secure network, such as the public internet. A URL is the address of a resource on the internet. According to PMO officials, the firewalls are monitored for IP address activity that may be indicative of a denial of service attack, which is a cyberattack in which the perpetrator seeks to make a machine or network resource unavailable to its intended users by temporarily or indefinitely disrupting services of a host connected to the internet.

[37]Until the discovery phase of the ECFS reengineering effort is completed in May 2019, officials could not comment on whether this issue would be addressed by the new system.

[38]Specifically, when a commenter submits a comment using the comment form on SEC.gov, officials receive that comment and its associated identity information as an email, which is then entered into the Comment Letter Log by SEC staff.

Most Selected Agencies Have Some Internal Guidance Related to Commenter Identity

Seven of 10 selected agencies have documented some internal guidance associated with the identity of commenters during the three phases of the public comment process, but the substance of this guidance varies, reflecting the differences among the agencies and their respective program offices.[39] For example, as shown in table 3, BLM has no internal guidance related to identity information, while CFPB has internal guidance related to the comment intake and response to comments phases.

Table 3: Presence of Internal Agency Identity-Related Guidance Associated with the Public Comment Process

Agency	Comment intake	Comment analysis	Response to comments
Bureau of Land Management	No	No	No
Centers for Medicare & Medicaid Services	No	Yes	Yes
Consumer Financial Protection Bureau	Yes	No	Yes
Employee Benefits Security Administration[a]	Yes	Yes	Yes
Environmental Protection Agency	Yes	No	No
Federal Communications Commission	No	No	No
Fish and Wildlife Service	No	No	No
Food and Drug Administration	No	Yes	Yes
Securities and Exchange Commission	Yes	No	No
Wage and Hour Division[a]	Yes	Yes	Yes

Source: GAO analysis of agency data. | GAO-19-483

[a]The Employee Benefits Security Administration and Wage and Hour Division provided GAO with Department of Labor guidance that applies to all agencies within the department.

[39]As used in this report, "guidance" refers to documented items such as internal standard operating procedures and training materials designed to assist agency staff in carrying out their daily responsibilities. We are not referring to formal guidance documents, defined by the Office of Management and Budget as an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statutory or regulatory issue.

For selected agencies that have guidance associated with the identity of commenters, it most frequently relates to the comment intake or response to comment phases of the public comment process. The guidance for these phases addresses activities such as managing duplicate comments (those with identical or near-identical comment text but varied identity information) or referring to commenters in a final rule. In addition, some agencies have guidance related to the use of identity information during comment analysis. Agencies are not required by the APA to develop internal guidance associated with the public comment process generally, or identity information specifically. For the three selected agencies that did not have identity-related guidance for the public comment process, cognizant officials told us such guidance has not been developed because identity information is not used as part of their rulemaking process. For example, BLM officials stated that the only instance in which identity information would be considered is when threatening comments are referred to law-enforcement agencies.

Identity-Related Guidance for Comment Intake

According to our analysis of the internal guidance the selected agencies provided, five of the 10 agencies have documented identity-related guidance associated with the comment intake phase. (See table 4.) Identity-related guidance for the comment intake phase addresses posting comments and their associated identity information to public comment websites. The guidance generally falls into two categories: (1) the treatment of duplicate comments (those comments with identical or near-identical content, but unique identity information) and (2) the management of comments reported to have been submitted using false identity information.

Table 4: Presence of Agency Identity-Related Guidance Associated with Comment Intake

Agency	Duplicate comments	Comments with potentially false identity information
Bureau of Land Management	No	No
Centers for Medicare & Medicaid Services	No	No
Consumer Financial Protection Bureau	Yes	Yes
Employee Benefits Security Administration[a]	Yes	Yes
Environmental Protection Agency	Yes	Yes
Federal Communications Commission	No	No
Fish and Wildlife Service	No	No
Food and Drug Administration	No	No
Securities and Exchange Commission	No	Yes
Wage and Hour Division[a]	Yes	Yes

Source: GAO analysis of agency data. | GAO-19-483

[a]The Employee Benefits Security Administration and Wage and Hour Division provided GAO with Department of Labor guidance that applies to all agencies within the department.

Duplicate Comments

Four of the 10 selected agencies have documented guidance on defining and posting duplicate comments, which may also be referred to as mass mail campaigns.[40] However, in accordance with the discretion afforded them under the APA, agency definitions of duplicate comments and recommendations on how to manage them during comment intake vary.[41] Specifically, for EBSA and WHD—the selected agencies within the Department of Labor (DOL)—one comment letter with multiple signers is considered one comment, while the same comment submitted by multiple signers as separate letters is counted separately. In both cases, however, each individual signer may provide unique identity information. In contrast, EPA guidance states that mass mail submissions often include attachments containing either bundled duplicate messages or a single

[40]For example, EPA established a document subtype of "Mass Mail Campaign" in FDMS, and refers to duplicate comments as those belonging to mass mail campaigns.

[41]As discussed previously in this report, the APA requires that agencies consider the significant issues raised in the comments, not the total number of comments received in favor of or opposed to a particular rulemaking proceeding.

comment with multiple signatures. For EPA, each signature is counted as a duplicate comment submission.

As of February 2019, CFPB's draft guidance does not explicitly define duplicate comments, but it does note that "duplicate identical submissions" are not subject to the agency's policy of posting all comments. Instead, the official responsible for managing the docket during comment intake may remove duplicate comments from posting or decide not to post them. According to CFPB officials, this policy is only applicable to comments that contain entirely identical comment content and identity information, and does not apply to mass mailing campaigns. Similarly, when DOL agencies receive duplicate comments as part of mass mail campaigns, the agency can choose to post a representative sample of the duplicate comment to Regulations.gov along with the tally of the duplicate or near-duplicate submissions, or post all comments as submitted. EPA guidance states that duplicate comments submitted as part of mass mailings are to be posted as a single primary document in Regulations.gov with a tally of the total number of duplicate comments received from that campaign. However, as discussed later in this report, EPA may post all duplicate comments it receives, depending on the format in which they are submitted.

Comments with Potentially False Identity Information

Five of the 10 selected agencies have documented internal guidance on how to manage posting comments that may have been submitted by someone falsely claiming to be the commenter. However, the procedures related to addressing comments with potentially false identity information also vary among agencies. For EBSA and WHD, guidance from DOL states that if a comment was submitted by someone falsely claiming to be the commenter, the identifying information is to be removed from the comment and the comment is treated as anonymous and remains posted.[42] In cases where an individual claims that a comment was submitted to CFPB or SEC using the individual's identity information without his or her consent, both agencies' guidance provide staff with discretion to redact, reattribute, or otherwise anonymize the comment letter in question.[43]

[42]DOL guidance does not indicate how officials determine that a comment was submitted using false identity information.

[43]CFPB's guidance is in draft form as of February 2019, and may be subject to further revision.

According to internal guidance from CFPB, EPA, and SEC, if agency officials are able to confirm that a comment was submitted by someone falsely claiming to be the commenter, such as by the agency sending an email to the address associated with the comment, the comment may not be made available to the public. SEC officials stated that although they have discretion to remove the comment from public posting, the typical response is to encourage the individual making the claim to submit another comment correcting the record. Similarly, if a member of the public contacts EPA claiming that a comment was submitted using his or her identity information without consent and agency staff cannot confirm it, EPA guidance directs staff to ask the requester who submitted the claim to submit another comment to the docket explaining that the original comment was submitted without the individual's consent. Both comments will be included in the docket.[44]

Identity-Related Guidance for Comment Analysis

According to our analysis of the guidance the selected agencies provided, four of the 10 agencies have identity-related guidance for the comment analysis phase (see table 5). Identity-related guidance for the comment analysis phase includes criteria for coding comments for analysis, including by identifying the type of commenter (such as an individual or interest group).

[44]According to FCC officials, the agency developed a similar policy for the Restoring Internet Freedom NPRM. Specifically, when FCC received a claim from a member of the public that a comment was submitted to the Restoring Internet Freedom NPRM using his or her identity information without the individual's consent, officials directed the individual to enter the complaint as a new comment, but did not remove the original comment.

Table 5: Presence of Agency Identity-Related Guidance Associated with Comment Analysis

Agency	Comment analysis
Bureau of Land Management	No
Centers for Medicare & Medicaid Services	Yes
Consumer Financial Protection Bureau	No
Employee Benefits Security Administration[a]	Yes
Environmental Protection Agency	No
Federal Communications Commission	No
Fish and Wildlife Service	No
Food and Drug Administration	Yes
Securities and Exchange Commission	No
Wage and Hour Division[a]	Yes

Source: GAO analysis of agency data. | GAO-19-483

[a]The Employee Benefits Security Administration and Wage and Hour Division provided GAO with Department of Labor guidance that applies to all agencies within the department.

Specifically;

- CMS guidance states that, during review, comments should be separated by issue area and tables may be used to assist in the grouping of comments and preparing briefing materials. While this guidance notes that these tables may be used to group commenters based on their identity during review, when summarizing comments later in the process the guidance indicates that CMS officials should avoid identifying commenters by name or organization.
- FDA training materials address how to prepare comment summaries to help ensure the agency has properly identified all comments regarding an issue. To conduct a quality-control check on the comment review process, FDA sorts the comments by commenter and reviews the comments from a sample of key stakeholders, including interested trade associations and consumer or patient groups, to confirm that relevant issues were identified.
- For EBSA and WHD, guidance from DOL recommends attaching the "organization name" to comments within a docket to improve transparency and help the agency and public users search for organizations within Regulations.gov. In addition, DOL guidance

suggests flagging comments for additional review, including at least one flag based on identity.[45]

Identity-Related Guidance for Responding to Comments

According to our analysis of the guidance the selected agencies provided, five of the 10 agencies have documented identity-related guidance for responding to comments. (See table 6.) Identity-related guidance for the response to comments phase includes guidance for agency officials on how, if at all, to address identity information related to comments in developing the final rule.

Table 6: Presence of Agency Identity-Related Guidance Associated with Responding to Comments

Agency	Response to comments
Bureau of Land Management	No
Centers for Medicare & Medicaid Services	Yes
Consumer Financial Protection Bureau	Yes
Employee Benefits Security Administration[a]	Yes
Environmental Protection Agency	No
Federal Communications Commission	No
Fish and Wildlife Service	No
Food and Drug Administration	Yes
Securities and Exchange Commission	No
Wage and Hour Division[a]	Yes

Source: GAO analysis of agency data. | GAO-19-483

[a]The Employee Benefits Security Administration and Wage and Hour Division provided GAO with Department of Labor guidance that applies to all agencies within the department.

Specifically;

- As discussed previously, during comment analysis, CMS guidance indicates that officials should avoid identifying commenters by name or organization when summarizing comments. These summaries may then be used as a basis for the agency's formal comment summary included in the preamble of the final rule.
- CFPB guidance states that a summary of the rulemaking process should be developed for the preamble of the final rule and include

[45]Specifically, DOL guidance instructs officials to flag any comments submitted by members of Congress.

how many comments are received and from which type of commenter. CFPB is to describe both the commenters and comments in general terms rather than identify commenters by name or entity. For example, rather than naming a specific financial institution, CFPB may refer to "industry commenters" in the final rule.

- For EBSA and WHD, guidance from DOL states that when several commenters suggest the same approach to revising or modifying the proposed rule, the names of specific commenters can be cited as a list in a footnote. When choosing which commenter should appear first in the list, DOL agencies are to select the commenter with the strongest or most detailed discussion on the issue. However, it is not necessary to always identify commenters by name, and, according to DOL officials, the department's general practice is not to do so. Instead, the agency may use phrases such as "several commenters," or "comments by the ABC Corporation and others." DOL agencies may also reference commenters by type rather than name, using terms including "municipal agency, state workforce agency, employer, academic representative, agency, and industry," among others.
- FDA training materials recommend that the final rule include a very brief explanation of the number and scope of comments to the proposed rule, including who submitted them. Commenters are not identified as individuals, but rather by commenter type, such as trade associations, farms, or consumer advocacy organizations, among others.

Selected Agencies' Treatment of Identity Information Collected during the Public Comment Process Varies

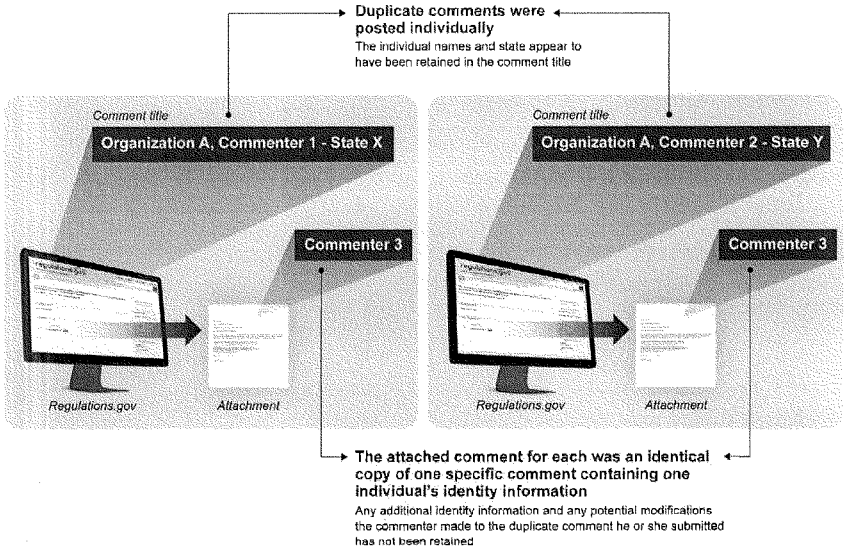
Within the discretion afforded by the APA, the 10 selected agencies' treatment of identity information during the comment intake, comment analysis, and response to comments phases of the public comment process varies. Selected agencies differ in how they treat identity information during the comment intake phase, particularly in terms of how they post duplicate comments, which can lead to identity information being inconsistently presented to public users of comment systems. Selected agencies' treatment of identity information during the comment analysis phase also varies. Specifically, program offices with responsibility for analyzing comments place varied importance on identity information during the analysis phase. All agencies draft a response to comments with their final rule, but the extent to which the agencies identify commenters or commenter types in their response also varies across the selected agencies.

Selected Agencies Vary in Their Treatment of Identity Information during the Comment Intake Phase

Within the discretion afforded by the APA and E-Government Act, selected agencies vary in how they treat identity information during the comment intake phase, which includes identifying duplicate comments and posting comments to the public website. Further, the way in which the selected agencies treat comments during the comment intake phase results in identity information being inconsistently presented on the public website. Generally, officials told us that their agencies either (1) maintain all comments within the comment system, or (2) maintain some duplicate comment records outside of the comment system, for instance, in email file archives. Specifically, officials from four selected agencies (CMS, FCC, FDA, and WHD) stated that they maintain all submitted comments in the comment system they use. Officials from the other six agencies (BLM, CFPB, EBSA, EPA, FWS, and SEC) stated that their agencies maintain some comment records associated with duplicate comments outside of the comment system.

Among the four agencies that maintain all submitted comments within their comment system, our review of comment data showed that practices for posting duplicate comments led to some identity information or comment content being inconsistently presented on the public website. For example, according to CMS officials responsible for comment intake, CMS may post all duplicate comments individually, or post duplicate comments in batches. When duplicate comments are posted in batches, the comment title will include the name of the submitting organization followed by the total number of comments. However, as discussed previously, CMS does not have any documented policies or guidance associated with the comment intake process, and we identified examples where the practices described by CMS officials differed. On one CMS docket, for instance, staff entered more than 37,000 duplicate comments individually, with the commenter's name and state identified in the comment title. However, the attached document included with each of the posted comments was an identical copy of one specific comment containing a single individual's identity information. While all the individual names appear to have been retained in the comment titles, and the count of total comments is represented, any additional identity information and any potential modifications made to each duplicate comment submitted have not been retained either online or outside of FDMS, and are not presented on the public website. (See fig. 4.)

Figure 4: Example of How the Centers for Medicare & Medicaid Services Posts Duplicate Comments

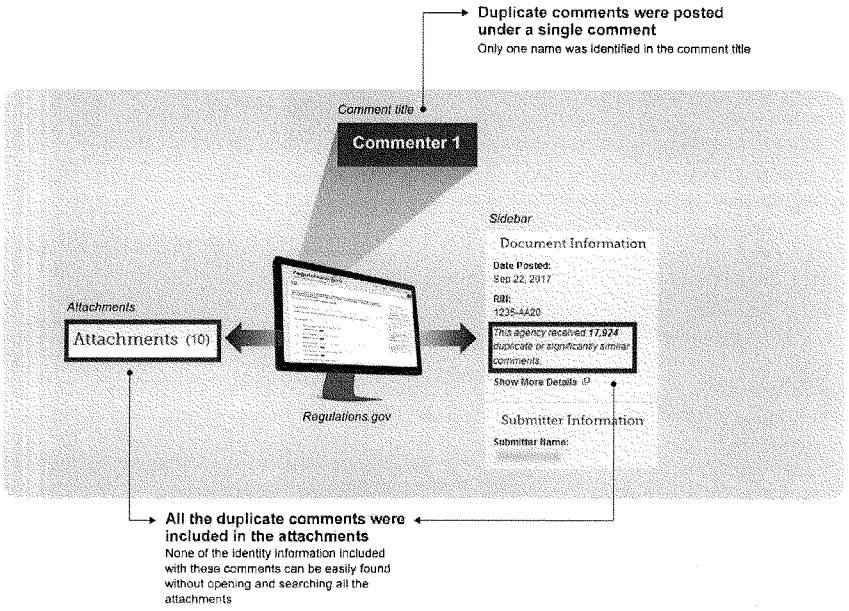


Source: GAO analysis of Regulations.gov information. | GAO-19-483

Note: We did not include the identity information associated with these comments. Instead, each unique piece of identity information is identified by a different number or letter.

Similarly, although our analysis of WHD comments did not suggest that any comments were missing from Regulations.gov, on one WHD docket almost 18,000 duplicate comments were associated with a single comment with one individual's name identified in the comment title. While all of the comments are included within 10 separate attachments, none of the identity information included with these comments can be easily found without opening and searching all 10 attachments, most of which contain approximately 2,000 individual comments. (See fig. 5.)

Figure 5: Example of How the Wage and Hour Division Posts Duplicate Comments



Source: GAO analysis of Regulations.gov information. | GAO-19-483

Note: We did not include the identity information associated with these comments. Instead, each unique piece of identity information is identified by a different number or letter.

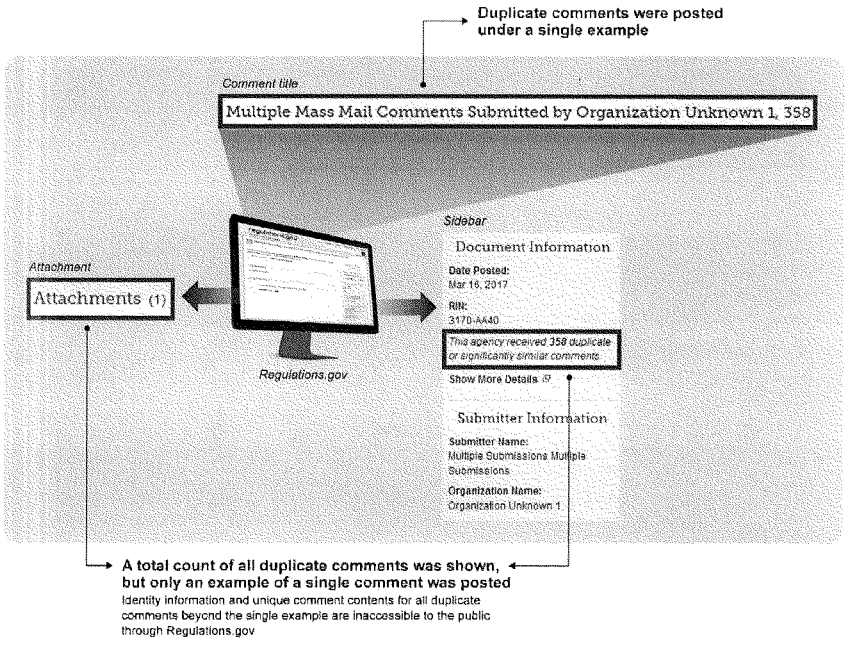
Our review of comment data showed that the selected agencies that maintain some comment records outside of the comment system (six of 10) also follow practices that can inconsistently present some identity information or comment content associated with duplicate comments. For BLM and FWS, agency officials responsible for comment intake stated that all comments received through Regulations.gov are posted, but a single example may be posted when duplicate paper comments are

received.[45] As discussed previously, neither BLM nor FWS have internal guidance or policy associated with comment intake. For CFPB, EBSA, EPA, and SEC, the agency may post a single example along with the total count of all duplicate comments, but does not necessarily post all duplicate comments online. Thus, identity information and unique comment contents for all duplicate comments may not be present on the public website. For example, on one CFPB comment, the agency posted an example of a submitted comment containing only the submitter's illegible signature.[47] None of the other associated identity information for the posted sample, or any of the duplicate comments, is included in the comment data. (See fig. 6.)

[45]According to BLM officials, although this is the agency's practice, there have been some instances where a technical issue with FDMS has prevented them from publicly posting all duplicate comments submitted through Regulations.gov.

[47]According to CFPB officials, they anticipate finalizing a new policy related to how duplicate comments are treated that would result in all comments being posted.

Figure 6: Example of How the Consumer Financial Protection Bureau Posts Duplicate Comments

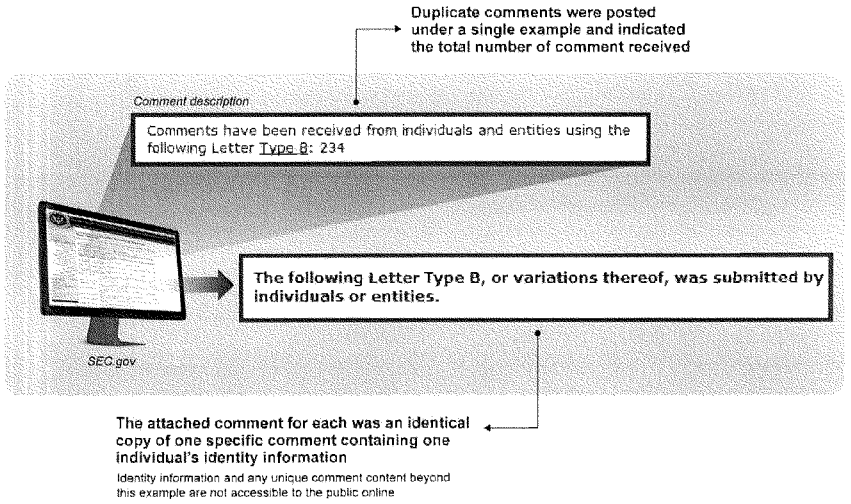


Source: GAO analysis of Regulations.gov information. | GAO-19-483

Similarly, for all duplicate comments received, SEC posts a single example for each set of duplicate comments and indicates the total number of comments received. As a result, the identity information and

any unique comment content beyond the first example are not present on the public website.[48] (See fig. 7.)

Figure 7: Example of How the Securities and Exchange Commission Posts Duplicate Comments



Source: GAO analysis of Securities and Exchange Commission information. | GAO-19-483

The Importance of Identity Information to Comment Analysis Varies

On the basis of the results from our survey, program offices with responsibility for analyzing comments differ in the importance they place on identity information during the analysis phase. Because subject-matter experts are responsible for reviewing public comments and considering whether changes to the proposed rule should be made, program offices generally analyze comments. Officials from all but one of the 52 program

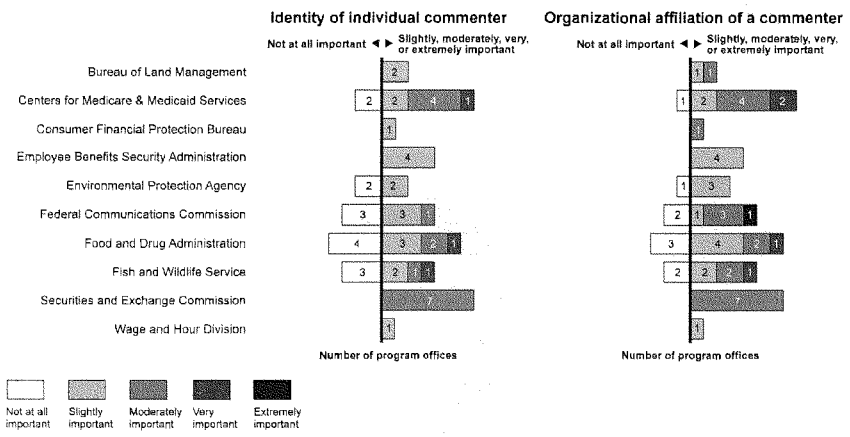
[48]According to SEC officials, if the unique content includes an argument distinguishing it from the other duplicate comments, it will be counted and posted separately.

offices we surveyed responded that they were responsible, in whole or in part, for analyzing public comments.[49]

In our survey of program offices with regulatory responsibilities in the 10 selected agencies, at least one program office in each agency reported that the identity or organizational affiliation of a commenter is at least slightly important to comment analysis. Additionally, five of the 10 selected agencies (CMS, EPA, FCC, FDA, and FWS) had at least one program office that reported that the identity or organizational affiliation of a commenter is not at all important to comment analysis. None of the 52 program offices we surveyed responded that the identity of an individual commenter is extremely important to their analysis, while only one program office responded that the commenter's organizational affiliation is extremely important to its analysis. (See fig. 8.)

[49]Officials from one program office within EPA responded that they are not responsible for analyzing public comments, but noted this responsibility is shared between program offices and a work group.

Figure 8: The Importance of Individual Commenter Identity and Organizational Affiliation to Comment Analysis



Source: GAO analysis of survey data. | GAO-19-483

According to officials we interviewed from eight of the 10 selected agencies, the substance of the comment is considered during analysis rather than the submitted identity information.[50] Officials from six of these agencies emphasized that because the agency accepts anonymous comments, identity is not relevant to their analysis of comments. However, officials from four of the eight selected agencies stated that, in certain instances, identity information may be noted. In the case of FDA, officials explained that commenters are required to indicate a category to which they belong, such as "individual consumer" or "academia." According to FDA officials, however, these categories were used to assist in writing the comment response, rather than informing the analysis. Officials from the Department of the Interior's Office of the Solicitor (responsible for part of the comment process at BLM and FWS) stated

[50]During our interview with CFPB officials at the agency level, officials did not comment on whether identity information was considered during comment analysis.

that the agency may make particular note of comments submitted by a law firm, as these comments can help the agency understand the position of the law firm and to prepare a defense in the event that a lawsuit is filed. Similarly, officials from EPA stated that they are familiar with many commenters and their positions on certain issues, due to prior legal interactions. In another example of how an agency may consider the identity of a commenter, officials from FWS stated that when scientific data are provided in support of a comment, subject-matter experts will verify the data and their source.

Selected Agencies Differ in How They Identify Commenters When Responding to Comments

All selected agencies draft a response to comments with their final rule, but the extent to which the agencies identify commenters in their response varies. In our survey of program offices with regulatory responsibility, officials from 51 of 52 offices stated that they are responsible in whole or in part for responding to comments.[51] Of those responsible, at least one program office from eight of the 10 agencies (28 of 52 offices) reported that they identified comments by commenter name, organization, or comment ID number in the response to comments for at least some rulemakings since 2013.[52] In the case of WHD, officials we interviewed explained that when they discuss a specific comment in the preamble to the final rule, they provide the name of the organization that submitted the comment so that anyone interested in locating the response to the comment may do so easily.

We found that EBSA and FCC also identified commenters by individual or organizational name in their response to comments, while EPA referred to comments by their comment ID number. For example, in a rule finalized in 2018, EPA referred to comment ID numbers in the response to comments: "Two comments: EPA-R06-RCRA-2017-0556-0003 and EPA-R06-RCRA-2017-0556-0005 were submitted in favor of the issuance of the petition." EPA officials noted that there is variation within the agency in terms of how commenters are identified when the agency is responding to comments, and there may be some situations where the commenter is identified by name.

[51]Officials from one program office within EPA responded that their office is not responsible for responding to public comments, but noted this responsibility is shared between program offices and a work group.

[52]For participating agencies, a comment ID number is also known as a document ID. This is the unique identifier established for a document and includes the agency acronym, the year created, the docket, and the document number.

Officials from all program offices within CFPB and BLM responded to the survey that they never identified comments by commenter name, organization, or comment ID in their responses to public comments. In its response to comments in a 2014 final rule, for example, CFPB stated that "industry commenters also emphasized the need to coordinate with the States," without specifying the organization or specific comments. Similarly, in its response to comments document for a 2016 rule, for example, BLM responded directly to the themes and issues raised by comments while stating that the issue was raised by "one commenter" or "some commenters."

Selected Agencies' Practices Associated with Posting Identity Information Are Not Clearly Communicated to Public Users of Comment Websites

The 10 selected agencies have implemented varied ways of posting identity information during the comment intake process, particularly regarding posting duplicate comments, as allowed by the APA. Our analysis of Regulations.gov and agency-specific comment websites shows that these practices are not always documented or clearly communicated to public users of the websites. Public users are members of the public interested in participating in the rulemaking process via Regulations.gov or agency-specific websites. They may or may not submit a comment. In part to facilitate effective public participation in the rulemaking process, the E-Government Act requires that all public comments and other materials associated with the rulemaking docket should be made "publicly available online to the extent practicable." There may be situations where it is not practicable to post all submitted items, for example when resource constraints prevent the scanning and uploading of thousands of duplicate paper comments. Because the content of such comments is still reflected in the administrative record, such practices are not prohibited by the APA or the E-Government Act.

However, key practices for transparently reporting open government data state that federal government websites—like those used to facilitate the public comment process—should fully describe the data that are made available to the public, including by disclosing data sources and limitations.[53] This helps public users make informed decisions about how to use the data provided. In the case of identity information submitted with public comments, for example, public users may want to analyze identity information to better understand the geographic location from which comments are being submitted, and would need information about the

[53]GAO-19-72.

availability of address information to do so. The Administrative Conference of the United States has made several recommendations related to managing electronic rulemaking dockets.[54] These include recommendations that agencies disclose to the public their policies regarding the treatment of materials submitted to rulemaking dockets, such as those associated with protecting sensitive information submitted by the public.[55]

As described earlier in this report, the varied practices that selected agencies use with regard to identity information during the public comment process results in the inconsistent presentation of this information on the public websites, particularly when it is associated with duplicate comments. Although the APA and E-Government Act do not include any requirements associated with the collection or disclosure of identity information, we found that the selected agencies we reviewed do not effectively communicate the limitations and inconsistencies in how they post identity information associated with public comments. As a result, public users of the comment websites lack information related to data availability and limitations that could affect their ability to use the comment data and effectively participate in the rulemaking process themselves.

[54]The Administrative Conference of the United States was established by statute in 1964 as an independent agency of the federal government. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

[55]78 Fed. Reg. 41,352, 41,360 (July 10, 2013).

Selected Agencies' Practices Associated with Posting Identity Information on Regulations.gov Vary and Are Not Clearly Communicated to Public Users

Public users of Regulations.gov seeking to submit a comment are provided with a blanket disclosure statement related to how their identity information may be disclosed, and are generally directed to individual agency websites for additional detail about submitting comments. The Regulations.gov disclosure statements and additional agency-specific details are provided on the comment form, and a user seeking to review comments (rather than submit a comment) may not encounter them on Regulations.gov.[56] Regulations.gov provides the following disclosure statement at the bottom of each comment submission form:

> *Any information (e.g., personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. To view any additional information for submitting comments, such as anonymous or sensitive submissions, refer to the Privacy Notice and User Notice, the Federal Register notice on which you are commenting, and the Web site of the Department or Agency.*

Similar information is provided to all public users in the Privacy Notice, User Notice, and Privacy Impact Assessment for Regulations.gov and the eRulemaking Program.[57] While all of these note that any information, personal or otherwise, submitted with comments may be publicly disclosed, public users are not provided any further detail on Regulations.gov regarding what information, including identity information, they should expect find in the comment data.

We found that when Regulations.gov provides public users with additional agency-specific information about the comment intake process, including accepting and posting comments, it is typically provided in the context of the comment form and does not provide public users enough detail to

[56]Agency-specific details may also be provided in the text of the NPRM, but when public users of Regulations.gov extract or search comment data, the comment data are presented in a consistent format, so it is not intuitive for a user to expect that different posting processes would be followed. In recent years, there have been several efforts in academic research and the media to conduct large-scale analyses of comment data. For example, Steven J. Balla et al., *Where's the Spam? Mass Comment Campaigns in Agency Rulemaking*, working paper (The George Washington University Regulatory Studies Center: Apr. 2, 2018).

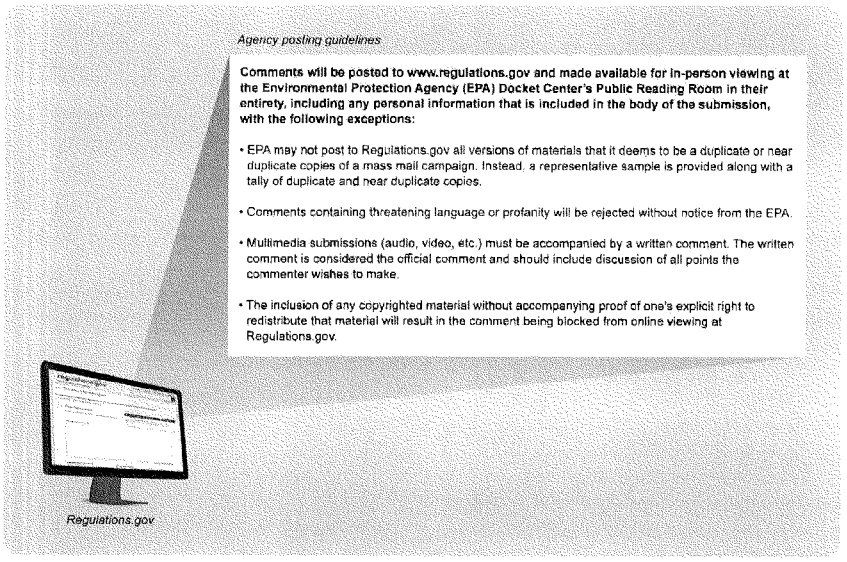
[57]The Privacy Notice and User Notice disclose the ways in which Regulations.gov uses, discloses, and manages data associated with the website. The Privacy Impact Assessment is required by the E-Government Act of 2002, and provides public users with documented assurance that privacy issues associated with Regulations.gov have been identified and addressed.

determine what comment data will be available for use when searching comments that are already submitted. Specifically, each comment form contains a pop-up box under the heading "Alternate Ways to Comment," which reflects the language associated with comment submission methods included in the NPRM on which individuals are seeking to comment. Additionally, three participating agencies in our review (EPA, FWS, and WHD) provide additional detail about posting practices on the comment form under the heading "Agency Posting Guidelines."[58] Both FWS and WHD indicate that the entire comment, including any identifying information, may be made available to the public. Although WHD follows DOL policy associated with posting duplicate comments, which allows some discretion in posting practices, according to a WHD official, without exception, all comments are posted to Regulations.gov. In our review of WHD comment data, we did not identify instances where this practice was not followed.

The "Agency Posting Guidelines" provided by EPA inform public users that all versions of duplicate or near-duplicate comments as part of mass mail campaigns may not be posted; rather a representative sample will be provided, with a tally of the total number of duplicate comments received. (See fig. 9.)

[58]The other five participating agencies in the scope of this report do not include any information under the "Agency Posting Guidelines."

Figure 9: Example of Additional Disclosures about Comment Review and Posting Provided to Commenters on a Comment Form



Source: GAO analysis of Regulations.gov information. | GAO-19-483

However, this information does not provide enough detail to help public users determine whether all of the individual comments and associated identity information are posted within this docket, because it indicates that samples are provided for duplicate comments, rather than all of the copies submitted. We found that one EPA docket received more than 350 separate sets of duplicate comments comprising a total of more than 4.3 million comments (as reported by Regulations.gov) but there is variation in how these comments were posted. Specifically, EPA inconsistently presented duplicate comments: 198 of the 350 duplicate comment sets in this docket were submitted via email. Of the duplicate comment sets

submitted via email, 45 sets have all comments posted in Regulations.gov, while 153 sets have a sample of the comments posted. According to EPA officials, this inconsistency results from the format in which the comments were submitted. For example, when duplicate comments are compiled into a single document and submitted to EPA through one email, all of the comments will be posted, whereas duplicate comments that are emailed separately will be accounted for in the tally accompanying a sample comment.

While the APA and the E-Government Act do not require comments to be posted in any particular way, EPA has established detailed internal guidance for the comment intake process for its Docket Center staff. This document is in draft form, but clearly lays out the processes EPA staff are expected to follow when duplicate comments are submitted in different ways, and what naming conventions will be used in different instances. However, EPA does not provide similar information to public users about the process it uses to determine whether all duplicate comments will be posted, making it challenging for public users to determine whether all comments are available on Regulations.gov.[59]

Participating Agency Websites

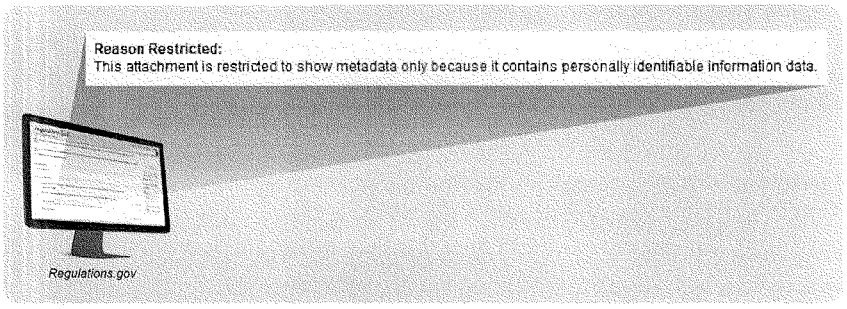
The eRulemaking PMO provides participating agencies with flexibility in how they choose to use FDMS and Regulations.gov, with each department or agency responsible for managing its own data within the website. As a result, Regulations.gov directs public users to participating agencies' websites for additional information about agency-specific review and posting policies. We found that all of the selected participating agencies provide additional information of some kind about the public comment process on their own websites. However, the provided information usually directs users back to Regulations.gov or to the *Federal Register*. Further, even when selected participating agencies include details on their website about the agency's posting practices or treatment of identity information associated with public comments, it does not fully describe data limitations that public users need to make informed decisions about how to use the data provided.

[59]This challenge is not limited to the general public. To compile, review, and prepare a summary report related to the mass mail comments submitted to the docket discussed in this section, EPA officials reported that it took them approximately 55 hours. The compiled information included whether the comments were included in FDMS or not, the location of comments stored outside of FDMS, and the format of the comment submissions for each mass mail campaign.

Specifically, seven of the eight participating agencies (BLM, CMS, CFPB, EPA, FWS, FDA, and WHD) direct public users back to Regulations.gov and the *Federal Register*, either on webpages that are about the public comment process in general, or on pages containing information about specific NPRMs. As discussed previously, however, the disclosure statement on Regulations.gov directs public users to the agency website for additional information. Although three of these participating agencies (EPA, FWS, and FDA) do provide public users with information beyond directing them back to Regulations.gov or the *Federal Register*, only FDA provides users with details about posting practices that are not also made available on Regulations.gov.

- **EPA:** The additional information provided on EPA's website largely replicates the "Agency Posting Guidelines" provided on the Regulations.gov comment form, as shown in figure 9. As discussed previously, however, the way in which EPA posts duplicate comments varies, and the provided information does not include details about the process the agency uses to determine whether all duplicate comments will be posted.
- **FWS:** One NPRM-specific web page that we identified communicated to public users that all comments will be posted on Regulations.gov, including any personal information provided through the process. This largely replicates the "Agency Posting Guidelines" provided on the Regulations.gov comment form, as well as language included in the NPRM itself. However, according to an FWS official, when the agency receives hard-copy duplicate comments through the mail, only one sample of the duplicate is posted publicly on Regulations.gov. FWS does not have any policies related to this practice and the information FWS provides to public users does not include details about how the agency determines which comment to post as the sample.
- **FDA:** On its general website, FDA includes a webpage titled, "Posting of Comments." On this page, FDA provides users with a detailed explanation about a policy change the agency made in 2015 related to the posting of public comments submitted to rulemaking proceedings. Specifically, prior to October 2015, FDA did not publicly post comments submitted by individuals in their individual capacity. See figure 10.

Figure 10: Example Food and Drug Administration Explanation for a Comment Withheld from Public Posting



Source: GAO analysis of Regulations.gov Information. | GAO-19-483

Note: Metadata summarize and describe the data contained in a dataset.

After October 15, 2015, FDA's policy is to publicly post all comments to Regulations.gov, to include any identifying information submitted with the comment.[60] In our review of FDA comments submitted to dockets opened since October 15, 2015, we did not identify instances where this policy was not followed.

The one participating agency in our scope (EBSA) that does not direct public users back to Regulations.gov instead recreates the entire rulemaking docket on its own website. On the main EBSA webpage related to regulations, public users can find links to various websites related to rulemaking, including a "Public Comments" page, but not Regulations.gov.[61] From the "Public Comments" page, public users can access pages that are specific to NPRMs and other activities for which

[60]FDA provides an exception for commenters wishing to submit a comment containing confidential information. To do so, a commenter must submit a comment marked "confidential" by mail or hard-copy delivery, and also provide a redacted version suitable for public posting.

[61]Public users are directed to other webpages within the EBSA site, the *Federal Register*, the Electronic Code of Federal Regulations, and Reginfo.gov, which displays regulatory actions and information collections under review at the Office of Information and Regulatory Affairs within the Office of Management and Budget.

EBSA is requesting public comments.[62] On the NPRM-specific webpages, the rulemaking docket that can be found on Regulations.gov is duplicated, including individual links to each submitted comment.[63] Certain document links, such as those for the proposed rule or final rule, direct a public user to the *Federal Register* document, but the comment links do not direct users to Regulations.gov.[64] While EBSA follows DOL guidance associated with posting duplicate comments, which allows some discretion in posting practices, EBSA does not have a policy for how comments are posted to Regulations.gov or its own website, and in the examples we reviewed the content of the docket pages does not always match. According to EBSA officials, the agency began this practice prior to the development of Regulations.gov, and has continued it because internal staff and other stakeholders find the webpages useful. However, we have previously reported that reducing or eliminating duplicative government activities can help agencies provide more efficient and effective services.[65]

Further, on EBSA's "Public Comments" webpage, public users are informed that comments with inappropriate content will be removed, but no other information associated with EBSA's posting practices is provided on this general page. In one instance on an NPRM-specific webpage, public users are informed that identity information has been removed from certain comments due to the inclusion of personal health information, but most of the NPRM-specific webpages we reviewed did not include this disclosure. Additionally, duplicate comments are posted on the NPRM-specific webpages under the heading "Petitions," and are posted with a number following the title of the comment. While public users are informed that the number represents the total number of comments submitted, not all links include a copy of each individual comment. This practice aligns with DOL guidance, but as a result, the way in which

[62]These include requests for information, which are not subject to APA Notice and Comment requirements.

[63]Certain elements available on Regulations.gov are not readily available on the EBSA NPRM-specific page without clicking on additional documents. These include items such as relevant dates, Regulatory Information Number, and Code of Federal Regulations citations.

[64]The *Federal Register* does include links to Regulations.gov.

[65]Duplication occurs when two or more agencies or programs are engaged in the same activities or provide the same services to the same beneficiaries. See GAO's Duplication and Cost Savings web page: http://www.gao.gov/duplication/overview.

EBSA posts duplicate comments varies even within dockets, and the provided information does not include details about the process the agency uses to determine whether all duplicate comments will be posted. Additionally, because EBSA recreates rulemaking dockets on its own website without referencing Regulations.gov or explaining the process, public users lack assurance about how EBSA's data sources relate to one another.

Because participating agencies are not required to adhere to standardized posting practices, Regulations.gov directs public users to participating agency websites for additional information about posting practices and potential data limitations. However, the additional information provided on the selected agencies' websites is rarely different from what is provided on Regulations.gov. Further, it does not describe the limitations associated with the identity information contained in publicly posted comments, and in many cases simply directs users back to Regulations.gov. As allowed for under the APA, all of the participating agencies in our review vary in the way in which they post identity information associated with comments—particularly duplicate comments. However, the lack of accompanying disclosures may potentially lead users to assume, for example, that only one entity has weighed in on an issue when, actually, that comment represents 500 comments.

The APA, E-Government Act and relevant Executive Orders establish the importance of public participation in the rulemaking process, to include access to electronic rulemaking dockets in formats that can be easily searched and downloaded. Further, key practices for transparently reporting open government data state that federal government websites—like those used to facilitate the public comment process—should fully describe the data that are made available to the public, including by disclosing data sources and limitations.[55] Without better information about the posting process, the inconsistency in the way in which duplicate comments are presented to public users of Regulations.gov limits public users' ability to explore and use the data and could lead users to draw inaccurate conclusions about the public comments that were submitted and how agencies considered them during the rulemaking process.

[55]GAO-19-72.

Agency-Specific Comment Websites Do Not Clearly Communicate Posting Policies to Public Users

Both SEC and FCC use comment systems other than Regulations.gov and follow standardized posting processes associated with public comments submitted to their respective comment systems, but SEC has not clearly communicated these practices to the public. Although it appears to users of the SEC website that the agency follows a consistent process for posting duplicate comments, this practice has not been documented or communicated to public users of its website. As discussed earlier, SEC posts a single example for each set of duplicate comments and indicates the total number of comments received. As a result, the identity information and any unique comment content beyond the first example are not accessible to the public online. According to SEC officials, this practice is not documented in formal policy, and is not explicitly communicated to public users of the SEC's comment website. Although SEC does provide public users with some information on its "How to Submit Comments" page, this information is limited to informing public users that all comments will be posted publicly, without any edits to personal identifying information, and no other information related to SEC's posting process is provided. Without clearly communicated policies for posting comments, public users of SEC.gov do not have information related to data sources and limitations needed to determine whether and how they can use the data associated with public comments.

In contrast, FCC identifies its policies for posting comments and their associated identity information in a number of places on the FCC.gov website, and on the ECFS web page within the general website. Regarding comments submitted to rulemaking proceedings through ECFS, public users are informed that all information submitted with comments, including identity information, will be made public.[67] According to FCC officials, all comments are posted directly to ECFS as they are submitted, without intervention by FCC staff. Further, according to officials, all duplicate comments remain in ECFS as individual comments, unless an organization submits a Standard filing with an attached file containing multiple comments. Our review of ECFS comment data did not identify discrepancies with this practice.

[67]In addition to posting policies associated with rulemaking proceedings, FCC also provides public users with information associated with other types of comments, such as submissions to FCC's consumer complaint database or comments made on FCC's various social media. For example, guidance provided on FCC's "Comment Policy" web page is specific to informal comments submitted to FCC online, and although it indicates that certain types of comments will be removed from posting, public users are also clearly informed these types of comments are not a substitute for formal submissions to ECFS.

Conclusions

While the public comment process allows interested parties to state their views about prospective rules, the lack of communication with the public about the way in which agencies treat identity information during the posting process, particularly for duplicate comments, may inhibit users' meaningful participation in the rulemaking process. While the APA does not include requirements for commenters to provide identity information, or for agency officials to include commenter identity as part of their consideration of comments, key practices for transparently reporting open government data state that federal government websites—like those used to facilitate the public comment process—should fully describe the publicly available data, to include disclosing data sources and limitations. Without clearly communicating how comments and their associated identity information are presented in the data, public users could draw inaccurate conclusions about public comments during the rulemaking process, limiting their ability to participate in the rulemaking process.

Five selected agencies do not have a policy for posting comments, and the selected agencies generally do not clearly communicate to public users about the way in which they publicly post comments and their associated identity information. In addition, one agency fully duplicates rulemaking dockets on its own website, without informing users that the information may be found in a searchable database on Regulations.gov. Regulations.gov does not provide detailed information about posting policies, and seven of the eight participating agencies in the scope of our review direct public users back to Regulations.gov or the *Federal Register* on their own websites. Further, the available information is provided on the comment form, so public users seeking to review comment data that had been previously submitted may not encounter it. Because all of the participating agencies in our review vary in the way in which they post identity information associated with comments—particularly duplicate comments—the lack of accompanying disclosures may potentially lead users to reach inaccurate conclusions about who submitted a particular comment, or how many individuals weighed in on an issue. As a result, public users of Regulations.gov do not have information related to data sources and limitations that could affect their ability to effectively use the comment data and, consequently, participate in the rulemaking process. Similarly, users of SEC.gov do not have information related to data sources and limitations needed to determine whether and how they can use the data associated with public comments, because the agency lacks a policy for posting duplicate comments and associated identity information to the public. In short, more clearly communicated information about posting policies, particularly with regard to identity information and duplicate comments, could help public users make informed decisions

about how to use the comment data these agencies provide, and how comments may have informed the rulemaking process.

Recommendations for Executive Action

We are making the following eight recommendations to the Directors of BLM, CFPB, and FWS; the Administrators of CMS, EPA, and WHD; the Assistant Secretary of Labor for EBSA; and the Chairman of the SEC, respectively:

The Director of BLM should create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments, and should clearly communicate this policy to the public on the BLM website. (Recommendation 1)

The Administrator of CMS should create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments, and should clearly communicate this policy to the public on the CMS website. (Recommendation 2)

The Director of CFPB should finalize its draft policy for posting comments and their identity information, particularly for duplicate comments, and clearly communicate it to the public on the CFPB website. (Recommendation 3)

The Assistant Secretary of Labor for EBSA should

1. create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments;
2. clearly communicate this policy to the public on the EBSA website; and
3. evaluate the duplicative practice of replicating rulemaking dockets on the EBSA website, to either discontinue the practice or include a reference to Regulations.gov and explanation of how the pages relate to one another. (Recommendation 4)

The Administrator of EPA should finalize its draft policy for posting comments and their identity information, particularly for duplicate comments, and clearly communicate it to the public on the EPA website. (Recommendation 5)

The Director of FWS should create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments, and should clearly communicate this policy to the public on the FWS website. (Recommendation 6)

The Chairman of the SEC should develop a policy for posting duplicate comments and associated identity information and clearly communicate it to the public on the SEC website. (Recommendation 7)

The Administrator of WHD should clearly communicate its policy for posting comments and their identity information, particularly for duplicate comments, to the public on the WHD website. (Recommendation 8)

Agency Comments and Our Evaluation

We provided drafts of this product for comment to CFPB, EPA, FCC, SEC, the Department of Health and Human Services, the Department of the Interior, and DOL. We received written comments from three of the selected agencies and the three Departments which are reproduced in appendixes V through X. All of the selected agencies generally agreed with the recommendations directed to them and indicated that they intended to take action to more clearly communicate their posting policies to the public. BLM, EBSA, FWS, and SEC also stated that they intend to develop written policies associated with posting comments.

In its written comments, the Department of Health and Human Services stated that CMS already has policies for standard posting requirements. However, CMS could not provide us with this policy during the course of our review, and in the accompanying technical comments, officials stated that guidance associated with posting comments has not been formalized in a written document. Given that we found significant variation in the way that CMS posts comments, even within a single docket, we continue to believe that it is important for CMS to develop and implement a standard policy for posting comments and their identity information, in addition to communicating this policy to the public on the CMS website.

CFPB and EPA also stated that they intend to finalize their draft policies for posting comments and their associated identity information. In addition, EPA included technical comments in its letter, which we considered and incorporated in this report as appropriate. FCC had no comments on the draft report, but provided technical comments, which we incorporated as appropriate. The remaining selected agencies and departments also provided technical comments, which we considered and incorporated in this report as appropriate.

As arranged with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to the appropriate congressional committees; the Director of CFPB; the Administrator of EPA; the Chairmen of FCC and SEC; and the Secretaries of Health and Human Services, the Interior, and Labor. In addition, the report will be available at no charge on GAO's website at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-6722 or bagdoyans@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix XI.

Seto J. Bagdoyan,
Director of Audits
Forensic Audits and Investigative Service

List of Requesters

The Honorable Rob Portman
Chairman
The Honorable Thomas R. Carper
Ranking Member
Permanent Subcommittee on Investigations
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable James Lankford
Chairman
Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Robert C. "Bobby" Scott
Chairman
Committee on Education and Labor
House of Representatives

The Honorable Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce
House of Representatives

The Honorable Elijah E. Cummings
Chairman
The Honorable Jim Jordan
Ranking Member
Committee on Oversight and Reform
House of Representatives

The Honorable Gerald E. Connolly
Chairman
Subcommittee on Government Operations
Committee on Oversight and Reform
House of Representatives

The Honorable Yvette D. Clarke
House of Representatives

The Honorable Eliot L. Engel
House of Representatives

The Honorable Hakeem S. Jeffries
House of Representatives

The Honorable Carolyn B. Maloney
House of Representatives

The Honorable Gregory W. Meeks
House of Representatives

The Honorable Paul D. Tonko
House of Representatives

The Honorable Nydia M. Velázquez
House of Representatives

Appendix I: Survey of Program Offices with Regulatory Responsibilities within Selected Agencies

To determine how selected agencies treat identity information associated with public comments, in October 2018 we surveyed and received responses from 52 program offices within the selected agencies about their practices associated with comment intake (including identifying duplicate comments and posting comments to the public website), comment analysis (including reviewing comments and considering their content), and response to comments. To select the program offices to receive survey questionnaires about the public comment process, we first reviewed agency websites to identify all of the program offices in each of the selected agencies. We then identified program offices with regulatory responsibilities described by the websites and that had issued at least one Notice of Proposed Rulemaking (NPRM) from 2013 through 2017, and provided these lists to the selected agencies for confirmation. Table 7 lists the program offices we surveyed.

Table 7: Program Offices within Selected Agencies with Regulatory Responsibilities

Bureau of Land Management (BLM), Department of the Interior
1. Assistant Director for Resources and Planning
2. Assistant Director for Energy, Minerals, and Realty Management
Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services
3. Center for Medicaid and Children's Health Insurance Program Services
4. Center for Consumer Information and Insurance Oversight
5. Center for Medicare—Parts C and D
6. Office of Financial Management
7. Center for Clinical Standards and Quality
8. Center for Medicare and Medicaid Innovation
9. Center for Program Integrity
10. Office of Information Technology
11. Center for Medicare—Fee for Service
Consumer Financial Protection Bureau (CFPB)
12. Office of Regulations
Employee Benefits Security Administration (EBSA), Department of Labor
13. Office of Exemptions Determinations
14. Office of Health Plan Standards and Compliance Assistance
15. Office of Regulations and Interpretations
16. Office of Policy and Research

Environmental Protection Agency (EPA)
17. Office of Air and Radiation
18. Office of Chemical Safety and Pollution Prevention
19. Office of Land and Emergency Management
20. Office of Water
Federal Communications Commission (FCC)
21. Consumer and Governmental Affairs Bureau
22. Office of Engineering and Technology
23. International Bureau
24. Media Bureau
25. Public Safety and Homeland Security Bureau
26. Wireless Telecommunications Bureau
27. Wireline Competition Bureau
Fish and Wildlife Service (FWS), Department of the Interior
28. National Wildlife Refuge System
29. Fish and Aquatic Conservation
30. Ecological Services
31. Migratory Birds
32. International Affairs
33. Wildlife and Sport Fish Restoration Programs
34. Chief Law Enforcement
35. Center for Biologics Evaluation and Research
36. Center for Drug Evaluation and Research
37. Center for Devices and Radiological Health
38. Center for Food Safety and Applied Nutrition
39. Center for Tobacco Products
40. Center for Veterinary Medicine
41. Office of Chief Counsel
42. Office of Combination Products
43. Office of Policy
44. Office of Regulatory Affairs
Securities and Exchange Commission (SEC)
45. Division of Corporation Finance
46. Division of Economic and Risk Analysis
47. Division of Investment Management
48. Division of Trading and Markets

49. Office of Municipal Securities
50. Office of the Chief Accountant
51. Office of Credit Ratings
Wage and Hour Division (WHD), Department of Labor
52. Assistant Administrator for the Office of Policy

Source: GAO. | GAO-19-483

Survey Development

We developed a draft survey questionnaire in conjunction with another GAO engagement team conducting work on the public comment process, and pretested it with program office officials from four of the selected agencies in August and September 2018. We interviewed these officials to improve the questionnaire and ensure that (1) the questions were clear and unbiased, (2) the information could be feasibly obtained by program office officials, (3) the response options were appropriate and reasonable, and (4) the survey did not create an undue burden on program office officials. The process of developing the survey was iterative, where we used the results of one pretest to modify the questionnaire for the next pretest.

Survey Administration and Review

We distributed the questionnaires to the program offices as fillable Portable Document Format (PDF) forms, in October 2018 requesting that officials collaborate with others in their office to ensure the responses were reflective of the program office as a whole, rather than one individual's experience. Two agencies, CMS and SEC, have agency-level administrative offices with centralized responsibilities for certain aspects of the public comment process. For these agencies, the selected program offices were instructed to leave certain questions blank, and we provided separate questionnaires for the administrative offices. All 52 program offices completed the survey, but the results cannot be generalized to program offices outside of the selected agencies.

In developing, administering, and analyzing this survey, we took steps to minimize the potential errors that may result from the practical difficulties of conducting any survey. Because we surveyed and received responses from all program offices with regulatory responsibilities in the selected agencies, our results are not subject to sampling or nonresponse error. We pretested and reviewed our questionnaire to minimize measurement error that can arise from differences in how questions are interpreted and the sources of information available to respondents. We also answered

questions from program offices during the survey, reviewed completed questionnaires, and conducted follow-up as necessary. On the basis of this follow-up and with agreement from the responding officials, we edited responses as needed. For CMS and SEC, we edited the blank questions in the program office questionnaires with responses from their administrative offices.

Relevant Survey Questions

Information collected from the survey we conducted will also be used in other forthcoming GAO reports that are focused on the public comment process. The specific questions and response options from the survey that were analyzed in this report are reproduced below. See the body of the report for the results. Other questions included in the survey will be reproduced in the reports that include their results.

3. Approximately how many rulemaking proceedings does your office **solicit comments** on in a typical year? Please only include rulemaking proceedings subject to notice-and-comment under the APA.
(Click one button)

- 0
- 1-5
- 6-10
- 11-15
- 16-20
- More than 20

4. Considering the rulemaking proceedings since 2013 your office has been responsible for that had a public comment period, approximately how many comments were submitted to the one rulemaking that received the **most total comments** during that time period?

- 1-500
- 501-1500
- 1501-5,000
- 5,001-25,000
- 25,001-100,000
- 100,001-500,000

- 500,001-1,000,000
- More than 1,000,000

5. f. Considering the rulemaking proceedings since 2013 your office has been responsible for that had a public comment period, in approximately how many rulemakings have comments been submitted anonymously?

- All or almost all rulemakings
- Most rulemakings
- About half of rulemakings
- Some rulemakings
- No rulemakings
- Don't know

7. Is your program office responsible, in whole or in part, for managing the intake of public comments submitted to federal rulemaking proceedings subject to notice-and-comment under the APA?

- Yes
- No — please identify the responsible office(s) and contact them as necessary to complete the following questions:

10. Is your program office responsible, in whole or in part, for identifying duplicative comments (carrying out a de-duplication process)?

- Yes
- No — please identify the responsible office(s) and contact them as necessary to complete the following questions:

13. Is your program office responsible, in whole or in part, for analyzing public comments submitted to federal rulemaking proceedings subject to notice-and-comment under the APA?

- Yes
- No — please identify the responsible office(s) and contact them as necessary to complete the following questions:

13.b(c). Considering the rulemaking proceedings since 2013, how important to your analysis, if at all, is the identity of the individual commenter?

- Extremely important
- Very important
- Moderately important
- Slightly important
- Not at all important
- Don't know

13.b(d). Considering the rulemaking proceedings since 2013, how important to your analysis, if at all, is the organizational affiliation, if any, of the commenter?

- Extremely important
- Very important
- Moderately important
- Slightly important
- Not at all important
- Don't know

16. Is your program office responsible, in whole or in part, for responding to public comments submitted to federal rulemaking proceedings subject to notice-and-comment under the APA?

- Yes
- No — please identify the responsible office(s) and contact them as necessary to complete the following questions:

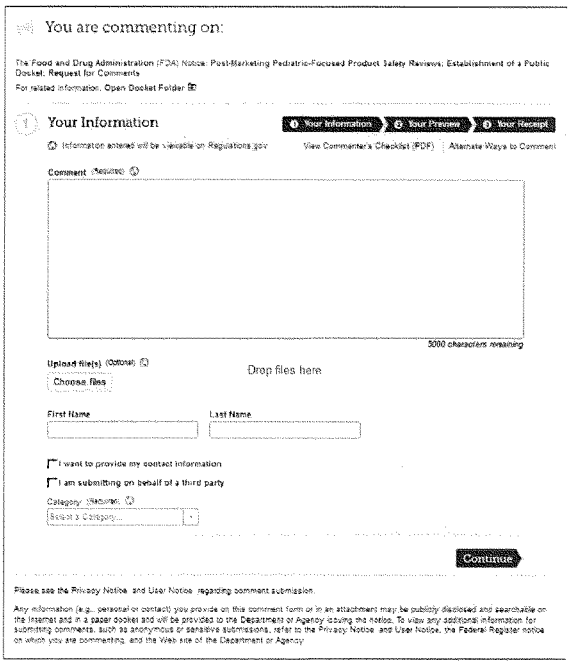
16.b.(a). Considering the public responses to comments that your office has drafted for rulemaking proceedings since 2013, how frequently did the responses identify any specific comments by commenter name, organization, or comment ID?

- All or almost all responses
- Most responses
- About half of responses
- Some responses
- No responses
- Don't know

Appendix II: Regulations.gov Comment Form Example

Comments are submitted to Regulations.gov via an electronic comment form. See figure 11 for an example of a comment form from Regulations.gov.

Figure 11: Regulations.gov Comment Form Example

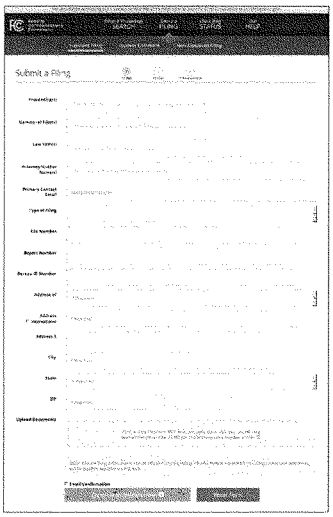


Source: Regulations.gov. | GAO-19-483

Appendix III: Electronic Comment Filing System Comment Forms

The Federal Communications Commission's (FCC) Electronic Comment Filing System (ECFS) allows commenters to submit comments to rulemaking proceedings via a Standard filing and Express filing.[1] A Standard filing allows commenters to attach a file to their comment. See figure 12 for an example of a Standard filing.

Figure 12: Federal Communications Commission Electronic Comment Filing System's Standard Filing Comment Form

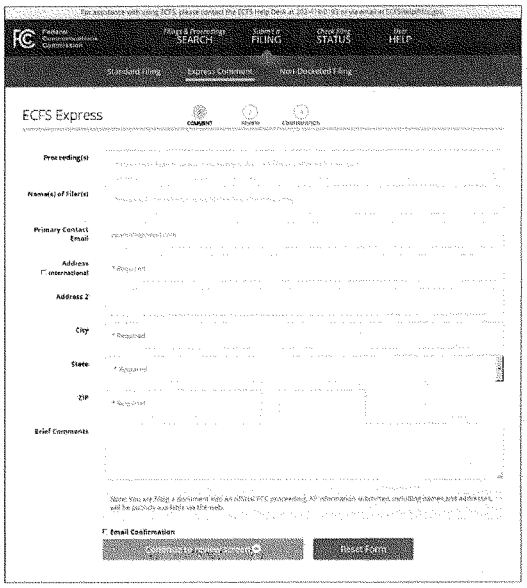


Source: FCC.gov. | GAO-19-483

[1]FCC's ECFS also accepts comments in response to specific types of FCC actions via Non-Docketed filings. Users are instructed not to use Non-Docketed filings to submit comments in a proceeding for which a docket number or rulemaking number has been assigned.

An Express filing does not allow for files to be attached. See figure 13 for an example of an Express filing.

Figure 13: Federal Communications Commission Electronic Comment Filing System's Express Filing Web Form

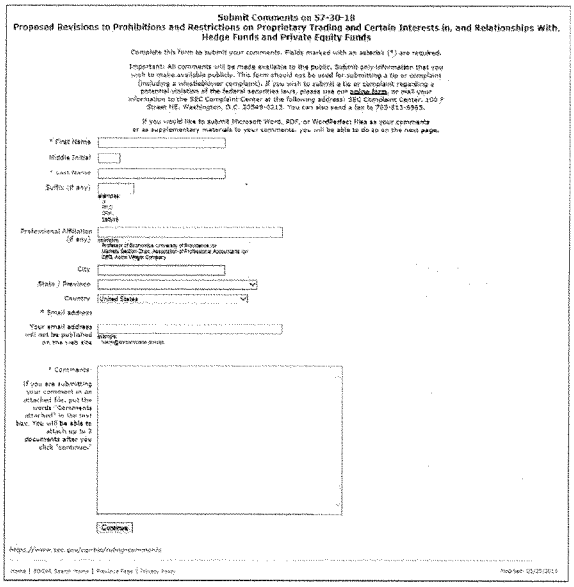


Source: FCC.gov. | GAO-19-483

Appendix IV: Securities and Exchange Commission Comment Form Example

One way in which comments are submitted to the Securities and Exchange Commission (SEC) is through an electronic comment form. See figure 14 for an example of a comment form from SEC.gov.

Figure 14: Securities and Exchange Commission Comment Form Example



Source: SEC.gov. | GAO-19-483

Appendix V: Agency Comments from the Bureau of Consumer Financial Protection

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

June 7, 2019

Seto J. Bagdoyan
Director, Audits
Forensic Audits and Investigative Service
Government Accountability Office
441 G Street, NW
Washington DC, 20548

Dear Mr. Bagdoyan,

Thank you for the opportunity to review and comment on the draft report by the Government Accountability Office (GAO), titled *Federal Rulemaking: Selected Agencies Should Clearly Communicate Practices Associated With Identity Information in the Public Comment Process* (GAO-19-483). The Bureau greatly appreciates GAO's work over the course of this engagement and believes the report provides the public with important information about how select federal agencies, including the Consumer Financial Protection Bureau, collect and treat identity information associated with public comments on proposed rulemakings.

In the report, GAO makes one recommendation to the Bureau:

- The Director of CFPB should finalize its draft policy for posting comments and their identity information, particularly for duplicate comments, and clearly communicate it to the public on the CFPB website.

The Bureau does not object to GAO's recommeodation. The Bureau will finalize its draft policy governing how the Bureau processes public comments for posting to Regulations.gov. Additionally, the Bureau intends to provide on its website an explanation of the Bureau's current practice for posting public comments, including identity information associated with public comments.

consumerfinance.gov

The Bureau looks forward to working with GAO as it monitors the Bureau's progress in implementing this recommendation.

Sincerely,

Kathleen L. Kraninger
Director

consumerfinance.gov 2

Appendix VI: Agency Comments from the Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF MISSION SUPPORT

Mr. Seto J. Bagdoyan
Director, Forensic Audits and Investigative Service
U.S. Government Accountability Office
441 G St., NW
Washington, DC 20548

Dear Mr. Bagdoyan:

Thank you for the opportunity to review and comment on the Draft Report, GAO-19-483, *Federal Rulemaking: Selected Agencies Should Clearly Communicate Practices Associated With Identity Information in the Public Comment Process* (102648). In this letter, the U.S. Environmental Protection Agency (EPA) responds to the U.S. Government Accountability Office's (GAO's) findings, conclusions and recommendations.

In this report, GAO examines (1) the identity information collected by Regulations.gov and agency-specific comment websites; (2) the guidance agencies have related to the identify of commenters; (3) how selected agencies treat identity information; and (4) the extent to which selected agencies clearly communicate their practices associated with identity information.

Recommendation

The Administrator of EPA should finalize its draft policy for posting comments and their identity information, particularly for duplicative comments, and clearly communicate it to the public on the EPA website.

Response to Recommendation

EPA is currently in the process of updating the Docket Center's Document Processing Standard Operating Procedures, which address the process for intake of public comments, including posting them to Regulations.gov when applicable. To address GAO's recommendation, EPA will finalize this document as soon as all updates are complete. Additionally, EPA currently provides information to the public on the EPA website (Commenting on EPA Dockets at https://www.epa.gov/dockets/commenting-epa-dockets) about when comments may or may not be posted on Regulations.gov. To address GAO's recommendation, EPA will expand upon the language currently on the website to further explain EPA's process for posting comments on Regulations.gov.

Comments on Draft Report

On pages 22 and 37 - 39, the draft report discusses inconsistencies as to whether all or some of EPA's duplicate and near duplicate comments are available on Regulations.gov. What comments are available on Regulations.gov depends on the format in which the comments are submitted to EPA. These formats can include: 1) duplicate and near duplicate comments that are submitted individually; 2) a single comment that contains, or has an attachment containing, a list of concurring signatures; and 3) a single transmission letter/sample of the mass mail message that has an attachment containing bundled duplicate and near duplicate comments. Regardless of the format type, it is EPA procedure to post to Regulations.gov a primary document for the mass mail campaign with a tally of the total number of duplicate and near duplicate comments received. For duplicate and near duplicate comments that are received individually via email, the primary document will be a representative sample of the email comments received. In this case, only the representative sample comment is available on Regulations.gov. Alternatively, if the primary document is an email that was submitted to EPA including an attachment containing either bundled duplicate and near duplicate comments or multiple concurring signatures, the contents of the attachment will be available on Regulations.gov as part of the primary document. EPA would not alter the comment by removing the attachments when posting it.

To fully explain how duplicate and near duplicate emails are made available on Regulations.gov, EPA recommends the following change (in red italics) to page 38 of the draft report: "Of the duplicate comment sets submitted via email, 45 sets have all comments posted in Regulations.gov while 153 sets have a sample of the comments posted. *The inconsistency in posting is due to the way in which the comments were submitted to EPA. For the duplicate comment sets where all comments were posted, EPA received a single email with an attachment(s) containing compiled comments or signatures. In this case, the single email with the attachment(s) was posted. For the duplicate comments sets where only one sample of the comments was posted, EPA received individual duplicate emails, which were sorted into the appropriate campaigns before posting a representative sample and the tally of all duplicate comments received for the campaign.* While the APA and E-Government Act do not require comments to be posted in any particular way, EPA has established detailed internal guidance for the comment intake process for its Docket Center staff."

Footnote 59 on page 38 of the report states that EPA officials took 55 hours to determine whether the comments for one particular docket were stored in the Federal Docket Management System (FDMS) or not. While EPA did spend 55 hours gathering information about the comments submitted for this docket as requested by GAO, the efforts undertaken by EPA were substantially more significant than currently stated in the report. To respond to GAO's request for information about this docket, EPA staff completed a full assessment of the docket, which is further explained below. EPA also prepared and throughly reviewed a complete summary report of the findings.

EPA recommends the following change (in red italics) to footnote 59: "This challenge is not limited to the general public. EPA officials responsible for identifying this information reported *spending approximately 55 hours compiling, reviewing, and preparing a summary report with detailed information about the 4,383,712 comments in the docket, including the 363 mass mail campaigns. This information included whether the comments were stored in FDMS or not, the location of where the comments were stored, the format of mass mail comment submissions (e.g., email, paper, USB, webform, etc.), a full listing of all the mass mail campaigns included in the docket, and the number of comments*

associated with each mass mail campaign. ~~that determining whether the comments were stored in FDMS or not took them approximately 55 hours to complete.~~"

Finally, it is important to note that the docket referenced in the report is the largest EPA docket ever in terms of number of comments received. In 2014, this docket received 4,383,712 public comments, out of the 6,051,473 total comments EPA received that year. To put that into perspective, in 2013, EPA received just 2,196,931 comments in total.

To provide this context, EPA recommends the following change (in red italics) on page 37: "We found that one EPA docket, *the Agency's largest docket in terms of comment count to date,* received more than 350 separate sets of duplicate comments comprising a total of more than 4.3 million comments (as reported by Regulations.gov)...."

We appreciate the opportunity to review and respond to the draft report. If you require additional information or would like to discuss further, please contact Patricia Williams (202) 564-0204.

Sincerely,

Vaughn Noga for
Chief Information Officer and
Deputy Assistant Administrator for Environmental Information

cc: Erin Collard, OMS
Patricia Williams, OMS
Janice Jablonski, OMS
Juanita Standifer, OMS
Rebecca Moser, OMS
Courtney Kerwin, OMS
Pam Shenefiel, OMS
Annette Morant, OCFO
Dave Bruno, GAO
Elizabeth Kowalewski, GAO

Appendix VII: Agency Comments from the Department of Health and Human Services

DEPARTMENT OF HEALTH & HUMAN SERVICES

OFFICE OF THE SECRETARY

Assistant Secretary for Legislation
Washington, DC 20201

JUN 07 2019

Seto Bagdoyan
Director, Forensic Audits and Investigative Service
U.S. Government Accountability Office
441 G Street NW
Washington, DC 20548

Dear Mr. Bagdoyan:

Attached are comments on the U.S. Government Accountability Office's (GAO) report entitled, *"Federal Rulemaking: Selected Agencies Should Clearly Communicate Practices Associated With Identity Information in the Public Comment Process"* (GAO-19-483).

The Department appreciates the opportunity to review this report prior to publication.

Sincerely,

for

Matthew D. Bassett
Assistant Secretary for Legislation

Attachment

GENERAL COMMENTS FROM THE DEPARTMENT OF HEALTH & HUMAN SERVICES ON THE GOVERNMENT ACCOUNTABILITY OFFICE'S DRAFT REPORT ENTITLED - FEDERAL RULEMAKING: SELECTED AGENCIES SHOULD CLEARLY COMMUNICATE PRACTICES ASSOCIATED WITH IDENTITY INFORMATION IN THE PUBLIC COMMENT PROCESS (GAO-19-483)

The U.S. Department of Health & Human Services (HHS) appreciates the opportunity from the Government Accountability Office (GAO) to review and comment on this draft report.

HHS is committed to maintaining public trust in the regulatory process through transparency and consistency in our notice and comment procedures. The rulemaking process is governed by the Administrative Procedure Act and managed government-wide by the Office of Management and Budget. The Centers for Medicare & Medicaid Services (CMS) has internal policies regarding public posting requirements, including regarding identity information and duplicate comments, in accordance with the Administrative Procedure Act.

The Administrative Procedure Act does not require commenters to provide identity information when submitting public comments. However, if identity information is provided, CMS policy is to post it with the comment. In addition, if multiple identical comments are received (such as form letters), agencies have discretion under the Administrative Procedure Act regarding how to post and identify these comments. CMS often receives duplicate comments or form letters, and our current policy is to post each comment from a unique commenter individually.

HHS appreciates GAO's review, and our response to the recommendation is as follows.

Recommendation 1
The Administrator of CMS should create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments, and should clearly communicate this policy to the public on the CMS website.

HHS Response
HHS concurs with this recommendation.

CMS already has policies for standard posting requirements regarding comments and their identity information, including for duplicate comments. CMS will communicate these policies to the public on the CMS website.

Page 1 of 1

Appendix VIII: Agency Comments from the Department of the Interior

United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

JUN 14 2019

Seto J. Bagdoyan
Director, Audits
Forensic Audits and Investigative Service
U.S. Government Accountability Office
441 G Street NW
Washington, DC 20548

Dear Mr. Bagdoyan:

Thank you for providing the Department of the Interior (Department) the opportunity to review and comment on the Government Accountability Office (GAO) draft report titled, *Federal Rulemaking: Selected Agencies Should Clearly Communicate Practices Associated With Identity Information in the Public Comment Process* (GAO-19-483). We appreciate GAO's review of the public comment process involved with the development and issuance of regulations.

The GAO issued the Department two recommendations to address its findings. Below is a summary of actions the Bureau of Land Management (BLM) and the U.S. Fish and Wildlife Service (FWS) have planned to implement the recommendations.

Recommendation 1: The Director of BLM should create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments, and should clearly communicate this policy to the public on the BLM website.

Response: Concur. The BLM will develop and issue policy for standard posting requirements regarding public comments and their identity information. The policy will also include how to address duplicate comments and the requirement for posting the policy on BLM's website.

Recommendation 6: The Director of FWS should create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments, and should clearly communicate this policy to the public on the FWS website.

Response: Concur. The FWS will develop and issue policy for standard posting requirements regarding public comments and their identity information. The policy will also include how to address duplicate comments and the requirement for posting the policy on FWS' website.

If you have any questions about this response, or need additional information, please contact Nancy Thomas at (202 208-7954.

Sincerely,

Scott J. Cameron
Principal Deputy Assistant Secretary
for Policy, Management and Budget

Appendix IX: Agency Comments from the Department of Labor

U.S. Department of Labor

Office of the Assistant
Secretary for Policy
Washington, D.C. 20210

Seto J. Bagdoyan
Director
Forensic Audits and Investigative Service
U.S. Government Accountability Office
441 G. Street, N.W.
Washington, D.C. 20548

Dear Mr. Bagdoyan:

The U.S. Department of Labor (DOL) is in receipt of the draft Government Accountability Office (GAO) report entitled, "Selected Agencies Should Clearly Communicate Practices Associated with Identity Information in the Public Comment Process" (GAO-19-483, Job Code 102648).

The report makes a total of eight recommendations. Two of those recommendations apply to the Department of Labor. We support both recommendations. Responses to the recommendations appear on the attached document.

If you would like additional information, or have any questions please contact me at 202-693-5080.

Sincerely,

Stephanie Swirsky
Deputy Assistant Secretary for Policy

Enclosures

GAO draft report entitled, "Selected Agencies Should Clearly Communicate Practices Associated with Identity Information in the Public Comment Process" (GAO-19-483, Job Code 102648)

DOL's Response to GAO's Recommendations for Executive Action

Recommendation 4

The Assistant Secretary of Labor for EBSA should:

(1) Create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments;
(2) Clearly communicate this policy to the public on the EBSA website; and
(3) Evaluate the duplicate practice of replicating rulemaking dockets on the EBSA website, to either discontinue the practice or include a reference to Regulations.gov and explanation of how the pages relate to one another.

EBSA response:

(1) Agreed. EBSA will examine any such written policies of other DOL agencies, including DOL's Wage and Hour Division, and develop a written policy or policies regarding the posting of comments, including those with identical or near-identical comment text but with unique identity information (i.e., duplicate comments).

(2) Agreed. EBSA agrees that its written policy or policies should be clear and readily available to the public on EBSA's website.

(3) EBSA will include a reference to Regulations.gov as part of each NPRM webpage that includes public comments together with an explanation of its relation to Regulations.gov as a means to access public comments on EBSA's rulemaking initiatives. Internal and external users have indicated a preference to have public comments available on EBSA's website, among other reasons, because of the convenience of having the comments located in close proximity to the proposed rule and other related interpretive guidance. End users also have commented on and appreciated EBSA's logical and user friendly indexing and presentation of public comments, as compared to the docketing system contained in regulations.gov. EBSA, nonetheless, will raise GAO's recommendation informally with stakeholder groups as part of our evaluation of GAO's report and recommendation.

Recommendation 8

The Administrator of WHD should clearly communicate its policy for posting comments and their identity information, particularly for duplicate comments, to the public on the WHD website.

WHD response:
WHD creates a Notice of Proposed Rulemaking (NPRM) webpage for all rules in which comments from the public are accepted. WHD will add the Agency Posting Guidelines to each NPRM webpage at the time of its creation to provide additional guidance to the public with respect to comment management.

Appendix X: Agency Comments from the Securities and Exchange Commission

OFFICE OF THE CHAIRMAN

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

June 10, 2019

Mr. Seto J. Bagdoyan
Director, Audits
Forensic Audits and Investigative Service
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Bagdoyan:

Thank you for your report, "Selected Agencies Should Clearly Communicate Practices Associated with Identity Information in the Public Comment Process." We appreciate being able to assist the GAO in assessing how various federal agencies process public comment letters.

The public plays an integral role in the Commission's rulemaking process. When members of the public send written comment letters in response to a proposed rule, they provide us with valuable information, including about potential real-world impacts or alternatives approaches for achieving regulatory goals.

For these reasons, I am pleased that the GAO's review did not identify any deficiencies in the practices the SEC's Office of the Secretary follows to intake, analyze, and post comment letters. As the report notes, the Office of the Secretary currently follows a standardized process with respect to posting of duplicate comments (for instance, mass mail letters) that have identical or near-identical comments, but unique identity information. In such cases, the practice is to post a single example for each set of duplicate comments and indicate the total number of other such comments received. The GAO report does not find fault with this practice, but does recommend that the SEC formalize it in a written policy and communicate it to the public on our website. I support this recommendation, which I have asked the staff to promptly implement.

Thank you for the consideration that you and your staff have shown our agency. If you require additional information, please contact Bryan Wood, Director of Legislative and Intergovernmental Affairs, at (202) 551-2010.

Sincerely,

Jay Clayton
Chairman

Appendix XI: GAO Contact and Staff Acknowledgments

GAO Contact

Seto J. Bagdoyan, (202) 512-6722 or bagdoyans@gao.gov

Staff Acknowledgments

In addition to the contact named above, David Bruno (Assistant Director), Elizabeth Kowalewski (Analyst in Charge), Enyinnaya David Aja, Gretel Clarke, Lauren Kirkpatrick, James Murphy, Alexandria Palmer, Carl Ramirez, Shana Wallace, and April Yeaney made key contributions to this report. Other contributors include Tim Bober, Dahlia Darwiche, Colin Fallon, Justin Fisher, James Healy, Katie LeFevre, Barbara Lewis, and Maria McMullen.

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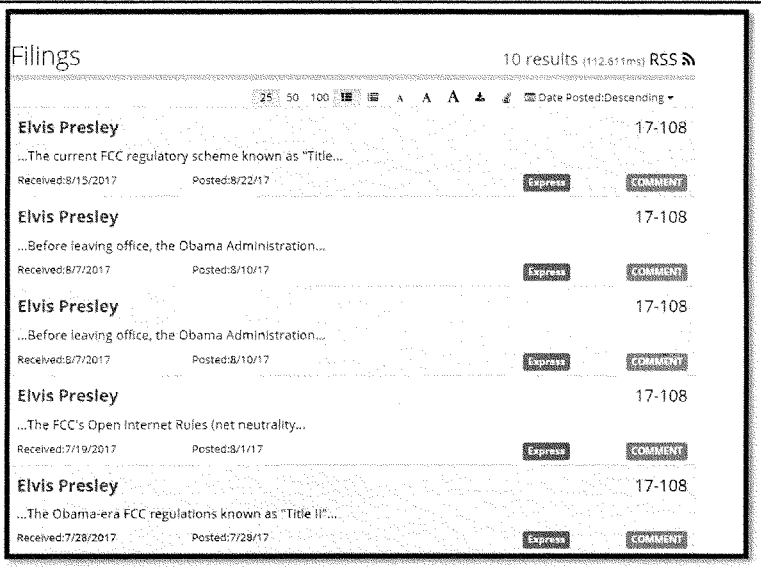
To Report Fraud, Waste, and Abuse in Federal Programs	Contact FraudNet: Website: https://www.gao.gov/fraudnet/fraudnet.htm Automated answering system: (800) 424-5454 or (202) 512-7700
Congressional Relations	Orice Williams Brown, Managing Director, WilliamsO@gao.gov, (202) 512-4400, U.S. Government Accountability Office, 441 G Street NW, Room 7125, Washington, DC 20548
Public Affairs	Chuck Young, Managing Director, youngc1@gao.gov, (202) 512-4800 U.S. Government Accountability Office, 441 G Street NW, Room 7149 Washington, DC 20548
Strategic Planning and External Liaison	James-Christian Blockwood, Managing Director, spel@gao.gov, (202) 512-4707 U.S. Government Accountability Office, 441 G Street NW, Room 7814, Washington, DC 20548

Please Print on Recycled Paper.

Name	Number of FCC Filings
Ajit Pai	1,434
Donald Trump	327
Barack Obama	53
LeBron James	43
Adolf Hitler	41
Mike Pence	38
Richard Nixon	23
Ronald Reagan	21
Elvis Presley	10
Kim Kardashian	6



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Comment from Mitt Romney

This is a Comment on the **National Oceanic and Atmospheric Administration** (NOAA) Proposed Rule: **Notice of Availability for the Mid-Atlantic Unmanaged Forage Fish Omnibus Amendment**

For added information, **Open Docket Folder**

Comment Period Closed

Nov 30, 2017, at 11:59 PM ET

ID: NOAA-NMFS-2017-0123-0004

Tracking Number: 1k1-8vb0-ie3z

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Mitt Romney

Organization Name:

The Republican Party

Comment

Silly

Federal Communications Commission

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Type of Filing	COMMENT	**Filing Status**	DISSEMINATED
Viewing Status	Sunshine		
Date Received	May 23, 2017	**Date Posted**	Jun 2, 2017
Address	250 United Way	**City**	Leitchfield
State	KY	**ZIP**	42754

Brief Comment FCC commissioners, I would like to comment on the FCC rules on the Internet. I want to encourage you to undo Tom Wheeler's order to regulate broadband. Internet users, not so-called experts, should be empowered to buy whatever products we choose. Tom Wheeler's order to regulate broadband is a perversion of net neutrality. It reversed a market-based approach that functioned fabulously smoothly for two decades with nearly universal approval.

○