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

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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]

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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]

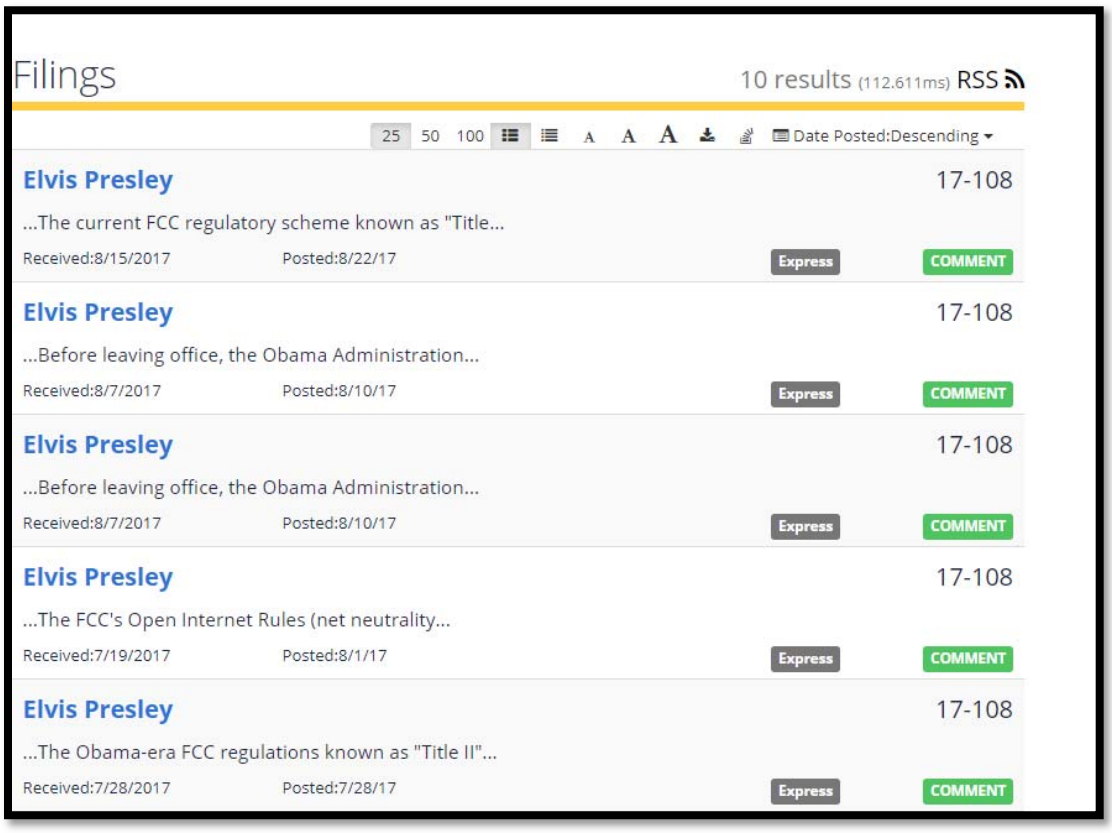
[102] Email from the office of the Hon. Mitch McConnell, Majority Leader, U.S. Senate, to Subcommittee staff (Aug. 5, 2019) (on file with the Subcommittee).

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

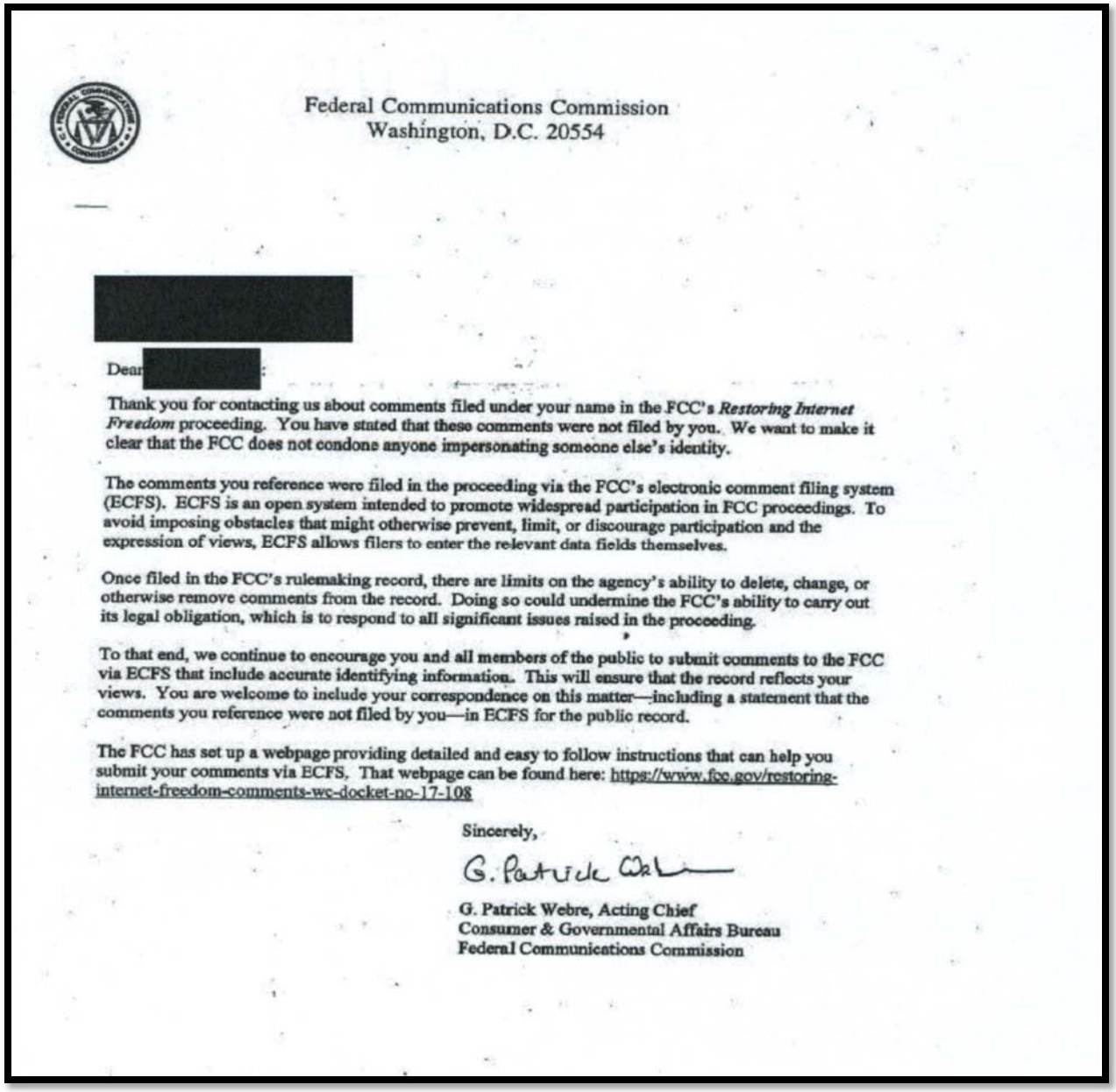
25 50 100 Date Posted:Descending

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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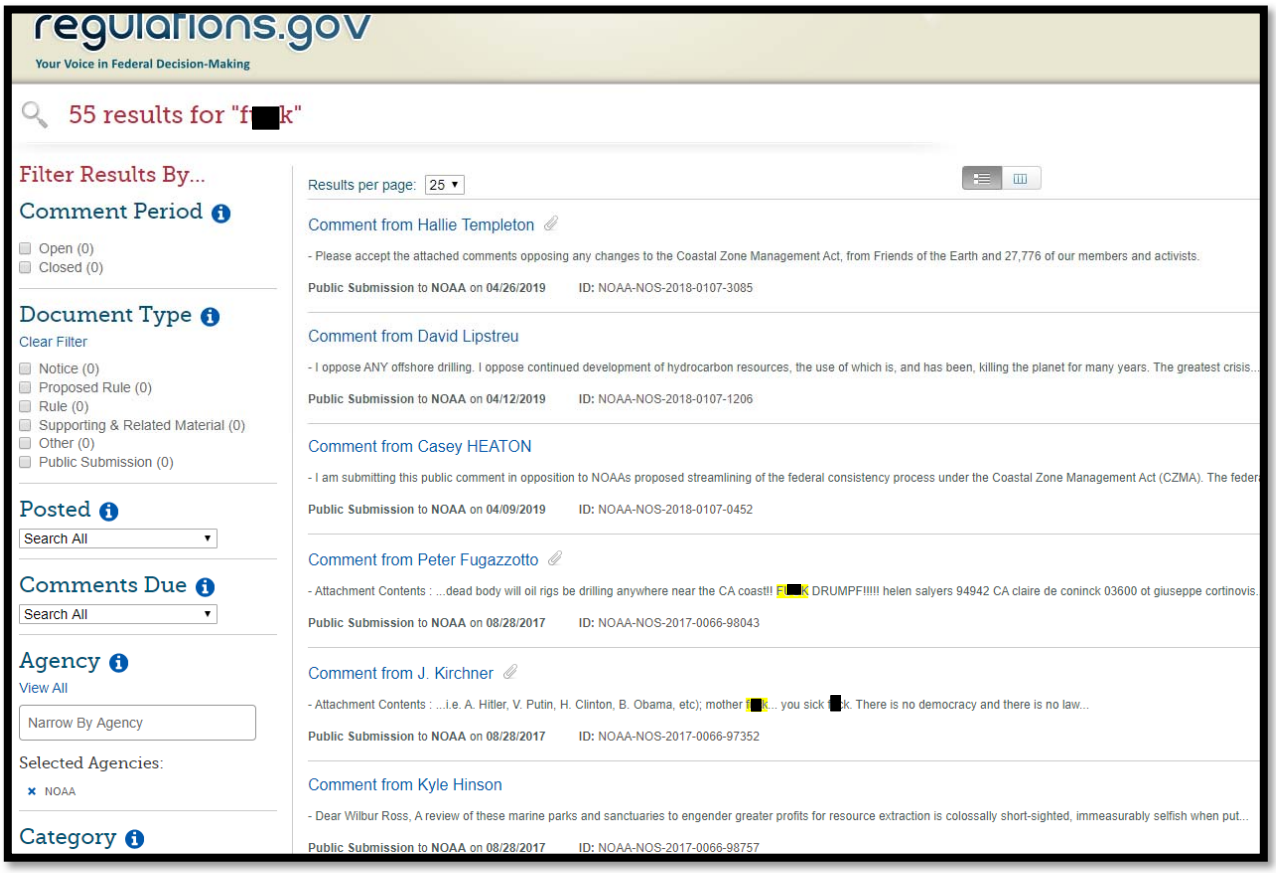
[114] *Id.*; Memorandum from Elizabeth Murphy, *et al.* to Simon Park, *et al.*, regarding Policies for Posting/Removal of Comment Letters on the Commission's Public Website (Nov. 3, 2011).
[115] Search of the SEC website current as of October 17, 2019.
[116] Staff telephone interview with SEC personnel (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."



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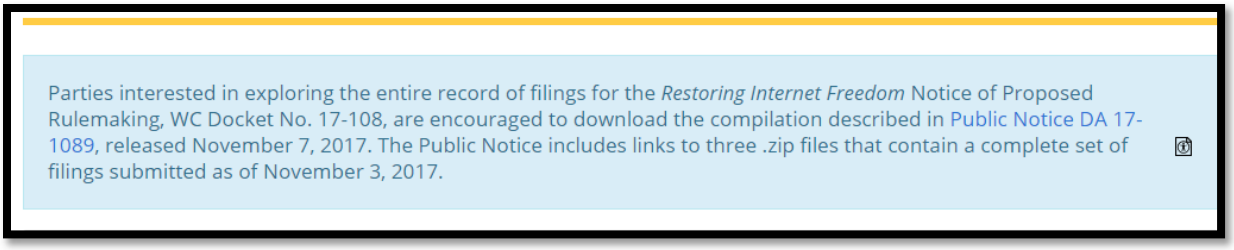
[123] FCC interview, Dec. 20, 2017.

[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).



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

[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

[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.