

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.