



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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For Release on Delivery  
Expected at 10:00 a.m. ET  
Thursday, October 24, 2019

# 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 Highlights

Highlights of [GAO-20-105T](#), a 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

## 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 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 action 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](mailto:bagdoyans@gao.gov).

October 24, 2019

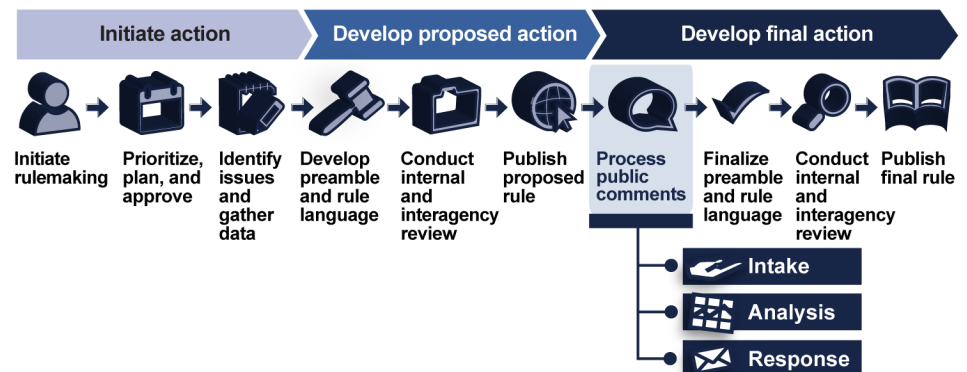
# FEDERAL RULEMAKING

## 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.

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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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> Subsequently, media and others reported that some of the comments submitted to FCC were suspected to have been submitted using false identity information.<sup>4</sup>

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<sup>1</sup>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.

<sup>2</sup>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*.

<sup>3</sup>Restoring Internet Freedom (82 Fed. Reg. 25,568 (June 2, 2017) and (83 Fed. Reg. 7,852 (Feb, 22, 2018)).

<sup>4</sup>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.

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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.<sup>5</sup> However, courts have held that agencies are not required to respond to every comment individually.<sup>6</sup> 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.<sup>7</sup> 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

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<sup>5</sup>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).

<sup>6</sup>*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).

<sup>7</sup>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).

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(“participating agencies”) and two agencies that operate agency-specific comment websites (“nonparticipating agencies”).<sup>8</sup> 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.<sup>9</sup> 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.

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<sup>8</sup>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).

<sup>9</sup>[GAO-19-483](#).

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## 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.<sup>10</sup> 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.

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## 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.<sup>11</sup> 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.

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<sup>10</sup>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.

<sup>11</sup>During the comment intake phase, agencies administratively process comments. During the comment analysis phase, 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 <sup>a</sup>	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 <sup>a</sup>	Yes	Yes	Yes

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

<sup>a</sup>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.

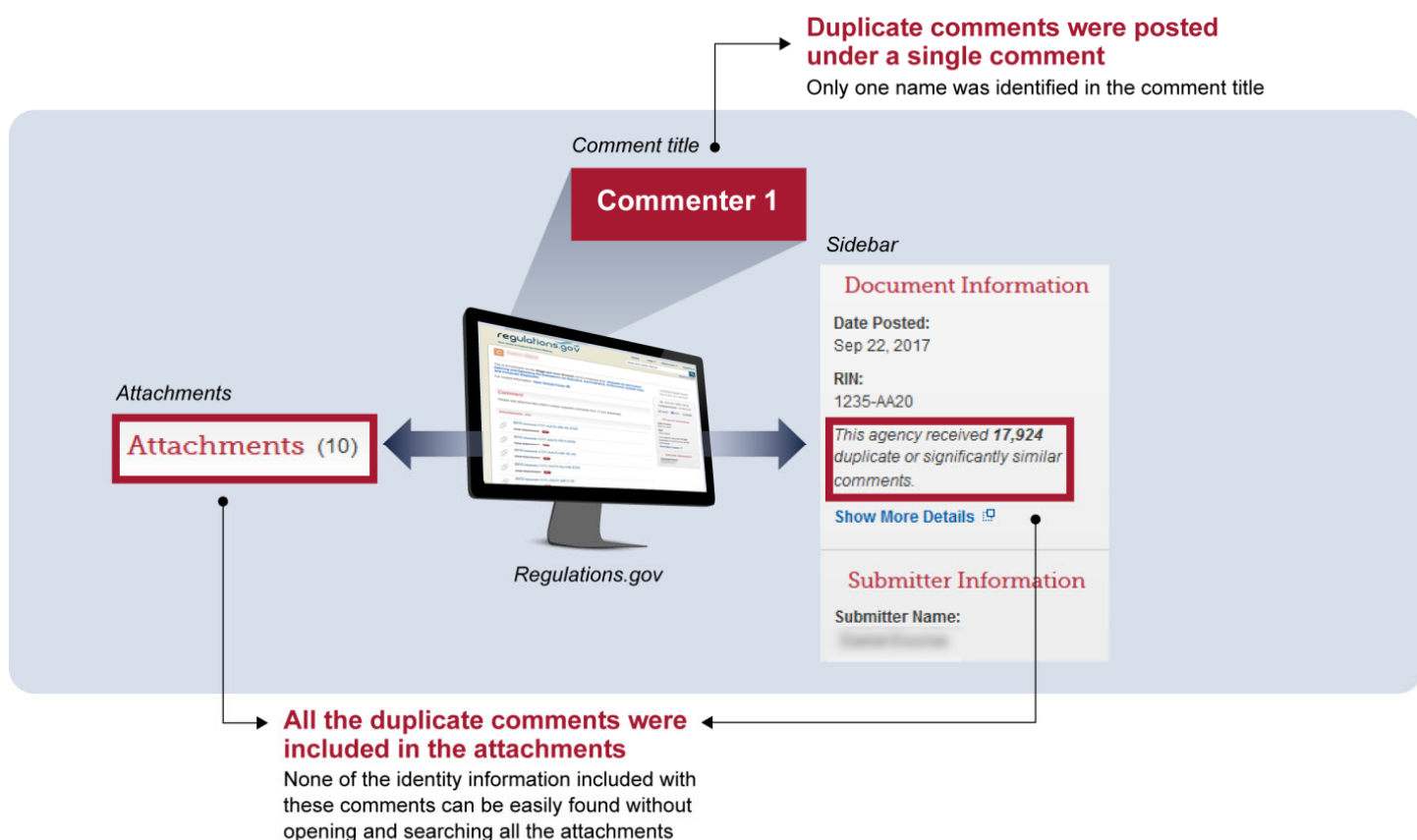
The guidance for these phases addresses activities such as managing duplicate comments (those with identical or near-identical comment text but varied identity information) or referring to commenters in a final rule. Agencies are not required by the APA to develop internal guidance associated with the 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.<sup>12</sup> 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

<sup>12</sup>Although all comments are stored in Regulations.gov, according to officials, some sensitive information may not be made publicly available.



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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.

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## 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."<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.

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

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

<sup>15</sup>The APA and E-Government Act do not include any requirements associated with the collection or disclosure of identity information.

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## 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.<sup>16</sup> 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.<sup>17</sup>

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

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<sup>16</sup>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.

<sup>17</sup>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.

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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.

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## 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

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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.<sup>18</sup> 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.

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## GAO Contact and Staff Acknowledgments

For further information regarding this testimony, please contact Seto J. Bagdoyan, (202) 512-6722 or [bagdoyan@gao.gov](mailto:bagdoyan@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),

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<sup>18</sup>[GAO-19-483](#).

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Elizabeth Kowalewski (Analyst in Charge), and Dahlia Darwiche. Other individuals who also contributed to the report on which this testimony is based include Enyinnaya David Aja, Gretel Clarke, Lauren Kirkpatrick, James Murphy, Alexandria Palmer, Carl Ramirez, Shana Wallace, and April Yeane.

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