

February 3, 2020

## Memorandum

**To:** Members, Committee on Financial Services  
**From:** FSC Majority Staff  
**Subject:** February 6, 2020, “Fake It Till They Make It: How Bad Actors Use Astroturfing to Manipulate Regulators, Disenfranchise Consumers and Subvert the Rulemaking Process”

---

The Subcommittee on Oversight and Investigations will hold a hearing entitled “Fake It Till They Make It: How Bad Actors Use Astroturfing to Manipulate Regulators, Disenfranchise Consumers and Subvert the Rulemaking Process,” on Thursday, February 6, 2020, at 2:00 p.m. This hearing will have one panel with five witnesses:

- **Bartlett Naylor**, Financial Policy Advocate, Public Citizen
- **Beth Simone Noveck**, Professor and Director, GovLab, Tandon School of Engineering, New York University
- **Paulina Gonzalez-Brito**, Deputy Director, California Reinvestment Coalition
- **Seto Bagdoyan**, Director, Forensic Audits and Investigative Service, U.S. Government Accountability Office
- **Dr. Steven Balla**, Associate Professor, George Washington University

### Overview

This hearing will examine the prevalence and potential impact of fraudulent comment submissions during the notice-and-comment period for proposed federal financial regulations. The testimony will discuss recent reports alleging that certain special interest groups have used invented or stolen identities to submit comments about proposed rules, a practice often called “astroturfing.” The testimony will also present actions regulators and legislators can take to deter and mitigate fraudulent comment submissions.

### The Administrative Procedure Act

The Administrative Procedure Act (APA), enacted in 1946, contains the primary procedural requirements of the federal rulemaking process.<sup>1</sup> The APA requires that an agency generally provide notice in the Federal Register when it intends to promulgate a rule. This step is referred to as a notice of proposed rulemaking (NPRM) or a proposed rule.<sup>2</sup> The agency must then allow “interested persons an opportunity” to comment on the proposed rule.<sup>3</sup>

After the comment period has ended, the APA requires the agency to consider the “relevant matter presented.”<sup>4</sup> Under various judicial interpretations of the APA, the agency is also required to review the

---

<sup>1</sup> 5 U.S.C. §§551 et seq.; *see generally* Congressional Research Service, *An Overview of Federal Regulations and the Rulemaking Process* (January 7, 2019) (CRS In Focus IF10003); *see also* Congressional Research Service, *The Federal Rulemaking Process: An Overview* (June 17, 2013) (CRS Report RL32240).

<sup>2</sup> 5 U.S.C. §553(b).

<sup>3</sup> 5 U.S.C. §553(c)

<sup>4</sup> 5 U.S.C. §553(c).

comments it received and respond in a “reasoned manner” to “significant” comments.<sup>5</sup> “Significant” comments are those that “raise relevant points and which, if adopted, would require a change in the agency’s proposed rule.”<sup>6</sup> Agencies are not required to weigh their decisions based on the number of comments received in favor of or opposition to a particular policy — although the number of comments received could influence an agency’s perception of the public’s view on an issue.

### **The E-Government Act of 2002 and eRulemaking**

Congress enacted the E-Government Act of 2002 to enhance the management and promotion of electronic government services and processes, including the rulemaking process. In January 2003, the eRulemaking Program, led by the Environmental Protection Agency, launched the “Regulations.gov” website, which is the public-facing website of the Federal Docket Management System (FDMS), the centralized online system federal agency officials use to structure online regulatory activities such as the collection of comments under the APA.<sup>7</sup> Regulations.gov was created to enhance agencies’ ability to receive comments electronically. Agencies are not required to use the website and may operate their own portal for receiving comments electronically. Site administrators for Regulations.gov lack sufficient funding and resources and as such have struggled to implement the design and operation of the site.<sup>8</sup>

### **Astroturfing in the Rulemaking Process**

The term “astroturfing” means “to create a false impression of a widespread, spontaneously arising, grassroots movement in support of or in opposition to something.”<sup>9</sup> Neither the APA nor the E-Government Act contemplates astroturfing or the submission of fraudulent comments during the rulemaking process. Astroturfing does not necessarily violate the APA, the E-Government Act, or other rulemaking procedures, although submitting fraudulent comments could arguably violate criminal laws that prohibit identity theft or using a government computer with intent to defraud.<sup>10</sup>

As currently designed, Regulations.gov provides minimal technical tools to deter a user from submitting comments under a false identity. The APA does not require agencies to collect the identities of individuals who comment on rules.<sup>11</sup> Regulations.gov allows commenters to post comments anonymously, does not require commenters to make attestations of identity, and only temporarily collects limited data about commenters such as IP addresses and browser types.<sup>12</sup>

Although there has been little government-sponsored research assessing the prevalence of astroturfing, journalists and nonprofit organizations have uncovered numerous instances when allegedly fraudulent

---

<sup>5</sup> See *A Guide to Federal Agency Rulemaking*, Chicago: American Bar Association (2018), 6<sup>th</sup> ed., 385-389.

<sup>6</sup> *Id.*

<sup>7</sup> Todd Rubin, “Regulations.gov and the Federal Docket Management System,” Administrative Conference of the United States (December 1, 2018).

<sup>8</sup> *Id.*

<sup>9</sup> “Astroturfing,” *Merriam Webster*, at <https://www.merriam-webster.com/dictionary/astroturfing> (last visited January 21, 2020); The term reportedly originates from Senator Lloyd Bentsen, who said, “A fellow from Texas can tell the difference between grass roots and Astroturf,” in response to letters he received in support of insurance company interests, *Keep Off the Astroturf*, *The New York Times* (August 18, 2009).

<sup>10</sup> For example, identity theft is an illegal activity (18 U.S.C. §1028) as is using a government computer with the intent to defraud (18 U.S.C. §1030).

<sup>11</sup> 5 U.S.C. §553(c)

<sup>12</sup> “Frequently Asked Questions,” *Regulations.gov*, at <https://www.regulations.gov/faqs> (last visited January 27, 2020).

comments were submitted during the rulemaking process.<sup>13</sup>

### **Notable Instances of Astroturfing**

In December 2019, the Securities and Exchange Commission published a proposed rule in the Federal Register that would amend the agency’s rules governing shareholder proposals.<sup>14</sup> The proposed amendments enjoyed broad support from many trade associations and industry groups. During a speech about the proposed rule, SEC Chairman Jay Clayton quoted several comments the agency had purportedly received from “long-term Main Street investors, including an Army veteran and a Marine veteran, a police officer, a retired teacher, a public servant, a single mom, [and] a couple of retirees who saved for retirement” in support of the proposed amendments.<sup>15</sup> An investigation by Bloomberg revealed that the letters quoted by the Chairman were not actually written by ordinary citizens, but instead were created by a pro-corporate advocacy group that had used the identities of ordinary Americans. According to Chairman Clayton, he contacted the agency’s general counsel and office of inspector general to discuss the suspicious comments and investigate claims that the comments came from a special interest group.<sup>16</sup>

In 2016, the Consumer Financial Protection Bureau sought comments in advance of issuing a regulation that would focus higher scrutiny on the payday lending industry. The agency’s efforts were frustrated by an influx of over a million comments, many of which were allegedly created by trade groups to appear as if they came from concerned consumers.<sup>17</sup>

In 2015, during its consideration of a proposed merger between CIT and OneWest Bank, the Office of the Comptroller of the Currency reportedly received numerous fake comments that mirrored the language of a form letter that an executive of the bank had been providing to friends and acquaintances to support the merger.<sup>18</sup>

Astroturfing campaigns have been growing increasingly common and complex in recent years. The Federal Communications Commission issued an NPRM in May 2017 which sought to repeal the Obama-era net neutrality rules. The agency received over 22 million comments. Further analysis by the agency revealed that fewer than 20% of those comments were “unique,” and the other 80% of the comments were suspiciously similar and were almost universally in support of the internet service provider industry’s position. Further analysis suggests that most of the suspicious comments were likely created by automated astroturfing bots.<sup>19</sup>

### **Potential Federal Actions to Combat Astroturfing**

Agencies that use Regulations.gov to collect comments must rely upon the website’s limited tools to combat fraudulent comment submissions. Agencies that operate their own comment portals, on the other

---

<sup>13</sup> *Hidden Influence: Millions of People Post Comments on Federal Regulations. Many Are Fake*, Wall Street Journal (December 12, 2017).

<sup>14</sup> Securities and Exchange Commission, *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, 17 CFR Part 240 (December 4, 2019).

<sup>15</sup> *SEC Chairman Cites Fishy Letters in Support of Policy Changes*, Bloomberg (November 19, 2019).

<sup>16</sup> *Fishy Comment Letters Are Being Investigated, SEC’s Clayton Says*, Bloomberg (December 10, 2019).

<sup>17</sup> *Payday-lending crackdown draws 1.4 million letters of protest*, Politico (October 18, 2016).

<sup>18</sup> *The Fake Public Comments Supporting a Bank Merger are Coming from Inside the House*, The Intercept (September 29, 2018).

<sup>19</sup> *More Than 80% of All Net Neutrality Comments Were Sent by Bots, Researchers Say: 95 percent of all organic comments favored net neutrality, according to the analysis*, Motherboard (October 3, 2017).

hand, can implement several measures that could deter fraudulent commenters.<sup>20</sup> For example, agencies could post a criminal liability warning that notifies users about the potential consequences of submitting a comment under a stolen identity.

Agencies operating their own comment portals can also take steps to impede automated bots by implementing or removing technologies that would limit access to the commenting system. Limiting application programming interfaces (APIs) could help limit the flow of misinformation.<sup>21</sup> By limiting APIs, agencies could limit the efficacy of automated bots that can flood a comment submission portal.

After comments have been submitted, all agencies could conduct audits designed to identify potentially fake comments. Such a system need not be mandatory but could trigger in certain circumstances, such as when the number of individual comments exceeds a predetermined threshold.

---

<sup>20</sup> Most federal agencies within the jurisdiction of the Committee rely on Regulations.gov to electronically manage comments during rulemaking. Notable examples of agencies within the Committee’s jurisdiction which operate their own online comment portal include the Federal Reserve, the Commodity and Futures Trading Commission, and the Securities and Exchange Commission. “Electronic Comment Form,” *Board of Governors of the Federal Reserve System*, at <https://www.federalreserve.gov/secure/forms/ElectronicCommentForm.aspx> (last accessed February 3, 2020); “Public Comment Form, Commodity and Futures Trading Commission, at <https://comments.cftc.gov/PublicComments/CommentForm.aspx> (last accessed February 3, 2020), “How to Submit Comments,” *U.S. Securities and Exchange Commission*, at <https://www.sec.gov/rules/submitcomments.htm> (last accessed February 3, 2020).

<sup>21</sup> *In the Wake of Fraudulent Comments, Regulations.gov Revises API Policy*, Sunlight Foundation (March 9, 2018). (An API is a tool that system administrators can implement to enable others to create programs that can help streamline access to a system and its data).