

**FAKE IT TILL THEY MAKE IT: HOW BAD
ACTORS USE ASTROTURFING TO MANIPULATE
REGULATORS, DISENFRANCHISE CONSUMERS,
AND SUBVERT THE RULEMAKING PROCESS**

HEARING
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS
OF THE
COMMITTEE ON FINANCIAL SERVICES
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED SIXTEENTH CONGRESS
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Thursday, February 6, 2020

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:38 p.m., in room 2128, Rayburn House Office Building, Hon. Al Green [chairman of the subcommittee] presiding.

Members present: Representatives Green, Beatty, Perlmutter, Tlaib, Garcia of Texas, Phillips; Barr, Posey, Zeldin, Loudermilk, Davidson, Rose, and Timmons.

Also present: Representative Porter.

Chairman GREEN. The Oversight and Investigations Subcommittee will come to order.

The title of today's hearing is, "Fake It Till They Make It: How Bad Actors Use Astroturfing to Manipulate Regulators, Disenfranchise Consumers, and Subvert the Rulemaking Process."

Without objection, the Chair is authorized to declare a recess of the subcommittee at any time. Also, without objection, members of the full Financial Services Committee who are not members of this subcommittee may participate in today's hearing for the purposes of making an opening statement and questioning the witnesses.

The Chair now recognizes himself for 5 minutes for an opening statement.

This hearing will examine a problem referred to as astroturfing, which is the practice of creating the false appearance of grassroots support for a particular policy or position where none exists, often to the benefit of shadowy, well-financed interests, and to the detriment of the general public. Investigations have revealed that astroturfing is used by unidentified entities to sway regulators who rely upon the integrity of the public comments they receive in the rulemaking process.

As we sit here today, according to the SEC Chair, Chair Clayton, the SEC has launched an investigation of the submission of multiple fraudulent comments in a recent rulemaking, comments that were expressly relied upon by Chair Clayton and the Commission

as indicia of broad public support in urging the adoption of the rule.

As today's testimony will highlight, there is also troubling evidence of astroturfing at other agencies charged with protecting consumers and overseeing financial institutions, including the Consumer Financial Protection Bureau (CFPB) and the Office of the Comptroller of the Currency (OCC).

We have learned, and we learn every day of new ways that the Trump Administration is working across Federal agencies to roll back consumer protections, civil rights, fair housing protections, access to healthcare for low- and middle-income Americans, minorities, LGBTQ+ Americans, and others. We cannot allow this ever-expanding injustice to be compounded by nefarious actors who would manipulate regulators by fabricating comments.

Today, we are fortunate to have a panel of distinguished witnesses who will describe the Federal notice and comment framework; the flaws and opacity inherent in the current public comment process; the pernicious impacts of these flaws on the rules and rule makers; and the potential of such flaws to cast doubt upon the legitimacy and integrity of the Federal rulemaking process by this Administration.

At a time when Americans, more than ever, are questioning the propriety of actions taken by Federal agencies and our most senior government officials, it is especially important that we fully understand the scope of this problem, its implications, and what we must do to restore trust in the integrity of public comments, rulemakings, and our regulators.

I now recognize the ranking member of the subcommittee, Mr. Barr, for a 5-minute opening statement.

Mr. BARR. Thank you, Mr. Chairman, and thank you to our witnesses for appearing today.

A key tenet of the Administrative Procedure Act's notice and comment period is the availability of a forum for citizens and interested parties to voice their thoughts, concerns, and opinions on proposed rules that will impact them or their businesses. As legislators, we provide oversight over the regulatory agencies as they implement the laws we write, but public input on pending rules is also important to allow regulators to hear directly from all interested stakeholders.

Today, we are examining the impact on rulemaking of so-called astroturfing or fake grassroots campaigns. Large coordinated letter-writing campaigns are not new. They have been a key strategy of interest groups across the political spectrum for decades. Because letter-writing campaigns and grassroots advocacy are commonplace, regulators don't evaluate the comments on numbers alone. They have mechanisms in place to de-duplicate comments and extract the valuable observations from each comment.

Recently, the Majority sent Comptroller Otting and FDIC Chairwoman McWilliams identical letters about the public comment period for the proposed Community Reinvestment Act (CRA) rulemaking. The letters ask for information about how the agencies vet public comments based on a report that an outside group may have submitted fishy comments during a completely different rulemaking at a completely different agency.

When Comptroller Otting was before the committee last week, I asked him directly if there was any evidence of fabricated comments and how, if at all, such comments could affect his agency's development of a new rule. He said that this is a non-issue, that the OCC has a system in place to review comments on their substance, and it doesn't evaluate comments based solely upon sheer volume.

Earlier this week, Comptroller Otting responded to Chairwoman Waters and echoed these same observations. Does the concern over potential astroturfing really warrant this hearing? I would submit that the answer is no. The Majority's letter and, frankly, this entire hearing are thinly-veiled attempts to slow the rulemaking process on a much-needed modernization to help our communities simply because the Majority doesn't like the regulators writing the rules.

While not perfect, the FDIC's and the OCC's proposal to reform the Community Reinvestment Act regulations makes important strides to bring the CRA into the 21st Century without compromising the important and original intent of the law to serve communities across the country.

It provides much-needed clarity for regulated entities to understand how they will be evaluated and what activities will qualify for CRA credit. It appropriately accounts for the expansion of on-line banking and allows for CRA deserts in rural or otherwise underserved areas to benefit from investment in their communities.

I am fortunate to have many great community bankers in my district in central and eastern Kentucky. I am proud of how they partner with their neighbors to drive the local economy. They are committed to helping the low- and moderate-income borrowers in the areas they serve, and to make investments that will benefit their communities at large.

These are people who go to work every day happy to serve their communities. They aren't simply trying to get, "double credit for doing half of their homework," as one of the witnesses suggested. More clarity on how they are evaluated for the CRA and the modernizations under the FDIC and OCC proposal could allow them to do even more.

As we hear from our witnesses today, I would urge my colleagues to be cognizant of potential unintended consequences. Do we really want to restrict citizens' opportunities to weigh in on important regulations? Is it worth silencing groups of stakeholders and infringing upon their First Amendment rights, their rights to participate in the administrative process, just because you don't like the regulators who are writing the rules? Public feedback on important rulemakings is critical to ensuring regulators get it right.

And should Congress really be in the business of evaluating whether or not a particular comment is worthy of inclusion in the record, or whether it should be excluded just because we don't like the particular regulators at the administrative agency?

The idea behind the notice-and-comment rulemaking is that you invite the public to participate. You may not like all of the comments that are submitted. You may like some of the comments that are submitted. But the whole point is to have an inclusive process that allows for public input on the rulemaking process.

Thank you, Mr. Chairman. I look forward to today's hearing, and, if I could, I would like to ask unanimous consent in my remaining time to insert four items into the record: a response from Comptroller Otting to the Chairwoman's January 15, 2020, letter regarding the OCC's protocols regarding comments received during the rulemaking process; a response from Chair McWilliams to the Chairwoman's January 15, 2020, letter regarding the FDIC's protocols regarding comments during the rulemaking process; and two studies written by Dr. Balla on issues pertaining to astroturfing and the public comment period.

Chairman GREEN. Without objection, it is so ordered.

Mr. BARR. Thank you, Mr. Chairman.

And, finally, I ask unanimous consent to insert into the record the opening statement of the ranking member of the full Financial Services Committee, Mr. McHenry.

Chairman GREEN. Without objection, it is so ordered.

Mr. BARR. Thank you. I yield back.

Chairman GREEN. The gentleman yields back.

I welcome each of the witnesses, and I am pleased to introduce the panel.

We have with us today: Beth Simone Noveck, professor and director of GovLab, at the Tandon School of Engineering, at New York University; Seto Bagdoyan, director of Forensic Audits and Investigative Service at the U.S. Government Accountability Office; Paulina Gonzalez-Brito, executive director of the California Reinvestment Coalition; Bartlett Naylor, financial policy advocate at Public Citizen; and Dr. Steven Balla, associate professor at George Washington University.

Again, welcome, and thank you for being here today. The witnesses will be recognized for 5 minutes each to give an oral presentation of their testimony. And without objection, the witnesses' written statements will be made a part of the record. Once the witnesses finish their testimony, each member will have 5 minutes to ask questions. On your table, you will see three lights: green means go; yellow is the 1-minute marker, which means you are running out of time, and you should begin concluding your remarks; and red means you are out of time.

With that, Professor Noveck, you are now recognized for 5 minutes for your opening statement.

STATEMENT OF BETH SIMONE NOVECK, PROFESSOR AND DIRECTOR, GOVLAB, TANDON SCHOOL OF ENGINEERING, NEW YORK UNIVERSITY

Ms. NOVECK. Thank you, Chairman Green and Ranking Member Barr, for the opportunity to participate today.

To reiterate, my name is Beth Simone Noveck, and I am a professor at the Tandon School of Engineering at New York University, where I direct The Governance Lab (GovLab), which is a non-profit, nonpartisan research center focusing on the use of technology to improve governance and strengthen democracy. At The Governance Lab, we conduct original research that I include in the project that we have launched today, called Crowd Law for Congress, about how legislatures around the world are using new technology to enable public engagement in law, rule, and policymaking,

and to provide training on how we can adapt those models in this country.

I previously served as Deputy Chief Technology Officer in the Obama White House, and the Director of Open Government, but I was also senior advisor for open government to Prime Minister Cameron. However, I am appearing today in my personal capacity, based on over 20 years of designing, building, testing, and researching civic platforms for citizen engagement in democratic participation.

We are here today because thousands of Federal regulations are enacted every year that touch every aspect of our lives, and under the Administrative Procedure Act, the public has a right to participate. Participation in rulemaking helps us to ensure that Federal regulations are based on the best available evidence, not just evidence that supports a single position.

Obtaining information from a wider audience can make it possible to understand whether and how a regulation fulfills its legislative purpose. However, technology has created challenges for public participation. Regulations.gov has made commenting easier, but it has also inadvertently opened the floodgates, as we have heard, to fake comments, or what I like to call “notice-and-spam.” But it has also created the challenge of voluminous comments, comments that are then hard for agencies to read and parse. A key example is the 2017 FCC net neutrality rulemaking, which had 22 million comments. A second and related problem is that of duplicative comments; only 6 percent of the comments filed in that FCC rulemaking were actually unique.

But there are remedies to those challenges. Using artificial intelligence (AI), researchers have developed tools that can extract meaning and summarize large bodies of text, for instance, Google and Microsoft have already built systems that can summarize news as well as legislative bills. The recently debuted Indian news abrogation app called Inshorts automatically creates 60-word summaries of articles also using AI. CitizenLab’s software for citizen engagement categorizes and clusters the text submitted, grouping similar ideas together using an approach known as topic modeling.

To deal with the issue of de-duplication, Dr. Stuart Shulman created a tool called DiscoverText in 2007. Although funded by the National Science Foundation, that tool is not yet in widespread use in government. And, of course, to handle fake comments, as we will hear more about today, many people have called for using CAPTCHA and reCAPTCHA, which is designed to separate the bots from the humans, and the newest version of reCAPTCHA does not even require human intervention—no more typing of those squiggly words anymore.

In short, researchers have cracked problems far more challenging than making sense of rulemaking data, and what Congress needs to mandate the use of better data science tools to make it possible for Federal agencies to make effective use of public comments, it has to go beyond fixing the problem after the fact and reimagine how public participation should work.

In our research, we are tracking over 100 examples of what we call CrowdLaw, innovative uses of new technology that foster pub-

lic engagement to improve the quality of lawmaking. And let me conclude with three quick examples.

In 2018, the German government used a free annotation platform called Hypothes.is to sort expert feedback on the country's artificial intelligence policy, soliciting expertise from experts all around the world.

Committees in the U.K. Parliament create online what they call evidence checks and invite members of the public to evaluate the evidence upon which a policy is based.

And just recently, a few weeks ago in December 2019, the Brussels Regional Parliament introduced the use of citizen juries. Now, every standing committee comprises 15 parliamentarians and a random sample of 45 citizens who deliberate and formulate recommendations together.

Imagine if we could introduce these innovations here.

Although their current attention is focused on the problem of astroturfing and cherry picking, the current concern for regulators and overseers should not just be who signed the comment, but should be to take steps to foster new and valuable citizen engagement. Failure to redesign public participation for the digital age will only put us further behind the growing number of advanced nations that use new technology today to tap the collective intelligence and know-how of their citizens and to improve the effectiveness and the legitimacy of the rulemaking process.

Thank you very much, and I look forward to your questions.

[The prepared statement of Professor Noveck can be found on page 136 of the appendix.]

Chairman GREEN. Thank you very much, Professor.

At this time, the Chair will recognize Mr. Bagdoyan for 5 minutes for your opening statement, please.

STATEMENT OF SETO J. BAGDOYAN, DIRECTOR, FORENSIC AUDITS AND INVESTIGATIVE SERVICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO)

Mr. BAGDOYAN. Thank you, Mr. Chairman.

Chairman Green, Ranking Member Barr, and members of the subcommittee, I am pleased to appear before you today to discuss GAO's June 2019 report on posting practices regarding identity information and public comments during proposed Federal rulemaking. As part of our overall review, this is the first of several planned reports. Extensive data analytics work continues on the identity characteristics of all public comments submitted over a 5-year period to the 10 selected agencies we have reviewed. Additional reports will follow beginning later this year.

Federal agencies publish, on average, about 3,700 proposed rules yearly and are generally required to provide interested persons an opportunity to comment on these rules. In recent years, some high-profile rulemakings have received extremely large numbers of public comments. The professor mentioned the FCC net neutrality rule, which received 22 million comments, raising questions about how agencies manage the identity information associated with such comments.

The Administrative Procedure Act (APA) governs the manner in which many Federal agencies develop and issue regulations, which

includes the public comment process. While the APA does not require the disclosure of identifying information from a commenter, agencies may choose on their own accounts to collect this information.

Today, I will highlight our report's four principal takeaways regarding how the 10 selected agencies handle identity information and public comments during proposed rulemaking.

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

Second, 7 of the 10 selected agencies have some internal guidance associated with the identity of commenters, but the content and level of detail varies, reflecting differences among these agencies. The guidance most frequently relates to the comment intake or response to comment phases of the overall comment process. For example, among agencies of interest to the subcommittee, the CFPB and the SEC have guidance for intake, and the CFPB has such also for response.

Third, within the discretion afforded them by the APA, selected agencies' treatment of commenters' identity information varies, particularly when posting duplicate comments, those that are identical or near-identical comment text by varied identity information. Generally, agencies told us that they: one, post all comments within the comments system; or two, maintain some comments outside of the system, such as in email file archives. However, within these broad categories, posting practices vary considerably, even within the same agency or rulemaking docket, and identity information is inconsistently presented on public websites.

For instance, the SEC posts a single example of duplicate comments and indicates the total number of comments received, whereas the Center for Medicare and Medicaid Services (CMS) posts every duplicate comment individually with no indication of the total number of duplicates received.

Fourth, selected agencies do not clearly communicate their practices regarding how comments and identity information are posted. According to key practices for transparently reporting government data, Federal Government websites should disclose data sources and limitations to help public users make informed decisions about how to utilize the data.

In our June report, we made eight recommendations to eight different agencies in our review, including the SEC and the CFPB, to more clearly communicate to the public their policies for posting comments and associated identity information to [regulations.gov](https://www.regulations.gov) and agency-specific comment websites. The agencies generally agreed with these recommendations and described actions they plan to take to implement them.

Since then, the SEC has implemented its recommendation in September 2019, and the CFPB has reported planned actions to do so.

Chairman Green, this concludes my remarks. I look forward to the subcommittee's questions. Thank you.

[The prepared statement of Mr. Bagdoyan can be found on page 32 of the appendix.]

Chairman GREEN. Thank you for your testimony.

Ms. Gonzalez-Brito, you are now recognized for 5 minutes.

STATEMENT OF PAULINA GONZALEZ-BRITO, EXECUTIVE DIRECTOR, CALIFORNIA REINVESTMENT COALITION (CRC)

Ms. GONZALEZ-BRITO. Thank you, Chairman Green, and Ranking Member Barr, for the opportunity to testify today, and I thank the subcommittee for holding this important hearing. Good afternoon.

The California Reinvestment Coalition is the largest Statewide reinvestment coalition in the country. [Speaking foreign language.] Because immigrants require it every day and contribute to building our nation.

The Community Reinvestment Act (CRA) is, as Congressman Meeks described it, at its core, a civil rights law. The law is meant to address discrimination in lending based on race, known as redlining, by ensuring that banks meet the credit needs of all communities, especially low-income communities and communities of color. The significance of the public participation process articulated in the law cannot be overstated.

Through public participation, communities help ensure banks meet their obligation under the law. In the OneWest-CIT mega merger of 2014, CRC, our members in southern California, and local community members engaged in the CRA's public process with the hope that, through our engagement, we could ensure that the soon too-big-to-fail bank would fulfill its CRA obligations.

As community opposition to the merger grew, Comptroller of the Currency Joseph Otting, then-CEO of OneWest Bank, took the unusual step of soliciting support for the merger from his Wall Street contacts and business partners, where there is a clear conflict of interest, by asking them to submit a form letter posted on the bank's website to the bank's regulators.

We were later contacted by an individual, who also sent a complaint to OneWest regulators, who was upset that an unauthorized email was submitted using his name and address in support of a bank merger he seemingly had never heard about before. The comment letter submitted in the person's name appears identical to the form letter on the OneWest website that Mr. Otting had sent to his Wall Street friends.

The complaint confirmed our worst fears. Our research of the letters of support that were submitted in favor of the OneWest Bank merger uncovered a number of anomalies. Of 593 petitions in support of the OneWest merger, nearly 100 percent have Yahoo email accounts. This oddity heightened our concerns, given Yahoo's relatively small share of the email market.

In addition, if the timestamps on the email are accurate, there was an extremely large number of petitions sent to the OCC and the Federal Reserve around 2 a.m. on Valentine's Day. In a review of 25 of those petitions, nearly half could not be verified by the United States Postal Service as legitimate addresses.

Further research found approximately one-third of emails sent to the addresses of these supporters of the merger bounced back. How many of these so-called supporters of the merger were not supporters at all, or were not even real people, for that matter? We do not know.

Mr. Otting led OneWest Bank during this merger, and serious questions remain about the integrity of the public comment process during its merger with CIT. Despite our calls for an investigation, there never was one. But we do know who benefited from this fake support: OneWest Bank did.

The OneWest-CIT mega merger was ultimately approved by the bank's regulators, who cited all the letters of support in their approval order. Now, Mr. Otting is Comptroller of the Currency and charged with the oversight of the public comment process during the CRA proposed rulemaking, and we have several concerns.

First, we fear that two core principles of CRA, community input and public participation, are in jeopardy under Joseph Otting's OCC. Astroturfing and fabricated comment campaigns breed distrust in the system and make it less likely or may make it less likely that the public would comment in the future. As a result, regulators may have less access to information from impacted communities about what is happening on the ground, far from regulators' offices. Regulators would then be left with the one-sided picture provided by financial institutions.

We are particularly concerned, first, that the OCC approach, the public comment process, as it currently seeks comment on the proposed rule, would, if finalized, significantly harm communities and threaten a return to redlining practices. And second, the Comptroller's public statements demonstrate hostility to anyone with whom he disagrees. His quote in The Wall Street Journal demonstrated this hostility. He was quoted as saying, "If you don't like this, you are either economically advantaged by the current structure, or you don't understand it."

We call on the OCC to focus on ensuring a fair process that prevents astroturf campaigns from unfairly manipulating the result of its current CRA rulemaking process rather than maligning opponents of its proposal.

Lastly, we continue to call for a full accounting and investigation into the fabricated comments and astroturf campaign during the 2014 OneWest-CIT merger. Until we know who is responsible for the fabricated comments supporting the bank that Comptroller Joseph Otting led, and what, if anything, was done about it, we cannot—and the OCC should not be permitted to proceed with finalizing a regulation that would curtail the impacts of the CRA.

Thank you very much.

[The prepared statement of Ms. Gonzalez-Brito can be found on page 53 of the appendix.]

Chairman GREEN. Thank you for your testimony.

Mr. Naylor, you are now recognized for 5 minutes.

**STATEMENT OF BARTLETT COLLINS NAYLOR, FINANCIAL
POLICY ADVOCATE, PUBLIC CITIZEN**

Mr. NAYLOR. Chairman Green, Ranking Member Barr, members of the subcommittee, Public Citizens' 500,000 members and sup-

porters are self-selected Americans who practice and engage in democracy on a daily basis. We are the members who figure prominently in the phone calls to your offices to vote for bills that come before this committee or on the House Floor. When some of those bills become law, we are the members who participate vigorously in the comment process to help the regulators implement those.

Public Citizen members are public citizens. We are especially encouraging of engaging in this committee because the financial crash demonstrated how much damage can be done by flawed financial policy. The positions that our members espouse, we think, are widely accepted across the political spectrum: safe banking; the ability of investors to exercise property rights; and the concept that racist lending has no place in America.

And so, when we see a rulemaking docket filled with comments purportedly from the grassroots that celebrate a redlining bank or that argue about reducing property rights for shareholders, we are suspicious, and when we scratch the surface of these grassroots, what we often find is plastic, is astroturf.

Case in point: Shareholders have the ability to bring resolutions before a company's annual meeting. One of the popular ones is calling on companies to disclose their political spending. Sometimes these resolutions are adopted.

Corporations don't like this. They haven't liked this for a long time, and they have mounted an effort to get shareholder resolutions, and Chair Clayton of the Securities and Exchange Commission answered that appeal a couple of months ago with a proposal to do just that, but he did not say that he was responding to corporate interests; no. He said that he was responding to Main Street investors, to a military veteran, to a police officer, to a retired teacher, to a retired couple who had written in.

Bloomberg News surveyed these seven supposedly randomly selected letters and found them to be fake. They were from relatives of the corporate lobbyists: the uncle; the brother; the in-laws.

When Chair Clayton testified before the Senate Banking Committee, Senator Van Hollen said that he had been duped. We think that may be charitable.

Second case: My colleague, Ms. Gonzalez-Brito, has documented the massive fabrication of astroturf comments coming out of the OneWest-CIT merger, but why? Why would one engage in such fabrication? One possibility is buried into the merger document that said that CEO Otting was going to be paid \$24 million if this merger went through. It was in the form of an employment contract that said, "If you last 3 years, you get this much every year, but if you are terminated, then you get the full \$24 million," and he was, in fact, terminated a few months into the merger document.

What can be done? What should this committee do?

First and foremost, as Public Citizen members are frequent commenters, what we would like is the glide slope from opinion to the landing path into that regulatory agency to be smooth. We do not want impediments. That said, we don't want competition with fabricated comments. Federal law already provides, under 18 U.S.C. §1001, that it is a Federal crime to misrepresent, to lie, to make fabrications to the government. Unfortunately, to our knowledge,

the number of cases that have been brought under that Federal code is zero. We think, without penalties, there is no deterrence.

In the case of Chair Clayton, we have already asked the Inspector General to look into why it is that he would be informed by seven fake letters. He did not reference the Public Citizen letter, the AFL-CIO letter, the CalPERS letter, the Colorado Pension Fund letter, or the Texas Pension Fund letter. He just happened to have those seven random letters. We hope, and we have reason to believe that the Inspector General will be looking into that.

In conclusion, Mr. Chairman, we think that the public comment process is important, and we look forward to working with you to make sure that the likes of Public Citizen are able to continue to exercise our democracy rights.

Thank you.

[The prepared statement of Mr. Naylor can be found on page 125 of the appendix.

Chairman GREEN. Thank you for your testimony.

Professor Balla, you are now recognized for 5 minutes.

**STATEMENT OF STEVEN BALLA, ASSOCIATE PROFESSOR,
GEORGE WASHINGTON UNIVERSITY**

Mr. BALLA. Thank you.

My name is Steve Balla. I am an associate professor of political science, public policy, public administration, and international affairs at George Washington University.

For the past several years, along with several colleagues at GW, I have been conducting research on mass-comment campaigns in agency rulemaking. By mass-comment campaigns, we mean collections of identical and near-duplicate comments that are sponsored by organizations and submitted by group members and supporters.

We asked three questions about mass-comment campaigns: Who sponsors them; what do they say; and how do agencies handle them?

Now, we focus so far in our research on the Environmental Protection Agency (EPA), and the EPA is a good agency to start with in that it is systematic and transparent in the way in which it catalogs and reports mass-comment campaigns on regulations.gov. So, when the EPA identifies a mass-comment campaign, it creates a record on the website. This record includes the identity of the sponsoring organization, if that is known. It also includes a statement of the number of comments that are submitted as part of the campaign, and it includes a single illustrative example of the campaign's comments, usually through a PDF or a Word attachment. Our analysis is based on more than 1,000 mass-comment campaigns that occurred during EPA rulemakings over a recent 5-year period.

So, who sponsors mass-comment campaigns? Well, there is a diverse mix of sponsoring organizations. Mass-comment campaigns are regularly sponsored by environmental advocacy groups, labor unions, and progressive organizations. Collectively, these kinds of organizations account for about 75 percent of the mass-comment campaigns in our analysis. The remaining 25 percent are mass-comment campaigns sponsored by regulated entities. In the case of

the EPA, these would be the agriculture industry and the energy sector, most commonly.

What do mass-comment campaigns say? Again, there is some diversity in the phenomenon. Some mass-comment campaigns are as short as a few words. They articulate a directional stance in favor of or in opposition to the proposed rule, and they say nothing else. There are other mass-comment campaigns, however, that incorporate arguments, reasoning, and data analysis.

Now, on balance, mass-comment campaigns shade toward short statements of directional opinion; that is, those types of mass-comment campaigns are more common than ones that bring extensive reasoning and extensive data to bear.

How does the agency handle mass-comment campaigns? Well, in response to comment documents, we find that mass-comment campaigns often get mentioned a single time, and the agency provides a brief response. By contrast, these standalone comments that we historically associate with the notice-and-comment process that might be submitted by organizations or individuals—not duplicates, not near-identical comments, but standalone comments—typically get mentioned repeatedly in response to comment documents.

Why would that be the case? It is because the agency is exhibiting a practice of responding separately to each argument, each piece of evidence that is presented in the comment. And so, with more argument, with more evidence comes more extensive—i.e., more repeat attention—on the part of the agency in the response-to-comment document.

In my view, these findings demonstrate that the agency is able to identify mass-comment campaigns, it is able to catalog them systematically and transparently, and it is able to respond to them in a manner that is commensurate with their substantive content. Contrary to hopes that have been articulated about mass-comment campaigns, particularly early on in the era of electronic rulemaking, I don't see mass-comment campaigns as having had a democratizing effect on the rulemaking process. That was one hope 20 years ago.

I also don't see—and this, again, is contrary to fears that have been expressed about mass-comment campaigns—they burying the EPA under an unmanageable avalanche of useful information. It is my argument that, for the most part, rather than mass-comment campaigns bringing fundamental change, whether good or bad, to the rulemaking process, what has happened instead is that the agency has adopted approaches that allow it to readily incorporate mass-comment campaigns into its existing rulemaking practices.

Thank you.

[The prepared statement of Professor Balla can be found on page 50 of the appendix.]

Chairman GREEN. Thank you.

The Chair will now recognize the gentleman from Colorado, Mr. Perlmutter, for 5 minutes.

Mr. PERLMUTTER. Thank you for your testimony today, and, Dr. Balla, I think you could probably ask anybody up here on this dais about mass communications and mass-comment campaigns, because we all get that, and this is part of the process, and you say,

okay, I got a thousand comments on right to work, and I got 77 comments on healthy forests. They are all identical. You just deal with it. So we understand that, and your next study should be on what we get as Members of Congress.

But I think the thing that I am concerned about is, from the beginning of this country with Publius and Brutus and the Federalist papers and the anti-Federalist papers, we knew they were anonymous and they wanted to speak about policy and approach to how our nation should be founded. So I am not afraid of anonymity, and I am not afraid of mass comments.

What I am afraid of is liars and cheats and phony information that you get because then you are misled. Then, it does undercut the trust, and, if it is a bunch of bots sending stuff out that is slightly different and requires specific answers, I want to know they are bots.

Ms. Novacek, in your testimony and sort of the research that you have done, can you explain how we might ferret out or how you would want to see us deal with sort of the bots and sort of the phyness that may come as part of an email approach, or it may be just case by case, I don't know? How would you go about this?

Ms. NOVECK. Thank you for the question.

I think you are asking very much the right question, that what we need to be asking as a corollary to the issue of, what do we do about the fake comments, the related or flip side of that is the question of, how do we extract the valuable meaning from this corpus of information that we have? We have a large quantity, maybe mass commenting, as Professor Balla has mentioned, maybe duplicative comments, maybe a large volume of individual comments.

The thing that we need to care about, first and foremost, is this issue of, how do we make it easy for agencies and the committees that oversee them to extract the valuable meaning and to do what was the intent of the Administrative Procedure Act when it called for commenting in the rulemaking process?

What I would do is I would ensure that every agency is using readily-available machine-learning tools, first to de-duplicate the comments, and the software has existed for that, funded incidentally by the Federal Government, for more than 15 years. It would allow us to first say: Let's remove all the duplicates.

Second is then the issue, because, as you know from your own work, you can have nonduplicative comments, but it is still too much for your staff to read, and they have other things to do during the day, is some of these new tools for summarization are really crucial. And they are great summarization tools, not simply from the Googles and the Microsofts and the sort of high-end tech, but they are stuff—specifically, civic technologies in the citizen engagement space, and I can name you a number of free and open-source or relatively cheap tools that exist to do precisely the job that are in use in various places to do the job of summarizing citizen comments. I mention a few of them in my testimony and show some pictures to make it clear how they do the work of helping regulators extract the meaning from this volume of information.

And then, in addition, I would say we have to create additional complementary fora for the reason that we want to make sure that we are hearing from diverse participants, and I mean diversity in

every way. Cynthia Farina at Cornell Law School has written extensively about the lack of diversity in participation. We hear lots from businesses but not necessarily from individuals. We hear from people who are white and wealthy and educated, but not necessarily people who don't meet those criteria, and that is true for all kinds of civic participation, and people want to participate more. So research that has been done by Pugh and other groups, every survey that you look at says people would like to engage and would like to have opportunities.

So, I would like to see us do more to actually create fora beyond the fill-in-the box that is available on regulations.gov to push out rules, to push out the opportunities to comment in the way that, again, other legislatures and agencies in other parts of the world and in our own backyard are beginning to innovate with using tech to create multiple opportunities for citizens to comment, and that can include expert citizens who are diverse and have life experience in general.

Let me pause to let you interject there.

Mr. PERLMUTTER. Well, I have 3 seconds, 2 seconds, 1 second. I yield back to the—

Chairman GREEN. The gentleman's time—

Mr. PERLMUTTER. —Chair, but thank you very much for your answer.

Chairman GREEN. The gentleman's time has expired.

The gentleman from Kentucky, Mr. Barr, is recognized for 5 minutes.

Mr. BARR. Thank you, Mr. Chairman. Thanks for holding this hearing, and thank you to our witnesses. I was very interested in the witnesses' ideas, and I appreciate your insights into this.

Let me start with Mr. Bagdoyan. Thank you for the GAO's work in this area.

I was interested in your report about how different agencies are taking different approaches with this, and it does appear from your report that many of these agencies are taking your recommendations and responding to adopt policies and communicate those policies on how they intake comments.

Do you believe that the APA itself should be amended to standardize this process more as opposed to just responding to GAO admonishment, or maybe, in reference to Dr. Balla's commentary, different agencies may have different approaches, is that the right approach? Which is the right approach: Uniformity, or allowing different agencies to approach this in different ways based on their own circumstances?

Mr. BAGDOYAN. That is a great question, Mr. Barr.

I probably won't be in a position to give you an exact answer right now. I would point out that the APA does allow comments to come in, in any shape or form. The agencies have discretion to treat those comments as they best see fit, which is, I think, what our report on policy and practice shows.

I will note, though, that we have ongoing data analytics work. It is in two parts, if I may explain it briefly for you.

The first is a survey of actual commenters to see whether they actually sent those comments in. So that will be one significant data point for us to analyze. And then, we also have ongoing work

where we are analyzing tens of millions of comments that were submitted to various agencies during the 5-year period covered by our work, and, based on those results, when we combine those results and see what, if anything, we can make of those results, then that would generate our policy and process procedure and perhaps technology mix of solutions, but I just can't comment on that right now.

Mr. BARR. Let me associate myself with the comments of my friend from Colorado about the—I agree with him. The concern is false, as opposed to mass or anonymous comments. I agree with my friend from Colorado on that.

Dr. Balla, however, I do want to ask you this: Should regulators generally err on the side of openness and inclusivity when soliciting feedback from interested citizens, given your research into the EPA, for example, being able to handle these mass communications in a fairly orderly way?

Mr. BALLA. As a researcher, I am going to argue against my self-interest, because as a researcher, I love uniformity, because uniformity allows me to access more information, more readily, and so that is the way that I can do a bigger scale study that would help broaden our general understanding of this phenomenon. But my argument is that agencies vary in the scope of their regulatory activity, and so a one-size-fits-all solution, I think, is quite scary, and I would argue strongly against it. So I would argue for a light touch on any kind of restrictions that would increase the friction, if you will, for submitting public comments.

Mr. BARR. Right. So, erring on the side of openness and inclusivity as opposed to exclusion helps?

Mr. BALLA. Absolutely, because agencies vary in their capacity.

Mr. BARR. Ms. Noveck had some interesting ideas about artificial intelligence, and I think she said summarization tools. Is there any risk of injecting bias into the process of screening out comments, however?

Mr. BALLA. Again, just to echo what Professor Noveck said, technology-wise, the solution has existed for a long time. Agencies can set duplicate thresholds at varying levels, and so they can separate out the duplicate content in a body of comments from those pieces that are unique contributions. So that technology exists, and agencies ought to be encouraged to use that to the extent that they don't yet.

Mr. BARR. I have many more questions, but my time has expired.

Chairman GREEN. The gentleman's time has expired.

The gentlelady from Texas, Ms. Garcia, is recognized for 5 minutes.

Ms. GARCIA OF TEXAS. Thank you, Mr. Chairman, and thank you for bringing this topic to the table.

It completely baffles me that people go to this end to corrupt the comment period, and I especially don't like it, if it refers to our Astros in any way, but I understand Senator Bentsen's point, because there is a big difference between astroturf and grassroots.

But I want to start with you, Ms. Gonzalez-Brito. I was really intrigued with the work that you have done, and I know that you mention in your written comments that you have called for an investigation.

Tell us what has happened or what we can do to help?

Ms. GONZALEZ-BRITO. Thank you for your question.

I do want to mention that these complaints were made by an individual who had no idea that these comments were made, that the opposition to the merger was made without his consent.

Ms. GARCIA OF TEXAS. Right, you cited four examples—

Ms. GONZALEZ-BRITO. Right. There were four examples. The OCC was made aware of these prior to the approval order, and it is not clear that the OCC did anything at the time except to ask the bank to respond to these complaints by these individuals.

We would like to know what the OCC did, if anything, if the bank did respond. It is not clear whether they did anything beyond that. And they definitely did not, in their approval order, cite that there were fraudulent comments. So, that is concerning.

We would like the Inspector General to begin an investigation and see if the OCC has put anything in place so that we are not just dealing with volume of comments, but that we are dealing with any fake comments that may come in as the CRA proposed rule is being looked at now, and as comments are coming in to that CRA proposed rule. So we ask that Congress ensure that the OCC is set up not just for volume of comments, but any fake comments that may come in as to this proposed rule.

Ms. GARCIA OF TEXAS. Thank you, and we will work with the Chair to see if we can help in that area.

Ms. GONZALEZ-BRITO. Thank you.

Ms. GARCIA OF TEXAS. And my second question is for Mr. Bagdoyan. And I just need to clarify. You all had been using the word, “duplicates.” So are you referring to duplicates in the sense of the same person sending to or duplicates in the massive emails, or both?

Mr. BAGDOYAN. Yes, that is a great question, Ms. Garcia, and what we are referring to is comments that are identical, every word—

Ms. GARCIA OF TEXAS. So the mass—

Mr. BAGDOYAN. The structure of the comments—

Ms. GARCIA OF TEXAS. —copy-and-paste kind of comment?

Mr. BAGDOYAN. Correct. Near duplicates are essentially the same comment with some variation in the wording or the sentence structure.

Ms. GARCIA OF TEXAS. Right. And do most agencies limit comments to one person, that you would not get the same person sending a duplicate?

Mr. BAGDOYAN. I think it is an open process, and comments are accepted at face value as they come in. I don’t think there is any kind of a screening out—

Ms. GARCIA OF TEXAS. What about the anonymous ones? Those are, in my mind, a little problematic.

Mr. BAGDOYAN. Sure.

Ms. GARCIA OF TEXAS. How many anonymous comments do we really get, and is there any reason that we might want to figure out a way to make sure that people identify themselves?

Mr. BAGDOYAN. The APA allows the submission certainly of anonymous comments, and agencies, in the spirit of the law, do allow those to come in. They don’t really analyze them in any spe-

cific way, but, as I mentioned in my response to Mr. Barr earlier, we are in the process of analyzing a vast trove of comments that were submitted over a 5-year period. I would say it is in the tens of millions, and we will have, hopefully, when our work is completed, better insight in terms of the identity characteristics of each and every one of these comments, and, if we are able to roll up those numbers, we will have a better sense of how many are anonymous and what other things are associated with those comments.

Ms. GARCIA OF TEXAS. Right.

My last question is for Mr. Naylor. You were talking about recommendations in policy changes. You told us one, and I just felt like you were going to say more. My question to you is, is there anything specifically that you think is the single-most important thing that we do, and then, also, has there been an increase in these fake comments within the last year or the last 2 years?

Mr. NAYLOR. Thank you, Congresswoman.

We have not tracked the incidence of fake comments, but, as you know, you have an urgent problem right now. Comptroller Otting is planning to gut the Community Reinvestment Act. Chair Clayton is planning to gut shareholder resolutions, and both of these are being based, in part, on astroturfing. So, if this committee can communicate in any way that that should not stand, then I invite you to do so.

Ms. GARCIA OF TEXAS. Okay.

Chairman GREEN. The gentlelady's time has expired.

Ms. GARCIA OF TEXAS. Thank you. I yield back. Thank you, Mr. Chairman.

Chairman GREEN. The gentleman from Florida, Mr. Posey, is recognized for 5 minutes.

Mr. POSEY. Thank you very much, Mr. Chairman, and Mr. Ranking Member, for holding this hearing on the Administrative Procedure Act in general and astroturfing more specifically.

The creation of false impressions of widespread spontaneously arising grassroots movements is a poor raw position to something that is, in fact, a real problem, as you all have expressed, and I am glad there are more people aware of it.

Number one, most people believe that their elected representatives make all the laws, which is a grossly inaccurate understanding of how this place and many State Governments work. They are unaware that, in most cases, most laws are made by unelected people, unrecallable people, unaccountable people, and they do it without having the statutory authority that they are supposed to have, and they have been able to get away with doing that for decades.

I have read in multiple sources that the odds of someone being hauled into Federal court for a violation of the law are 1,000–1 in favor of it being a law—i.e., administrative rule enforceable as a law—that an unelected, unaccountable bureaucrat wrote, not one that lawmakers actually passed. It is, I think, the biggest problem with the operation of our government.

If a Federal employee is caught stealing cash, hopefully, they are prosecuted. If a Federal employee is caught stealing equipment, whether it be a copy machine or a backhoe, hopefully, they are prosecuted. But Federal employees routinely steal the resources of

hard-working Americans, American businesses, and American households with absolutely no consequence whatsoever, and that is why we need to have some authority. And the astroturfers are partners in that crime, I believe.

Every Member of Congress gets a copy every day of the Federal Register, which is mostly administrative rules, proposed changes to rules, Executive Orders, and they range from that thick, to five a day this thick, and I don't know a single Member of the House or the Senate who reads them because we can't do anything about them. We have abdicated total control to the unelected, unaccountable bureaucrats, and the only way we can change any rule that they make is to pass a bill in opposition to it, and you all know how simple that is to do up here, right?

Dr. Balla mentioned the EPA. The EPA has outlawed the use of glider kits based on flawed information, criminal information that has been deemed false. They won't change their rule. You mentioned it. That is just one of many.

The FDA. How well-intended can you be, but you want to put all of the premium cigar manufacturers out of business so that children don't smoke premium cigars. I guarantee you there is not a child in the United States of America who has ever smoked a premium cigar. They don't have the statutory authority to do that. They have been confronted with it, and, instead of admitting they are wrong, what do they do? They give the industry the finger and say, we are going forward anyway.

Even the CDC seems to have engaged trolls and astroturfers when they want issues put forward.

The last time Congress addressed the Administrative Procedure Act to change it, to try and make it right, they basically said, "You have to do a cost-benefit analysis on any rule that causes over a \$100 million impact." So, if you just impact every family in the United States by a total of \$99 million, et cetera, you don't have to do anything, and of course a lot of the agencies don't comply with that requirement.

So, it took 8 years to fix this problem in one State, and we haven't even started to kick it off here. Maybe this hearing will serve as the kickoff, Mr. Chairman, and, if it is, I applaud you for that.

And I'm almost running out of time here. I wish I could tell you about how we fixed it in Florida. It is a riveting story.

But, Dr. Bagdoyan, are you aware of any rulemaking processes that have gone into litigation based on alleged astroturfing?

Mr. BAGDOYAN. I am not, but we can certainly look into it and get back to you, sir.

Mr. POSEY. Okay. Dr. Balla?

Mr. BALLA. I am not aware of any either.

Mr. POSEY. Is anyone aware of any?

Okay. It seems likely that mass-comment campaigns will be seized on by a rulemaker when they support a position that the rulemaker has already embraced and otherwise ignored.

Have any of you seen instances of that before?

Ms. Noveck, you are smiling. I think we all have if we are honest about it, but Ms. Noveck?

Ms. NOVECK. It is not a phenomenon of new technology. We always like the evidence that supports our point of view.

Mr. POSEY. Okay.

Mr. Chairman, I see I am out of time, so I yield back. Thank you.

Chairman GREEN. The gentleman's time has expired.

The gentleman from Ohio, Mr. Davidson, is recognized for 5 minutes.

Mr. DAVIDSON. Thank you, Mr. Chairman. I thank the committee and our guests for an important hearing highlighting the tension between the way we make our laws, the way we regulate the country in the absence of laws, and, frankly, the impact on the American people.

It has been highlighted by my colleague, Mr. Perlmutter, really going back to the origins of the country and the ability to make private comments. Sometimes, today, that is under the biggest attack. I would say, in this committee, in Financial Services, the ability to have some modicum of privacy with your financial life is heavily diminished.

For example, when I hear people say, "Oh, we should know the identity of everyone who comments," are we really proposing something along the lines of the Bank Secrecy Act, where you have know-your-customer provisions for every comment that comes in? And should every congressional office only do that if they are constituents? And clearly, constituents are only citizens; so we should discount the noncitizens, right?

So, when you look at how you go down the way this goes is, as has been highlighted, we all receive comments from many forums, where people duplicate them. They are individuals. They are organizations across the political spectrum. I seem to get a lot from some group called the Resistance Movement—resist, resist bots. Any number of resist, #resisting show up in my comments.

And I can't imagine there is any incentive for this group or group of people, individuals, to dump these comments on as we are reviewing legislation, but of course it happens, and the same thing happens through our regulatory state, and, as Mr. Posey highlighted, it can be really high stakes.

We have regulators in position, and I really think that the remedy has to be that we have to reclaim the Article I powers of this body and, frankly, we need to have a government that is only big enough to fit inside the Constitution, and Congress does the things that are enumerated, and we reserve to the States the things that aren't enumerated because there is more local control on those things. And I will say there is a clear consensus that the Federal Government and Congress should do some things that aren't enumerated.

For example, healthcare. Not an enumerated power. Broad consensus, we should have some sort of Federal role there. We could amend the Constitution to make it clear exactly what is the expectation. Those are high bars, and, in the absence of our action here in Congress, we have simply said, well, this would be really important, like the EPA. We want clean air and clean water; you all figure it out.

And when they do it, as we saw, Dr. Balla, you highlighted, particularly with the waters of the USA action, a regulatory agency

using something called Thunderclap to spoof comments, totally fake comments, the epitome of astroturfing, by a regulatory agency to support what they wanted to do anyway, causing great harm to industry, to farmers especially, whose comments were disregarded, not taken into consideration. And thankfully, in that case, the system worked as it should, Congress reclaimed its authority, we moved it through the House and the Senate, and the President signed it, and we revoked it. And in the interim, the courts worked as they should and said: This exceeds your constitutional authority; it is outside the bounds.

So, Dr. Balla, could you highlight, given the background that you do there, with the EPA, kind of the tension that exists and what worked well, and what do we still need to address?

Mr. BALLA. Sure. The one question to ask is, do comments matter? And I want to separate that question into two parts. Does the forum or the venue through which the comment comes in matter, mass-comment campaigns versus stand-alone, and separate that from the identity of the commenter? And what we find is that actually there is quite an overlap in the EPA's context in terms of who does mass commenting versus stand-alone comments.

So, it is hard for us to separate out: Is it the mass-comment campaign; is it the venue itself, the vehicle of delivery that matters, or is it what is actually said? According to the Administrative Procedure Act, it is substance that matters, not the identity of the commenter.

And so, to bring this back to the issue of anonymous comments, one thing you might be concerned about is, agencies can be quite powerful, as we have heard, they have a lot of authority, and there are stakeholders who might be in a vulnerable position if their identity, when they criticize an agency, is revealed. And I think we might want to tread carefully about limiting anonymity in public commenting.

Chairman GREEN. The gentleman's time has expired.

The gentleman from Tennessee, Mr. Rose, is now recognized for 5 minutes.

Mr. ROSE. Thank you, Chairman Green and Ranking Member Barr, for holding this hearing today, and thank you to the panelists for being here. I wonder, Dr. Balla, if you might continue where you left off?

Mr. BALLA. Sure. Agencies are—what are their responsibilities? It is to address the substance, the relevant matter in their comment, in their corpuses of comments that they receive. They are not instructed by the Administrative Procedure Act to pay attention to identity. They are instructed to pay attention to relevant matter.

And so, again, do comments matter? In my experience, if we think about the administrative rulemaking process, it is a legal administrative process governed by the EPA, but that, of course, occurs in the context of a larger political system.

What does that mean for us? Do we have evidence that mass-comment campaigns affect the outcomes of rulemakings? I don't think we can say that because, in the period between a notice of proposed rulemaking and a final rule, a lot of inputs happen into the system. There are public comments. There are ex parte commu-

nications. There might be advisory committee meetings. There are all kinds of inputs that can happen in the rulemaking process.

But what I think we can say is that mass-comment campaigns have been justified, have been used by both political parties amid both Administrations of both political parties to justify actions that they already would like to have taken. And so, in the context of the Waters of the United States rulemaking, Administrator McCarthy came to Capitol Hill and said, "We have heard over one million comments; 87.1 percent of them are in favor of this rule."

The rule was finalized shortly thereafter, in line with those comments.

Was it those mass-comment campaigns that were mainly submitted by environmental advocacy groups like the Sierra Club, and the NRDC? Was it those mass-comment campaigns that led the agency to that end point? I am quite skeptical that that was the case. I would argue that was the approach that the agency was already planning to take in the rule and the mass-comment campaigns provided no legal or administrative justification for taking that action, but they provided sort of a larger political justification. Thank you.

Mr. ROSE. Beyond the case that we have been discussing of the Obama-era EPA and the Waters of the United States rulemaking, is there pervasive evidence of agency-generated astroturfing?

Mr. BALLA. I am only aware of that one particular case, that one particular thunder-clap instance, but that doesn't mean there aren't others. I just don't know.

Mr. ROSE. And I direct this question to you and also Mr. Bagdoyan. Are there any laws or regulations specifically addressing agency staff encouraging or generating comments?

Mr. BAGDOYAN. I am not aware of any, but again, I would be happy to look into that and get back to your staff on it.

Mr. ROSE. I would appreciate that. Are there any procedures that either of you are aware of in place to monitor or detect agency personnel generating comments or encouraging comments beyond the normal opening of the comments for public comment?

Mr. BALLA. I am not aware of any.

Mr. BAGDOYAN. I am not either, but that doesn't mean they don't exist. I will add that to my to-do list.

Mr. ROSE. Thank you.

And, Dr. Balla, I am also wondering, is there any analysis that you have done or research that you are aware of, on selection bias by agency personnel as they prioritize comments? Has that question ever been looked at?

Mr. BALLA. What do you mean by, "selection bias?"

Mr. ROSE. Well, pulling out or providing preference to the comments that supported the position that they perhaps already had.

Mr. BALLA. That certainly happens in the public sphere, right? Again, if we come back to the Waters of the United States rulemaking, that is, in fact, what was going on in that case, for sure.

Mr. ROSE. And I am wondering, I know one of the panelists talked about diverse comments or encouraging diversity among those commenting, but I am curious if that doesn't—I guess I would fear that that would become just a vehicle for soliciting the comments that you want to hear when they are absent from the

voluntary comment process. Dr. Balla, have you seen anything that you can point to for us there?

Mr. BALLA. What I would encourage agencies to do is, if they feel that they don't have the information they need to move a rule-making forward, use advance notices of proposed rulemaking where you ask general questions and direct stakeholders and affected parties towards issues that you think you need help, where you have information gaps. So, I don't think it is a bad thing for agencies to direct commenters in particular areas where they have gaps in their understanding.

Mr. ROSE. Thank you, Mr. Chairman.

I yield back.

Chairman GREEN. The gentleman's time has expired.

The gentlewoman from California, Ms. Porter, is recognized for 5 minutes.

Ms. PORTER. Thank you so much. I appreciate the opportunity to join this subcommittee today.

Mr. Naylor, in December, a few months ago, the nonprofit you work for wrote a letter to the SEC asking the Commission to investigate some suspicious letters submitted during the public comment period on a new rule that the SEC had issued, and that rule would shrink shareholders' rights to hold corporate interests accountable. And your letter raised concern specifically about the actions—the comments of SEC Chair Clayton. And he had directly quoted some of these public comments to make the case for the SEC's proposed rule. Who did the Chair say had submitted the letters, the comments that he cited in support?

Mr. NAYLOR. It was a Frank Capra moment, in fact, when the Chair discussed these. He made reference to a Marine veteran and a retired teacher and so forth, and it was with some ceremony and reverence that he explained that these were Main Street investors that he had surveyed.

Ms. PORTER. Okay. So, he cited 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. Bloomberg News investigated and discovered that those letters were, in fact, submitted by a trade group, and the Bloomberg article is entitled, "SEC Chairman Cites Fishy Letters in Support of Policy Change." We believe these letters, these comments were actually forged, and your letter goes on at length about forced arbitration clauses, how damaging these arbitration clauses are. Explain to the committee how forced arbitration clauses relate on that shareholder proposal? What was at stake here for the American public in making this—why is it important to get this right?

Mr. NAYLOR. There are only a few lines of accountability for corporations. There are the laws that you pass. There is litigation to support these laws. There are whistleblowers that we saw play out during the impeachment. And there is shareholder activism, which is when shareholders decide that they are going to make companies accountable. We saw this play out, for better or for worse, with Enron, with Wells Fargo, and with others.

In forced arbitration—ironically enough, a former Harvard professor, Hal Scott, believes that a certain company, in this case Intuit, should bind their shareholders to forced arbitration if they be-

lieve the company is misrepresenting its financial figures. And that is the kind of thing that a shareholder activist can do. Happily, shareholders rejected that, I think, 98 to 2. So, that is where the two kind of converge.

Ms. PORTER. Can you tell the committee what astroturfing refers to? It is the title of today's hearing.

Mr. NAYLOR. In our opinion, astroturfing is just fake grassroots. It is the appearance of grassroots commentary on something which, in fact, is the fiction generated by the very corporate interests that the likes of us are trying to control.

Ms. PORTER. And in your opinion, would you consider Chair Clayton's reference to these fake comments of an Army veteran, a Marine veteran, a single mom, and a couple of retirees, would you consider that an instance of astroturfing?

Mr. NAYLOR. Or if not, beyond astroturfing, he represents that he did a random sample across America and just happened to put his hand into the jar of comments and selected these. There were hundreds, if not thousands of comments from the likes of us, all arguing for stronger shareholder rights. These were essentially the only ones that argued against that. I would say that is a misrepresentation. I think that is something that falls under 18 USC §1001, that says, you are not supposed to tell untruths to the United States Government or else there are consequences.

Ms. PORTER. So, in your opinion, we could use that statute to—

Mr. NAYLOR. You should explore that statute.

Ms. PORTER. —pursue the trade groups, the lobbyists who are behind these fake, forged comments because the comments, what the investigation suggests is that these comments were not private individuals pretending to be other private individuals. They were actually lobbyists and corporate lobbying entities and trade associations submitting fake comments. We could investigate them, we could prosecute them, the government?

Mr. NAYLOR. I believe that should be explored. These are corporate lobbyists using actual people as stooges. They are pawns. They are victims in one sense. But the real victim is the American public who—

Ms. PORTER. Tell me why you think they are victims?

Mr. NAYLOR. Because they didn't write these letters. They just happened to be the cousin, the uncle, the in-law who said, oh, yes, sweetie, you are a lobbyist, do whatever you like. But now the public sees their name is on something that they probably do not subscribe to.

Ms. PORTER. Thank you.

Chairman GREEN. The gentlelady's time has expired.

The gentleman from Georgia, Mr. Loudermilk, is recognized for 5 minutes.

Mr. LOUDERMILK. Thank you, Mr. Chairman. Thank you all for being here. I would like to kind of continue on with something Ms. Porter brought up, the Bloomberg story. I think, in the Bloomberg story, they highlighted seven people who supposedly—their names were used, but they didn't submit comments. I actually have in my hand here, it was the organization that orchestrated the comments was an organization of 60 Plus, who went back to each one of these people, and I actually have declarations of five of those people who

say they actually did submit those comments. They were able to track them down after the story was printed.

Apparently, when Bloomberg called them about this, they didn't necessarily remember or know exactly what the reporter was talking about. So, just out of clarity, I would like to submit these to the record, Mr. Chairman, these affidavits, these declarations of statement that they did actually submit those comments.

Chairman GREEN. Without objection, it is so ordered.

Mr. NAYLOR. That is fair, Congressman, but let me just try to restate what I think is—

Mr. LOUDERMILK. Hang on a second. I just want to make sure that we did that. There are a couple of areas I want to get into. We will get to that if I have time. Something Mr. Naylor said a little while ago, Mr. Balla, that is a little concerning, is he made the comment that the OCC is making a rulemaking process decision based off of fraudulent comments that they have received regarding the Community Reinvestment Act, but I heard you answer a question a little while ago that indicated that we don't have evidence of—and then some others have commented on this, that there has been no evidence that rulemaking decisions, or that these campaigns or false comments have actually resulted in the decision in rulemaking.

My question is, do we have evidence that the OCC and the FDIC have been receiving fraudulent comments during the Community Reinvestment Act process?

Mr. BALLA. I can't answer that question. I don't have any knowledge about that particular case. I just want to reiterate the general point that I was making, in that even after decades of research on the topic, "do public comments matter," the answer is still quite muddled. And so, this has nothing to do with the nature of the comment, whether they are mass-comment campaigns, fake-comment campaigns; it is going back to pre-rulemaking.

Now, I don't want to argue that we need to be paralyzed in our ability to make a causal inference between the submission of a comment and the decision of an agency, but I do want to suggest that identifying that particular connection is quite tough—

Mr. LOUDERMILK. Right, right. I understand that.

Mr. BALLA. —in a case study context or a large end context.

Mr. LOUDERMILK. And I remember something Ms. Noveck said. Basically, if a comment supports the direction that you are wanting to go, you are going to accept it. And I think that is just human nature.

But Mr. Naylor, your comment, if I didn't misunderstand it, you indicated that the OCC is using these false statements to make decisions on the CRA. Was that correct?

Mr. NAYLOR. If Comptroller Otting had any credential to be Comptroller, it was the consummation of a merger between OneWest and CIT, and that merger was built in no small part on astroturf, on fake comments. And so the person who is now fabricating, dismantling the CRA, is somebody whose career has 2 feet into a very serious problem.

Let me just point out one thing about Chair Clayton's comments. Had he said, "I have seven letters, one comes from the brother-in-law of a lobbyist, one comes from the uncle of a lobbyist, one comes

from the in-laws of a lobbyist,” that is far different than a marine veteran, a retired schoolteacher, and a police officer. Thank you.

Mr. LOUDERMILK. Okay. Even though they may be the same people?

Mr. NAYLOR. Same person, but a corporate lobbyist’s brother is a little different atmospherics than a retired police officer.

Mr. LOUDERMILK. Okay. Honestly, I do find occasionally that lobbyists also tend to be experts in certain careers and fields, and they often do have opinions. I’m not defending them.

But Mr. Balla, as you said, these campaigns are nothing new, correct?

Mr. BALLA. That is correct. They were—

Mr. LOUDERMILK. They have been going on—

Mr. BALLA. —postcard campaigns in the old days.

Mr. LOUDERMILK. Exactly. I am running out of time. Mr. Bagdoyan, quickly, I was on the Science, Space, and Technology Committee when we were investigating when the EPA actually was using social media to go out and generate false comments on the Waters of the United States rulemaking. You investigated that, did the report on that, is that correct?

Mr. BAGDOYAN. That was a legal opinion, Mr. Loudermilk. I was not involved with the work, but I am familiar with it, yes.

Chairman GREEN. The gentleman’s time has expired.

Mr. LOUDERMILK. Thank you, Mr. Chairman.

Chairman GREEN. The Chair now recognizes the gentlewoman from Michigan, Ms. Tlaib, for 5 minutes.

Ms. TLAIB. Thank you so much. I don’t know if Mr. Naylor or someone else can help me out. Do you think brothers-in-law of lobbyists are experts?

Mr. NAYLOR. They can be experts, but as long as you say brother-in-law of lobbyist, then that helps establish that we are not dealing with average, randomly selected Americans.

Ms. GONZALEZ-BRITO. And can I just give an example? In the OneWest merger, Mr. Otting solicited support from Wall Street vendors, lawyers, and business contacts who had financial interest in the bank when he asked for support of the merger. And so, in that case, there was a clear conflict of interest in those he was asking for support. So, I am not sure I would call those experts in the community needs of the bank that he was asking for support.

Ms. TLAIB. No, I agree. And conflict of interest is something that can really poison various institutions and policymaking, I agree.

Mr. Naylor, help me out here. If there is a bully in my son’s class, and his teacher makes a rule against bullying, like, you can’t bully, it would be wrong if the bullying was continuing, and this particular bully, he was literally bullying 12 people in the class; would it be wrong if that bully paid those 12 kids that he was bullying to tell the teacher that they loved getting bullied?

Mr. NAYLOR. It has been a while. I think that would be wrong, but actually, public—

Ms. TLAIB. No, it is pretty common sense.

Mr. NAYLOR. —policy on that is not well-developed, I guess I would have to say.

Ms. TLAIB. Yes. I understand the Public Citizens Chamber Watch investigated the 2015 case by contacting each of the 12 small busi-

ness owners to see if their opposition to the rule was, at minimum, misleading and so forth. Is that correct?

Mr. NAYLOR. Yes.

Ms. TLAIB. It was revealed that more than a fourth of the small business owners were actually lobbyists for the brokerage. And I am sorry if I—I was chairing another committee, so I apologize if this is repetitive. But it is good because truth matters, right? Mr. Naylor, can you describe in detail what else the investigation revealed?

Mr. NAYLOR. Well, context, and thank you for the question, Congresswoman. This was an Obama-era rule that said brokers aren't supposed to rip off their customers. They are supposed to advise stuff that is in their best interest and not something that is going to fatten their own pocketbooks, which should be good for everybody, including small business.

In lobbying against this, the Chamber supposedly found several dozen businesses that said they would lose their trusted adviser, which I found a little surprising. So I called them all and found, as you say, that some of them were, in fact, Wall Street brokers themselves. Others didn't answer the phone. One woman said that the ability to use her trusted adviser had allowed her to grow her business employment over the last decade, and I asked her how many employees she had, and she had grown it by one.

So, in other words, these were pawns, as we discussed with Congresswoman Porter. The law was going to help them, but the Chamber of Commerce, serving Wall Street interests, was going to sacrifice these pawns to make a misrepresentation, in my opinion, to this committee and the Labor Committee to fight the fiduciary rule so that Wall Street could save \$17 billion a year in inflated commissions that they were then charging.

Ms. TLAIB. In my district, we don't call it a con. We actually call it cheating. It is cheating.

Mr. BAGDOYAN, based on your role as Director of Forensic Audits and Investigative Services at GAO, what have you learned regarding the ability of a well-funded corporate industry to misappropriate the identity of ordinary Americans and create an illusion, or what I call misleading, lying, a widespread support for pro-industry positions not only during the notice-and-comment period of the rulemaking process but while lobbying Members of Congress?

Mr. BAGDOYAN. Well, a lot of organizations send in these mass mailings. I don't have any evidence to the extent that that happens and by whom. That is not something that we have focused on. Our work has focused on the policy and practice of identity information. So, that is what our analysis—

Ms. TLAIB. You should probably get into looking at this. What can we do to help you look into something like this? Because we don't want industry to hijack the public process that is for ordinary Americans to be engaged in. I just left another committee hearing about the Trump Administration repealing and changing the mercury standards, basically what has been working to reduce 80 percent of mercury output, and now they are saying, no, no, no, we are going to go and fix it, and now it is open to people commenting. I want moms and regular folks to be able to say: Don't do this.

What can we do to help support you taking a deeper dive into this, so that again, this process is really transparent?

Mr. BAGDOYAN. Sure, yes, I take your point, and what I can offer, like I have explained to other members of the subcommittee, is that we have ongoing data analytics work that is focusing on identity characteristics of comments. And we are also surveying commenters to see whether the comments they submitted were indeed by them, rather than someone else posing as them, and our plan is to actually engage into some deeper dives into those responses that we do receive.

Chairman GREEN. The gentlelady's time has expired. I will ask you to put your comments in the record, please.

Mr. BAGDOYAN. Yes, sir, thank you.

Chairman GREEN. Thank you. At this time, the Chair will yield himself 5 minutes.

Mr. Balla has indicated that there is a question, in terms of evidence of adverse effect emanating from mass-information campaigns. Maybe not in those exact words. I would yield time to you, Ms. Gonzalez-Brito. Can you give us some indication as to whether or not this was evidenced in the case that you cited?

Ms. GONZALEZ-BRITO. In the case of the OneWest-CIT merger, we had a bank that was foreclosing on, in some cases, we are hearing up to 100,000 families across the country, that had one of the worst reinvestment records in the State of California and had a CRA plan that was approved by its regulator that was one of the worst in its State. And none of this was addressed in the merger order by both of its regulators, and when it was approved, the merger was approved, the fake comments that were, that the bank's regulator had notice of before the approval, as I mentioned earlier, was not dealt with or investigated before the merger approval order.

So, here we have a public comment process in which hundreds of organizations and community members commented on, and there was evidence of fake public comments. None of that was investigated. Fake Yahoo email addresses were generated, and we still don't know who was responsible. And the CEO of that bank is now running the CRA rulemaking that is happening now. So, not only is there an adverse impact on the merger that was approved, but now we have a CRA rulemaking by the OCC, where we don't know if they have a system in place to ensure that fraud is not taking place in that rulemaking. There are a lot of questions that need to be answered, an investigation that needs to take place, and we want to make sure that the public rulemaking process is—that there is integrity in that process.

Chairman GREEN. Mr. Naylor, I am looking at your testimony, and you have indicated that, with reference to the affair that Bloomberg uncovered, that the 60 Plus group was funded by an entity. Would you care to express what you have given to me as your written statement?

Mr. NAYLOR. Well, 60 Plus is a group that is known to the public generally as a sometime Koch-funded group that fights for the right, fights against regulation, fights for that which gets in the Koch business' way. The false front in front of the effort to gut shareholder resolutions, we believe begins and is generally overseen by the U.S. Chamber of Commerce.

The false fronts have included something called the Main Street Investors Coalition. It's not very difficult to uncover because its own website, before it took it down in shame, said it was funded by the National Association of Manufacturers. Why are these guys upset? Because the one thing about capitalism and apparently the CEOs don't like is people showing up at the annual meeting and saying they would like the CEO and the board to do things a little differently.

They have been arguing against shareholder suffrage for a long time. And to do that, they need to make it look like actual shareholders want this, are tired of this, and so they created these false fronts, including the efforts done through 60 Plus.

Chairman GREEN. Quickly permit me to ask some questions that would necessitate raising a hand. Is there a significant risk of misinformation masquerading as legitimate public input? If you believe such is the case, kindly extend a hand into the air.

All but one, I believe.

Mr. BAGDOYAN. Yes, Mr. Chairman. I am not in the position to comment on that. I just don't have the evidence right now. But we are working on it.

Chairman GREEN. Okay. I greatly appreciate it.

Are we adequately policing the comment process? If you believe that we are adequately policing, would you kindly extend a hand into the air?

Mr. Balla.

And can these problems that have been called to our attention today be remedied with technology? If you think so, kindly extend a hand into the air? We have two, Ms. Noveck and Mr. Balla. Let the record reflect such.

Friends, I greatly appreciate your testifying. The ranking member has asked for a privilege. He would like to have an additional 1 minute, and I will accord the privilege, without objection. And I will have a minute as well.

Mr. BARR. Okay, I appreciate the gentleman. Let me just clear up one thing. From what I understand, we don't have any evidence whatsoever that, in the CRA rulemaking process, there is any evidence of any fraudulent comments being submitted. I raised this issue with Comptroller Otting when he was here last week, and he testified that there was no evidence of any fraudulent comments submitted in the CRA process, and I want to make that clear for the record.

In terms of false fronts, there may be, in various agencies, false comments over the course of this, but I think, with the example from the EPA in 2015, you have this on all sides, fraudulent comments. It is not just on one particular side. You have it everywhere.

And the final point is, in many cases, the industry representatives should have a right to comment, and some of the witnesses seem to be suggesting that someone who has an interest in the rule—

Chairman GREEN. The gentleman's time has expired.

Mr. BARR. —doesn't have a right to comment on it, and that makes no sense whatsoever.

Chairman GREEN. The gentleman's time has expired.

Mr. BARR. I yield back.

Chairman GREEN. Thank you.

The Chair now yields himself 1 minute, and I would note with a degree of interest that you would mention Mr. Otting, because I did ask him questions when he was here, and he vehemently denied any involvement or engagement by his business and his associates.

But I think, Ms. Gonzalez-Brito, you have given us information to the contrary. Is it unusual for people who have been involved in activities that are adverse to their best interest to deny involvement? Is it unusual? If you believe that it is unusual for persons to deny involvement in activities that are adverse to their best interest, would you kindly raise a hand?

Let the record reflect that no one has raised a hand.

With this, I yield back the balance of my time.

Without objection, on behalf of Professor Noveck, I would like to offer for the hearing record a report that she has authored entitled, "Crowdlaw for Congress: Strategies for 21st Century Lawmaking."

I thank the witnesses for their testimony, and for devoting the time and resources to travel here and share their expertise with this subcommittee. Your testimony today has helped to advance the important work of this subcommittee and of the U.S. Congress.

The Chair notes that some Members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to these witnesses and to place their responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record.

This hearing is now adjourned.

[Whereupon, at 4:11 p.m., the hearing was adjourned.]

A P P E N D I X

February 6, 2020



United States Government Accountability Office

Testimony

Before the Subcommittee on Oversight
and Investigations, Committee on
Financial Services, House of
Representatives

For Release on Delivery
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Thursday, February 6, 2020

FEDERAL RULEMAKING

Selected Agencies Should Clearly Communicate How They Post Public Comments and Associated Identity Information

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

GAO Highlights

Highlights of GAO-20-413T, a testimony before the Subcommittee on Oversight and Investigations, Committee on Financial Services, House of Representatives

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 10 selected agencies treat identity information; and (4) the extent to which the selected agencies clearly communicate their practices associated with identity information. The 10 agencies were selected on the basis of the volume of public comments they received on rulemakings. For this testimony, GAO obtained updates on the status of recommendations made to the selected agencies.

What GAO Recommends

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

View GAO-20-413T. For more information, contact Seto J. Bagdoyan at (202) 512-6722 or bagdoyans@gao.gov.

February 6, 2020

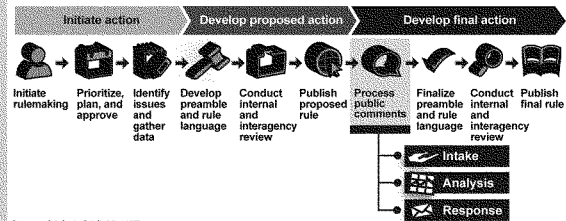
FEDERAL RULEMAKING

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What GAO Found

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

The Rulemaking Process under the Administrative Procedure Act



Source: GAO. | GAO-20-413T

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, and all selected agencies accept anonymous comments in practice.

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 of this guidance 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 some of the 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.

United States Government Accountability Office

February 6, 2020

Chairman Green, Ranking Member Barr, and Members of the Subcommittee:

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

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

¹5 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.

²Regulations.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*.

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

media and others reported that some of the comments submitted to FCC were suspected to have been submitted using false identity information.⁴

The APA requires agencies to allow comments on NPRMs to be submitted by any interested party (commenters). The APA does not require the disclosure of identity information from commenters, such as name, email, or address. Agencies therefore have no obligation under the APA to verify the identity of such parties during the rulemaking process. Agencies must give consideration to any significant comments submitted during the comment period when drafting the final rule.⁵ However, courts have held that agencies are not required to respond to every comment individually.⁶ Agencies routinely offer a single response to multiple identical or similar comments, because the comment process is not a vote. As explained by Regulations.gov's *Tips for Submitting Effective Comments*, "...agencies make determinations for a proposed action based on sound reasoning and scientific evidence rather than a majority of votes. A single, well-supported comment may carry more weight than a thousand form letters."

Additionally, the E-Government Act of 2002 requires agencies, to the extent practical, to accept comments "by electronic means" and to make available online the public comments and other materials included in the official rulemaking docket.⁷ Executive Order 13563 further states that regulations should be based, to the extent feasible, on the open exchange of information and perspectives. To promote this open exchange, to the extent feasible and permitted by law, most agencies are required to provide the public with a meaningful opportunity to participate

⁴Comments 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.

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

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

⁷Pub. L. No. 107-347, § 206, 116 Stat 2899, 2915–2916 (2002), codified at 44 U.S.C. § 3501 note.

in the regulatory process through the internet, to include timely online access to the rulemaking docket in an open format that can be easily searched and downloaded.⁸

Most agencies meet these responsibilities through Regulations.gov, a rulemaking website where users can find rulemaking materials and submit their comments, but all agencies are not required to use that platform.⁹ In October 2002, the eRulemaking Program was established as a cross-agency E-Government initiative and is currently based within the General Services Administration. The eRulemaking Program Management Office (PMO) leads the eRulemaking Program and is responsible for developing and implementing Regulations.gov, the public-facing comment website, and the Federal Docket Management System (FDMS), which is the agency-facing side of the comment system used by participating agencies.

My remarks today are based on our report issued in June 2019.¹⁰ 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, (4) the extent to which selected agencies clearly communicate their practices associated with posting identity information collected during the public comment process, and (5) the status of our recommendations to these agencies.

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

⁸Exec. Order No. 13,563, § 2(b), 76 Fed. Reg. 3,821 (Jan. 18, 2011). However, this Executive Order does not apply to independent regulatory agencies such as the FCC, Securities and Exchange Commission (SEC), and Consumer Financial Protection Bureau (CFPB).

⁹As of March 2018, Regulations.gov identified 180 participating and 128 nonparticipating agencies. These agencies may be components of larger departmental agencies. Some nonparticipating agencies, including FCC and SEC, have their own agency-specific websites for receiving public comments.

¹⁰GAO, *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).

agencies that use Regulations.gov as their agency's comment website ("participating agencies") and two agencies that operate agency-specific comment websites ("nonparticipating agencies").¹¹ We surveyed 52 program offices within these agencies about their comment process and reviewed comment websites, agency guidance, and comment data. We also interviewed relevant agency officials. Additional information about our scope and methodology is available in our June 2019 report.¹² Since the issuance of that report, we have 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.¹³ 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.

¹¹Selected 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 (within the Department of Labor), Environmental Protection Agency, Fish and Wildlife Service (within the Department of the Interior), Food and Drug Administration (within the Department of Health and Human Services), and Wage and Hour Division (within the Department of Labor). Selected nonparticipating agencies are FCC and SEC.

¹²GAO-19-483.

¹³This statement is based primarily on GAO-19-483, but it also includes information pertaining to the implementation status of the recommendations we made in that report.

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. Specifically, in the comment forms on Regulations.gov and agency-specific comment websites, a commenter can submit under a fictitious name, such as "Anonymous Anonymous," enter a single letter in each required field, or provide a fabricated address. In each of these scenarios, as long as a character or characters are entered into the required fields, the comment will be accepted. Further, because the APA does not require agencies to authenticate submitted identity information, neither Regulations.gov nor the agency-specific comment websites contain mechanisms to check the validity of identity information that commenters submit through comment forms.

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.¹⁴ 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 for system security and performance, and cannot be reliably connected to specific comments.

¹⁴Application 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.

Most Selected Agencies Have Some Internal Guidance Related to Commenter Identity

Seven of the 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.¹⁵ 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, it most frequently relates to the comment intake or response to comment phases of the public comment process.

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

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

Source: GAO analysis of agency data. | GAO-20-413T

^aThe 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.

¹⁵During 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 publicly available responses to the comments in accordance with any applicable requirements.

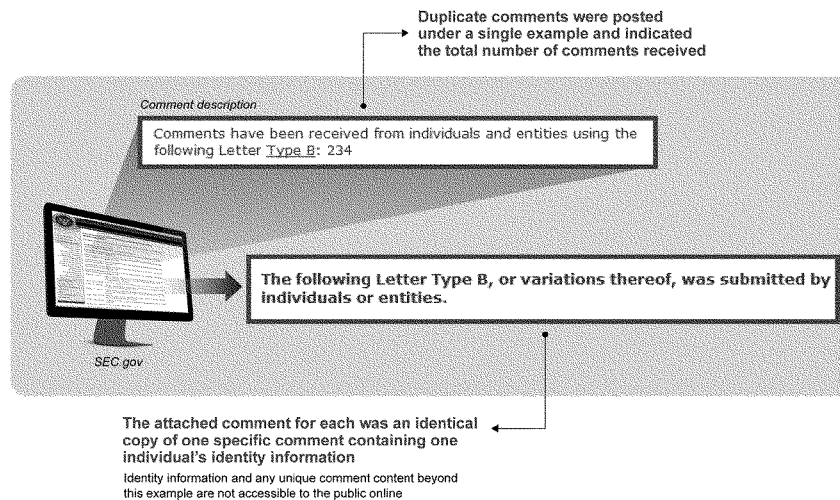
Selected Agencies' Treatment of Identity Information Collected during the Public Comment Process Varies

Within the discretion afforded by the APA, the 10 selected agencies' treatment of identity information varies during the three phases of the public comment process. 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.

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. When an agency chooses to post a sample of duplicate comments, the identity information and unique comment contents for all duplicate comments may not be present on the public website. For example, for all duplicate comments received, Securities and Exchange Commission (SEC) posts a single example for each set of duplicate comments and indicates the total number of comments received. As a result, the identity information and any unique comment content beyond the first example are not present on the public website.¹⁶ (See fig. 1.)

¹⁶According to SEC officials, if the unique content includes an argument distinguishing it from the other duplicate comments, it will be counted and posted separately.

Figure 1: Example of How the Securities and Exchange Commission Posts Duplicate Comments



Source: GAO analysis of Securities and Exchange Commission information. | GAO-20-413T

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

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

Our analysis of Regulations.gov and agency-specific comment websites shows that the varied comment posting practices of the 10 selected agencies are not always documented or clearly communicated to public users of the websites. 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."¹⁷ In addition to the requirements of the E-Government Act, 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.¹⁸ 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.¹⁹ 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.

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.

¹⁷Pub. L. No. 107-347, § 206(d)(2), 116 Stat 2899, 2915–2916 (2002), codified at 44 U.S.C. § 3501 note.

¹⁸GAO, *Open Data: Treasury Could Better Align USAspending.gov with Key Practices and Search Requirements*, GAO-19-72 (Washington, D.C.: Dec. 13, 2018).

¹⁹The APA and E-Government Act do not include any requirements associated with the collection or disclosure of identity information.

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.²⁰ Three of these participating agencies – the Environmental Protection Agency (EPA), the Fish and Wildlife Service (FWS), and the 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.²¹

The eighth participating agency – the Employee Benefits Security Administration (EBSA) – does not direct public users back to Regulations.gov, and instead recreates 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 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

²⁰The *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.

²¹On 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.

potentially lead users to assume, for example, that only one entity has weighed in on an issue when, actually, that comment represents 500 comments. Without better information about the posting process, the inconsistency in the way in which duplicate comments are presented to public users of Regulations.gov limits public users' ability to explore and use the data and could lead users to draw inaccurate conclusions about the public comments that were submitted and how agencies considered them during the rulemaking process.

Agency-Specific Comment Sites

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

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

Selected Agencies Are in the Process of Implementing GAO Recommendations

As shown in Table 2, we recommended in our June 2019 report that five of the selected agencies establish a policy for posting comments, and that eight selected agencies take action to more clearly communicate their policies for posting comments, particularly with regard to identity information and duplicate comments.²² These 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, all of the agencies to which we made recommendations have provided us with additional updates.

Table 2: Status of GAO Recommendations on the Public Comment Process

Agency	Recommendation	Provided Updates
Bureau of Land Management	Create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments, and clearly communicate this policy to the public on its website.	Yes
Centers for Medicare & Medicaid Services	Create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments, and clearly communicate this policy to the public on its website.	Yes
Consumer Financial Protection Bureau	Finalize its draft policy for posting comments and their identity information, particularly for duplicate comments, and clearly communicate it to the public on its website.	Yes
Employee Benefits Security Administration	1. Create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments; 2. Clearly communicate this policy to the public on its website; and 3. Evaluate the duplicative practice of replicating rulemaking dockets on its website, to either discontinue the practice or include a reference to Regulations.gov and explanation of how the pages relate to one another.	Yes
Environmental Protection Agency	Finalize its draft policy for posting comments and their identity information, particularly for duplicate comments, and clearly communicate it to the public on its website.	Yes
Federal Communications Commission	None	N/A
Fish and Wildlife Service	Create and implement a policy for standard posting requirements regarding comments and their identity information, particularly for duplicate comments, and clearly communicate this policy to the public on its website.	Yes
Food and Drug Administration	None	N/A
Securities and Exchange Commission	Develop a policy for posting duplicate comments and associated identity information and clearly communicate it to the public on its website.	Yes
Wage and Hour Division	Clearly communicate its policy for posting comments and their identity information, particularly for duplicate comments, to the public on its website.	Yes

Source: GAO-19-483 and agency communications. | GAO-20-413T

²²GAO-19-483.

Specifically, SEC completed actions that are responsive to the recommendation we made to it. In this regard, in September 2019, SEC issued a memorandum that reflects SEC's internal policies for posting duplicate comments and associated identity information. SEC has also 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. These measures will help public users better determine whether and how they can use the data associated with public comments.

The other seven agencies have provided updates, but have not yet implemented the recommendations. In December 2019 and January 2020, the Bureau of Land Management (BLM), Consumer Financial Protection Bureau (CFPB), EPA, and FWS notified us that they are in the process of developing or updating policies for posting public comments as well as statements for their websites to communicate these policies to the public. Similarly, in January 2020, the Department of Health and Human Services (HHS) stated that the Centers for Medicare and Medicaid Services (CMS) would update its comment posting policy and communicate it on the CMS website. However, the excerpt of the policy language provided does not include information about how the agency posts duplicate comments. Further, CMS did not provide us with the finalized policy, and our review of the website does not indicate any changes have been made. HHS officials stated they would provide additional follow up actions by July 2020.

In September 2019, EBSA also stated that it will develop a written policy regarding posting of comments, including duplicate comments, which will be available on its website. However, the agency did not provide evidence that a formal evaluation of its current practice of replicating rulemaking dockets had been conducted, and did not identify plans to do so. The Wage and Hour Division (WHD) indicated that it will add text to each webpage for any rulemaking that invites public comments that states any personal information included in the comments (including duplicate) will be posted to Regulations.gov without change. However, the preliminary text provided by officials in August 2019 does not explain WHD's policy of posting duplicate comments as a group under a single document ID, and therefore does not clearly communicate the agency's posting practices to the public.

Chairman Green, Ranking Member Barr, and Members of the Subcommittee, this concludes my prepared remarks. I would be happy to answer any questions you may have at this time.

GAO Contact and Staff Acknowledgments

For further information regarding this testimony, please contact Seto J. Bagdoyan, (202) 512-6722 or bagdoyans@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), Allison Gunn (Analyst in Charge), Elizabeth Kowalewski, and Roger Gildersleeve. Individuals who 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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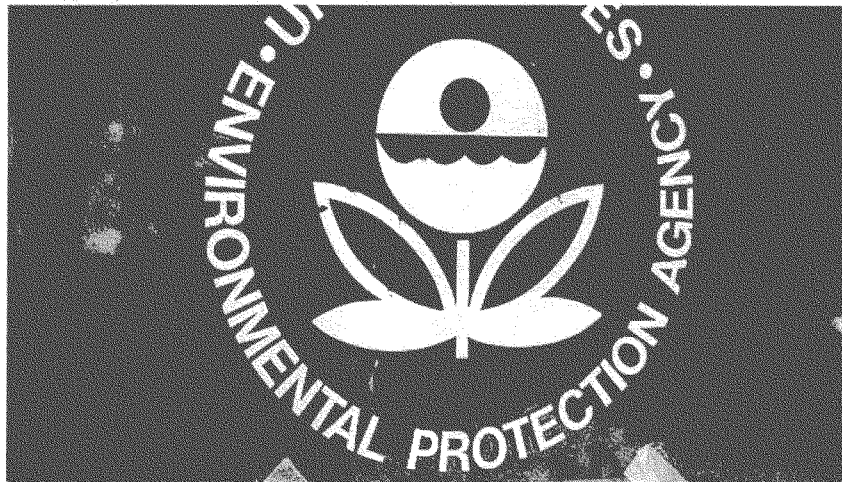


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Are mass comment campaigns an abuse of the rulemaking process?

By Steven J. Balla, Opinion Contributor — 11/02/19 02:00 PM EDT
The views expressed by contributors are their own and not the view of The Hill



On Oct. 24, the United States Senate Permanent Subcommittee on Investigations issued a [bipartisan report](#) highlighting a variety of abuses of online platforms through which the public comments on proposed agency regulations. These abuses include mass comment campaigns, comments submitted under false identities, and profane and threatening language. Although identity theft, profanity, and threats directed at agency officials and others classify as abusive

behavior, recent research I have conducted with colleagues suggests that mass comment campaigns are not as harmful as feared by Senate investigators.

Mass comment campaigns are collections of identical and near-duplicate comments sponsored by organizations and submitted by group members and supporters. Earlier in October, for example, the Michael J. Fox Foundation for Parkinson's Research submitted more than 100,000 signatures calling on the Environmental Protection Agency to ban a chemical associated with increased risk of Parkinson's disease. Such mass comment campaigns are typically short in length, state directional preferences in support of or in opposition to proposed rules, and provide little in the way of substantive arguments or evidence.

Our research suggests that mass comment campaigns, although lacking in substantive detail, do not constitute abuses of the rulemaking process. As a result, efforts to limit the coordinated submission of large numbers of identical and near-duplicate comments should not be a top priority for lawmakers. Congress should focus on the more immediate dangers presented by fake comments and profane and threatening language.

Our research focuses on the occurrence of mass comment campaigns at the EPA over a recent five-year period. During this period, the agency received dozens of mass comment campaigns consisting of at least 100,000 comments, with two campaigns totaling in excess of a half-million submissions. The agency identifies and posts mass comment campaigns to regulations.gov, the federal government's primary online platform for the rulemaking process. The agency informs the public about the organization that sponsored the mass comment campaign, as well as the number of comments contained in the campaign. It also posts an illustrative example of the comments submitted by group members and supporters.

At this moment, the EPA is the only agency in the federal government that documents mass comment campaigns on regulations.gov in this manner. We encourage other agencies to adopt this approach to cataloging mass comment campaigns, as sharing such information would make clear just how common campaigns are in the rulemaking process in general.

Our research demonstrates that the EPA acknowledges the vast majority of mass comment campaigns when it promulgates final rules. In this regard, mass comment campaigns are handled in a procedurally identical manner as substantive comments submitted by organizations. In other words, we do not find evidence that the agency is overwhelmed and unable to readily process and respond to mass comment campaigns.

We also examine the changes the EPA makes across proposed and final rules, and the association between these changes and requests made in comments of various types. Our analysis shows that requests made in mass comment campaigns are less likely to correlate with changes in the content of rules than appeals made in substantive organization comments. This pattern confirms that the agency continues to emphasize legal, economic, scientific, and technical information in the rulemaking process, irrespective of the fact that it regularly receives mass expressions of directional preferences.

In the end, our research demonstrates that it is possible for agencies to identify and handle mass comment campaigns in a routine manner reflective of the preference-oriented, non-substantive nature of campaigns. We encourage Congress not to place limitations on mass comment campaigns, which are normatively valid expressions of free speech and, practically speaking, do not inhibit agencies from receiving and incorporating substantive information into rulemaking decisions. Rather, we recommend that agencies post mass comment campaigns to [regulations.gov](https://www.regulations.gov) and other rulemaking platforms in a manner similar to the EPA, thereby making it straightforward for the public to separate campaigns from substantive comments submitted in response to proposed rules. Although fake comments and the submission of profane and threatening language constitute abuses of the rulemaking process, mass comment campaigns are not as problematic as portrayed by Senate investigators.

Steven J. Balla is Associate Professor of Political Science, Public Policy and Public Administration, and International Affairs and is senior scholar at George Washington University's Regulatory Studies Center.

**Fake It Till They Make It: How Bad Actors Use Astroturfing to
Manipulate Regulators, Disenfranchise Consumers and Subvert the
Rulemaking Process**

Written Testimony of

Paulina Gonzalez-Brito
Executive Director
California Reinvestment Coalition

Before the United States House of Representatives Financial Service Committee,
Subcommittee on Oversight and Investigations

February 6, 2020

Chairman Green, Ranking Member Barr and Members of the Subcommittee, thank you for holding this important hearing today and for inviting the California Reinvestment Coalition (CRC) to testify.

Paulina Gonzalez-Brito and CRC

My name is Paulina Gonzalez-Brito. I am the Executive Director of the CRC. The California Reinvestment Coalition builds an inclusive and fair economy that meets the needs of communities of color and low-income communities by ensuring that banks and other corporations invest and conduct business in our communities in a just and equitable manner.

We envision a future in which people of color and low-income people live and participate fully and equally in financially healthy and stable communities without fear of displacement, and have the tools necessary to build household and community wealth.

Over the last 30 years, CRC has grown into the largest statewide reinvestment coalition in the country, with a membership of 300 organizations that serve low-income communities and communities of color.

CRC has our main office in San Francisco, and an office in Los Angeles.

Introduction

In this testimony, I wish to highlight to following points:

1. The ability of communities to have their voices heard through a fair and transparent public comment process is central to the Community Reinvestment Act and its effective implementation.
2. During the merger of OneWest Bank and CIT in 2014 and 2015, CRC uncovered facts that confirmed that the public comment process had been compromised and that fabricated comment letters were submitted in support of the bank merger.
3. Corruption of the public comment process in this way impairs administrative decision making and thereby harms the public interest, breeds distrust in the process and is likely to lead to diminished public participation, and undermines our democracy.
4. CRC has called for the Office of the Comptroller of the Currency (OCC) to: conduct an investigation into who corrupted the public comment process during the OneWest merger; revise the approval order to delete reference to letters of support for the merger or, in the alternative, note that some of these support letters were found to be “fabricated;” and develop and publicize a process that ensures that such breaches will not recur.

Community input is a critical component of the CRA

The Community Reinvestment Act (CRA)¹ is a federal law that was passed in 1977 to address discrimination in lending based on race, known as redlining. The CRA requires that banks meet the credit needs of all communities where they take deposits, including low and moderate-income (LMI) neighborhoods. As a result of the CRA, banks have increased their lending to small businesses and made home ownership more accessible, regardless of race. It has also resulted in banks providing financial services in more communities, such as opening branches and offering affordable bank accounts without high fees that strip earnings from low-income households.

The CRA encourages dialogue between banks, regulators, and community leaders. The CRA has three regulatory points of engagement during which the public and regulators must assess the performance of a bank in its deposit-taking areas: during a merger or consolidation process, when a bank applies to open a bank branch, and during regular CRA examinations which occur every few years depending on the size and the past performance of the bank. The significance of the public participation process in CRA implementation cannot be overstated – how can banks meet community credit needs if the community is not permitted to help define those needs?

As such, a critical aspect of CRA's regulatory regime and implementation is community input. As the Federal Reserve notes on its website in discussing CRA and the bank application process, "An important aspect of the applications process is the opportunity for the public to comment in writing on any or all of the factors the FR must consider in evaluating an application--including the applicant's CRA performance. Public comments can provide insight to a financial institution's CRA performance. Written comments received from the public, which may express either support for or opposition to the application, are reviewed by FR staff, sent to the applicant financial institution, and included as part of the public record that the FR carefully examines in the evaluation of an application."²

The CRA regulations specifically invite public comment. In fact, the CRA Notice that banks are required to make available in their main offices and branches informs members of the public that, "Your involvement is encouraged," and describes how the OCC evaluates a bank's record of helping to meet community credit needs and how the OCC takes this record into account when deciding on certain corporate applications.³

¹ Community Reinvestment Act, 12 U.S.C. §2901(a).

² Board of Governors of the Federal Reserve System, "Electronic Applications and Applications Filing Information," available at: <https://www.federalreserve.gov/supervisionreg/afi/cra.htm>

³ See Code of Federal Regulations Title 12, Chapter I, Part 25, Appendix B, available at: https://www.ecfr.gov/cgi-bin/text-idx?SID=5aec1f6c39f9bbba8aeaf6d1a61a3312&mc=true&node=ap12.1.25.0000_0nbspnbspnbsp.b&rgn=div9

Further, the Comptroller's Licensing Manual notes that the OCC welcomes public comments and is committed to providing the public with easy access to public information on filings. Any interested person may comment in writing on any filing for which public notice has been published. Specific comments assist the OCC in understanding the matters that commenters believe merit investigation and consideration, and allow the OCC to review potential issues more completely.⁴

The way in which CRA regulation and implementation build community input into the process enables affected communities to have a voice as banks seek to grow their businesses. This dynamic encourages dialogue that can lead to reinvestment commitments by banks to communities that ensure that communities don't get left behind, while at the same time helping banks serve their communities through profitable and safe lending and investment opportunities. These commitments are often reflected in CRA agreements, or Community Benefits Agreements.

A Federal Reserve study found CRA agreements increased bank lending to LMI borrowers and borrowers of color by up to 20 percent.⁵ CRC negotiates formal written CRA agreements with banks, which benefits both communities and financial institutions. Over the past three years, CRC has worked with communities and financial institutions to secure more than \$50 billion in new CRA commitments.⁶ These commitments are addressing critical community needs that help to create a more just, equitable, and robust economy, uplifting low-income people and people of color.

Currently, the OCC under Comptroller Otting is proposing dramatic changes to CRA rules⁷ that CRC, our members and allies believe will be harmful to communities. The proposal would likely lead to far less meaningful community input as CRA implementation would move to formula-based approaches and rely on bank performance data that is less transparent and available to the public than is the case today. All of this comes at the expense of community input, community partnerships, and any activity that cannot be quantified into dollars that can support the OCC's one ratio framework. There is no apparent and meaningful way to incorporate community comments on local credit needs or on bank performance; community input comes second to target dollar goals.

Comments from the public, including community groups, can shed light on issues and conduct

⁴ Office of the Comptroller of the Currency, "Comptroller's Licensing Manual: Public Notice and Comments," November 2017, available at: <https://www2.occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/file-pub-lm-public-notice-and-comments.pdf>

⁵ Raphael Bostic and Breck Robinson, "Do CRA Agreements Influence Lending Patterns?" 2002, Retrieved from <https://lusk.usc.edu/research/working-papers/do-cra-agreements-influence-lending-patterns>

⁶ CRC's recent community commitments with banks can be found at <http://www.calreinvest.org/publications/bank-agreements>.

⁷ See Federal Register Vol. 85 No. 6, January 9, 2020, available at: <https://www.fdic.gov/news/board/2019/2019-12-12-notice-dis-a-fr.pdf>

about which regulators are not aware, and can highlight the extent of particular concerns about certain institutions on the part of the public. But when the public comment process is undermined, the impact on communities is great.

OneWest/CIT Merger: a Case Study in “Fabricated Comments”

When CIT and OneWest Bank filed their applications to merge with the Federal Reserve and the OCC in 2014, it triggered a public comment process. CRC, and many of our members, allies, and other groups based in Southern California availed ourselves of the right to comment on what we viewed as a highly problematic merger of two highly problematic financial institutions. CRC extensively documented our numerous concerns about the merger in a series of comment letters to banking regulators, Freedom of Information Act (FOIA) requests, research and data analysis, and testimonials.

During this time, Joseph Otting, then CEO of OneWest Bank, took the unusual step of soliciting his Wall Street contacts and business partners, urging them to support the merger by going to OneWest Bank’s website to submit a letter to the regulators.⁸ CRC obtained one of these solicitations, which included a form letter to send to bank regulators. The form letter attested to the fact that the bank was being well managed (presumably by Comptroller Otting), that OneWest Bank was doing a good job serving southern California communities (it wasn’t), and that regulators did not need to hold public hearings on the merger (they eventually did). The letter provided no supporting data to justify or even explain the claims and conclusions made. It read:

“I am writing to offer my support for the pending OneWest and CIT merger. OneWest serves as a strong source of capital and banking services to the Southern California community. This merger will retain and create new jobs in California. I believe the management team and OneWest have demonstrated its commitment to our community and to serving the needs of not only their clients but the community at large and due to this, I do not believe there is a need for a public hearing.”⁹

CRC, genuinely surprised that people would actually be in support of this problematic merger, began to look at the letters of support that were submitted in favor of the Bank, at the Bank’s direction, and apparently via the Bank’s website. We observed a number of anomalies. In one batch of 593 petitions in support of the OneWest merger and opposed to a public hearing that was posted on the Federal Reserve’s website, nearly 100% had Yahoo email accounts, an oddity that heightened our concerns given Yahoo’s relatively small share of the email market. In addition, a significant number of these emails were sent very late on February 13 or very early on

⁸ Matthew Monks and Elizabeth Drexheimer, “OneWest Seeks Wall Street’s Help Lobbying Yellen on CIT,” Bloomberg, January 8, 2015.

⁹ See David Dayen, “The Fake Public Comments Supporting a Bank Merger Are Coming from Inside The House,” The Intercept, September 29, 2018.

February 14, 2015, including a large share around 2am on Valentine's Day.

And consistent with reports at the time, a large number of emails supporting the merger that used the language from the Bank's website to which Joseph Otting referred his contacts were seemingly from lawyers (from dozens of law firms); real estate, investment, and accounting firms; branch and supply services providers; and from individuals outside the state of California.¹⁰

How much weight should regulators give to a bank support letter submitted by a contractor who relies on business from the Bank CEO who requested the letter, or a letter from the CEO's Wall Street acquaintance who asserts, presumably based upon nothing but the request of the CEO, that the bank is doing a good job serving the community in Los Angeles, and there is no need for a public hearing on the merger?

According to a report by the US Treasury Department, run by Secretary Steve Mnuchin, Comptroller Otting's former boss at OneWest Bank, equal weight should be given to supporters and opponents of mergers.¹¹ We are concerned that such recommendations only encourage astroturfing and fabricated comments by corporations, which dilutes and distorts the public input process by adding voices that are not necessarily interested or knowledgeable about the issues at hand, but are being employed primarily in the service of well-resourced and self-interested shareholders, managers, vendors, or similar stakeholders in the corporation.

Given the anomalies in the email support for this problematic merger, we became suspicious. On September 21, 2015, our fears were confirmed when CRC received an email directly from one such "supporter" of the merger who was upset that his name and his address had been used without his authorization to support a bank merger he seemingly had never heard about before. Specifically, the author noted,

"I am writing your (sic) this email regarding this bogus email (cut and pasted below), sent to comments.applications@ny.frb.org and We.licensing@occ.treas.gov by you on my behalf which I came across on the internet today, the email address (redacted)@yahoo is not mine and I did not authorize or send this email, and I did not authorize for you to use my name and address to be used for any support of One West and CIT Merger, I have no affiliation or whatsoever to this (sic) companies and would like you to stop using my name, address, or email address, or I will have to go through legal action and notify proper authorities regarding this matter. I value my privacy and identity and take this matter seriously. Thanks, (redacted).

¹⁰ To review "support" letters submitted in favor of the merger, see: https://www.federalreserve.gov/bankinfo/reg/Comment_Letters_2-7-15_to_2-19-15.pdf While the Federal Reserve website still provides access to these comment letter, the OCC website seemingly does not.

¹¹ In a report issued under Secretary of the Treasury Mnuchin, Treasury notes that "regulators should give careful and equal weight to the views of individuals who support and oppose the activity," from, "A Financial System That Creates Economic Opportunities: Banks and Credit Unions," U.S. Department of the Treasury, June 2017.

Below his comments was a copy of the email letter in support of the merger using the same language found on the OneWest bank website and to which Joseph Otting directed his contacts, sent to the banking regulators purportedly in support of the bank merger and against the call for a public hearing on it. The above email was sent to CRC staff, and to the two regulators overseeing the OneWest/CIT merger – the OCC and the Federal Reserve Bank of NY.

It was only happenstance that this one individual discovered his name had been used fraudulently to support the merger, and that he then reached out to CRC. If others had their names used without their authorization, they might very well never realize this to be the case, and the regulators might never know as well.

CRC attempted to investigate further to see if other supposed “supporters” of the OneWest merger had their identities stolen as well. In a review of 25 of the petitions from the batch of 593 yahoo emails, 12 listed street addresses that could not be verified by the United States Postal Service as legitimate addresses.

Additionally, in a follow up “spot check” of approximately 150 email addresses attributed to the petition organized by OneWest, 25 of the email addresses appeared non-existent. However, as with the case of the individual who emailed our offices, if email addresses were created in the name of real people without their knowledge, then it might be difficult to detect the fraud because those emails wouldn’t necessarily bounce back as non-existent.

Subsequent investigation found approximately one-third of emails sent to these addresses of “supporters” of the merger bounced back, including from some with questionable addresses such as “goeypooey69@yahoo.com.”¹²

CRC, along with Inner City Press/Fair Finance Watch, then submitted a detailed Freedom of Information Act (FOIA) request to the OCC seeking documentation relating to potentially false letters of support being filed as part of the merger process. The OCC produced in response, amongst other things, a file labelled by the OCC “OneWest CIT Bank Merger Fabricated Comment Letters,” that includes documents reflecting four email exchanges with the OCC from “supporters” of the merger who did not affirmatively support or even know about the merger.

These individuals communicated to the OCC:

*“This is to bring to your attention that **I received an email from the OCC regarding a subject that I am completely unaware of.** I DID NOT send the email below that you responded to. This is a fraudulent use of my email account. I will be working with my email hosting provider to ensure that this does not happen again. I will appreciate your reply acknowledging this very*

¹² See David Dayen, “The Fake Public Comments Supporting a Bank Merger Are Coming from Inside The House,” The Intercept, September 29, 2018.

important notice. Thank you very much!"

"I am NOT the writer of the communication below – name, address & zip are wrong:"

"I did not write this letter!"

"To whom it may concern< I never send (sic) this email. I am not aware of the merge of the companies Someone got a hold of my email address Sorry"

These four emails were sent in response to the OCC's acknowledgement of their purported "support" of the OneWest merger. The support letters submitted to the OCC under their names used the language from the OneWest website to which Joseph Otting referred his contacts.

The FOIA response from the OCC also included an email from OCC staff to the legal counsel for OneWest Bank with the following note: "FYI and review. We would appreciate any information you can provide regarding this submission." This note was forwarded along with the replies from consumers whose identities were fraudulently used to support the bank merger.

The FOIA response did not include any further information from the Bank or its counsel in reply to this request from the OCC. As such, we have no reason to believe any investigation of the "fabricated comment letters" was ever conducted.

How many "supporters" of the merger were not supporters of the merger, or were not even real people for that matter? We do not know. But that didn't stop the Federal Reserve and the OCC from citing the "support" letters in the orders approving the merger of CIT and OneWest. The OCC order noted that, "Approximately 1,700 of the letters resulted from an email campaign initiated by CITG and OWB seeking support for the merger."¹³ The Federal Reserve order approving the merger of holding companies noted that "A large number of commenters supported the proposal," citing in a footnote that "Approximately 2,177 commenters supported the proposal, of which approximately 2,093 commenters submitted substantially identical form letters."¹⁴

The OCC was on notice about "fabricated comment letters" as early as January 16, 2015, the date when two of the above email exchanges with defrauded consumers took place. The OCC and the Federal Reserve nonetheless conditionally approved the bank merger six months later, in July of 2015, again, citing the support letters in their approval orders. CRC raised concerns about the fraudulent support letters with the regulators once we received the communication from the

¹³ Office of the Comptroller of the Currency, "Application to Merge CIT Bank, Salt Lake City, UT with and into OneWest Bank, N.A., Pasadena, CA and Request Waiver of Residency Requirement," Letter to Joseph M. Otting conditionally approving the application to merge, dated July 21, 2015, p. 2.

¹⁴ Federal Reserve System, "CIT Group, Inc. Livingston, New Jersey: Order Approving the Acquisition of a Bank Holding Company," July 19, 2015, p. 4.

defrauded consumer in September of 2015. The OCC removed any conditions relating to the merger eight (8) months later, in May of 2016,¹⁵ without publicly addressing the fabricated comment letters.

CRC has called for an investigation into who was responsible for the fabricated emails, for changes to ensure that false bank support for a merger cannot again be allowed to corrupt the public comment process, and for the regulators to revise their orders to reflect that the support for the OneWest merger was suspicious at best.¹⁶ CRC is not aware that any of these remedies have been pursued or even considered by the OCC, including under Comptroller Otting.

CRC and Democracy Forward have submitted a FOIA request to the OCC to determine, amongst other things, whether there are any indicia of fabricated emails corrupting the current CRA rulemaking process.¹⁷

Community input and public participation are at the heart of the CRA. We fear these core principles of the CRA are in jeopardy under this OCC which seeks to stifle dissent and minimize involvement by community groups in the very reinvestment assessments and decisions that impact them greatly.

Corruption of the Public Comment Process Harms Communities

When astroturfing and similar measures are used to undermine the public input and comment processes, it is low-income communities and communities of color that suffer. The CRA framework has provided a perhaps unique, even if imperfect, opportunity for communities to have a seat at the table and their voices be heard by establishing that bank performance in meeting community credit needs is to be considered in corporate applications and in bank CRA examinations. This process necessarily requires the input of community groups and members to help regulators and banks identify community needs. And CRC implementation encourages banks to develop partnerships with community groups that understand and can help banks meet these community needs. CRA has generated trillion of dollars in safe and sound lending and investment in LMI communities and communities of color as a result of public input and community/bank partnerships. Bank CRA commitments and the ability of the public to comment on bank performance are important and effective ways to identify which institutions are helping

¹⁵ See CRC statement on the OCC approval of the CIT CRA Plan, a final condition of merger approval, available at: <http://calreinvest.org/press-release/california-reinvestment-coalition-denounces-occs-approval-of-cit-groups-new-cra-plan/>

¹⁶ FOIA request submitted by CRC and ICP, as well as OCC responses, are available at: <http://calreinvest.org/wp-content/uploads/2018/10/CRC-FOIA-Request.pdf>

¹⁷ Press releases from CRC and Democracy Forward, with links to the FOIA request, are available here: <http://calreinvest.org/press-release/coalition-of-community-orgs-seeks-records-on-trump-administrations-attempt-to-silence-opposition-to-gutting-anti-redlining-rules/>, and <https://democracyforward.org/press/coalition-of-community-orgs-seeks-records-on-trump-administrations-attempt-to-silence-opposition-to-gutting-anti-redlining-rules/>

communities and which are hurting communities.

When regulators rely on fabricated comments, the public loses. Fabricated comments provide misinformation to regulators, and may distract them from true areas of concern. This is dangerous. In years past, housing counseling agencies and legal service offices informed regulators about the growing problem of subprime and option adjustable-rate mortgage loans infiltrating underserved communities. Today, CRC and our members are raising alarms about banks that finance the displacement of low-income communities meant to benefit from the CRA. Regulators must guard against disinformation campaigns that risk drowning out these concerns.

Additionally, astroturfing and fabricated comment campaigns breed distrust in the system and may make it less likely that the public would comment in the future. As a result, regulators may have less access to information from impacted communities about what is happening on the ground far from regulatory offices. Regulators would be left with the one-sided picture provided by financial institutions. Further, such efforts corrupt the democratic process. Our system of government functions by allowing public input into decisions made by public officials. Congress and regulators have recognized the importance of this function by promulgating laws and rules designed to ensure that public comment is considered and that the process for doing so is fair. In the OneWest merger, the process was unfairly manipulated by private interests to create an outcome without regard to the public interest or the merits of the important issues at hand.

Finally, we are particularly concerned about the OCC's approach to the public comment process as it is currently seeking comment on a Proposed Rule that if finalized would significantly harm communities and threaten a return to redlining practices. The Comptroller's comments demonstrate hostility to anyone with whom he disagrees. He recently told the Wall Street Journal that "If you don't like this [proposed change to CRA], you are either economically advantaged by the current structure or you don't understand it,"¹⁸ Presumably he does not believe that the few supporters of the proposal are similarly corrupt or ignorant. CRC feels that everyone's voice should be heard and all views considered on their merits. We believe that the OCC should be less focused on impugning those who disagree with its proposal, and more focused on ensuring a fair process that prevents astroturf campaigns from unfairly manipulating the result. Based on the activity during the OneWest merger comment period, and the apparent lack of accountability or reform that followed, we have little faith in the ability of this OCC to guard against astroturfing or ensure a fair process where all comments are meaningfully considered.

A Renewed Call for an Investigation and a Commitment to a Fair Process

As noted, CRC requested an investigation into the public comment process even before the

¹⁸ "Bank Regulators Propose Overhaul of Lending Rules for Poorer Communities." Andrew Ackerman. The Wall Street Journal. Dec. 12, 2019. <https://www.wsj.com/articles/bank-regulators-propose-overhaul-of-lending-rules-for-poorer-communities-11576177437>

merger of OneWest Bank and CIT was approved by the OCC and the Federal Reserve. Given the subsequent confirmation of the fabricated comment letters from our FOIA request to the OCC, we renew that call. Such an investigation should determine what happened, who was responsible, when the Bank and the OCC were first aware that the integrity of the public comment process had been compromised, what consequences were imposed on those responsible for defrauding the process, and what the OCC has done to ensure that this will not happen again. We further call for the OCC and the Federal Reserve to revise the orders approving the merger to reflect that at least some of the letters of support in favor of the merger were tainted and included “fabricated comment letters.”

Finally, we call on the OCC to clarify its policies and procedures to ensure that comments submitted and considered are from individuals and organizations who actually intended to comment. Further, given dismissive statements by the Comptroller about large swaths of potential and actual commenters on the current proposal to substantially change the CRA regulations, we request clarification from the OCC as to which categories of groups and individuals can expect to have their comments reviewed and genuinely considered by this OCC. If the Comptroller is not able to commit to a fair process that considers all viewpoints, especially that of the large number of groups that oppose his Proposed Rule, then he should recuse himself from this rulemaking.

Conclusion

Mr. Chairman and members of the Subcommittee, thank you again for the opportunity to testify today about how to ensure that community voices are not drowned out by fabricated comments fraudulently submitted in favor of industry. The California Reinvestment Coalition looks forward to working with you to ensure important protections, like the Community Reinvestment Act regulations, are not weakened as part of deregulatory schemes designed to benefit the largest and most powerful corporations, that historically disenfranchised communities do not lose out, and that the voices of all Americans are heard.

Photo: Tom Williams/CQ Roll Call via AP

The Intercept

THE FAKE PUBLIC COMMENTS SUPPORTING A BANK MERGER ARE COMING FROM INSIDE THE HOUSE



David Dayen

September 29 2018, 4:00 a.m.

COMMENTS SUBMITTED TO a top banking regulator supporting a 2015 merger between OneWest Bank and CIT Bank were attributed to people who never sent them, according to documents obtained under the Freedom of Information Act and reviewed by The Intercept.

The fake comments appear to be tied directly to Joseph Otting, the head of the regulatory agency himself.

The documents reviewed by The Intercept show that the Office of the Comptroller of the Currency, the main bank regulator for nationally chartered banks, knew about the fake comments at the time, before it approved the merger. But the OCC appears to have done no

meaningful investigation of the matter, and even cited public support for the merger when approving it.

Incidences of fake comments delivered to the government to boost support for a particular regulatory position have become epidemic. New York Attorney General Barbara Underwood is investigating fake comments submitted regarding the Federal Communications Commission's repeal of net neutrality regulation, with as many as 2 million identities stolen. The Wall Street Journal also found fake comments in the Consumer Financial Protection Bureau's proposed rule on payday lending.

But in this case, OneWest Bank may have played a role in the fabrication. The text of the fake supportive comments is identical to a sample letter placed on the OneWest website in 2015 encouraging customers to support the merger. Otting, then CEO of OneWest, sent emails to his contacts on Wall Street at the time, pointing to the sample letter on the website and soliciting support.

Otting now heads the OCC, where he has kicked off a project to "modernize" the Community Reinvestment Act, which assesses banks for lending into low- and moderate-income areas. The CRA really only has one enforcement mechanism: Regulators examine it when banks attempt to merge. Otting has cited his experience with the OneWest-CIT merger as cementing his views on the CRA. "I went through a very difficult period with some community groups ... who came in at the bottom of the ninth inning, that tried to change the direction of our merger," he told a banking conference in April.

Critics argue that Otting's main goal is to undermine the CRA because of his experience in the OneWest merger. "This bank did a particularly poor job in lending to the community," claimed Kevin Stein of the California Reinvestment Coalition, one of the organizations that fought the merger. "They were upset there was an effort to hold them to account. The response is to try and loosen the rules across the board, and diminish the role the community has in the process."



John Thain, chair and chief executive officer of CIT Group, left, speaks alongside Joseph Otting of OneWest, during a public meeting in Los Angeles, Calif., on Feb. 26, 2015, held by the Federal Reserve Board and the Office of the Comptroller of the Currency to collect information relating to the merger of CIT Bank into OneWest Bank.

Photo: Patrick T. Fallon/Bloomberg via Getty Images

ONEWEST ROSE OUT of the ashes of failed subprime lender IndyMac. A consortium led by current Treasury Secretary Steve

Mnuchin purchased the bank, with a unique backstop agreement in which the Federal Deposit Insurance Corporation covered losses beyond a certain threshold. OneWest faced persistent criticism in its short life for hasty — and what some have alleged as illegal — foreclosures.

In 2014, CIT, a business lender run by John Thain, the disgraced leader of Merrill Lynch, who installed a \$35,000 golden toilet in his office while the investment bank was failing, announced a proposed \$3.4 billion purchase of OneWest. Investors like Mnuchin, who bought IndyMac for just \$1.55 billion, would more than double their money. Otting, CEO of OneWest since shortly after its launch in 2010, would also stand to gain.

As is customary, federal regulators — both the OCC and the Federal Reserve had jurisdiction — opened a public comment process for the merger. Community activist groups like the California Reinvestment Coalition immediately called for a public hearing, citing OneWest’s dubious foreclosure practices and insufficient commitment to lending in poor communities. “This bank had very low reinvestment; they mostly foreclosed on people,” said Kevin Stein.

This reportedly angered Otting. As a January 2015 Bloomberg piece explained, the then-CEO emailed his rolodex of contacts with the subject line “Support for OneWest Bank,” urging recipients “to click on the link below and submit a letter of support” for the merger. The link, now dead, went to a mini-site at OneWest Bank, also promoted to bank customers, which featured a sample letter:

I am writing to offer my support for the pending OneWest and CIT merger. OneWest serves as a strong source of capital and banking services to the Southern California community. This merger will retain and create new jobs in California. I believe the management team and OneWest have demonstrated its commitment to our community and to serving the needs of not only their clients but the community at large and due to this, I do not believe there is a need for a public hearing.

“I have never heard anything like this,” said one banking consultant to Bloomberg about Otting’s solicitation of support. “It strikes me as unusual and kind of overkill.”

According to the Federal Reserve, 2,177 individuals and organizations submitted supportive comments, “of which approximately 2,093 commenters submitted substantially identical form letters” — aka OneWest’s sample letter. Opposition groups filed petitions with 21,000 signatures calling on regulators to block the merger.

In an email, OCC spokesperson Bryan Hubbard stated that “identical ‘form letters’ are considered one comment letter as form letters are frequently used.” But the OCC’s order on the merger states: “The OCC received over 2,300 comment letters both in support of and in opposition to the Application. Approximately 1,700 of the letters resulted from an email campaign initiated by CITG and OWB seeking support for the merger.”

Almost immediately, the California Reinvestment Coalition found irregularities with the support letters. The group heard from a Vallejo, California, resident who was listed as sending an email of support for the merger. “I did not authorize or send this email,” the individual said.

Upon further research, the CRC found that, in a batch of 593 “supporters” of the merger, all of them had Yahoo email addresses, when Yahoo only controlled 3 percent of the email market. Yahoo famously suffered a data breach in 2014 of at least 500 million user accounts, including passwords, which could have facilitated placing emails in user’s names without their knowledge. Plus, a large number of the emails were sent in the middle of the night on Valentine’s Day in 2015, and roughly one-third of the email addresses associated with supporters bounced back, including seemingly fake ones like “gooeypooey69@yahoo.com.”

Reports also indicated that OneWest donated \$2.5 million to 14 organizations who provided supportive comments on the merger. In two cases, then-OneWest chair Mnuchin sat on the boards of supportive organizations, and personally delivered \$66,000 to them

from his family foundation. Community groups asked at the time for an investigation into OneWest's possible manipulation of public support, but were rebuffed.

Activists did get regulators to commission a public hearing, and in response to criticism, CIT and OneWest put together a \$5 billion low-income lending plan. But regulators approved the merger on July 21, 2015. The OCC order of approval cited public support. "Commenters in support of the transaction praised the banks for many reasons, including the banks' community outreach efforts," the OCC wrote in its approval order. The astroturf campaign appeared to have worked.

When Otting was nominated to run the OCC in mid-2017, CRC and Inner City Press, a watchdog journalism outlet based in the Bronx, filed an expansive FOIA request, seeking information on OneWest foreclosures, loan modifications, consumer complaints, and regulatory enforcement activities. In addition, the organizations sought "communications, conversations, complaints, interpretations, decisions or actions taken relating to whether emails or other letters or representations of support for the merger of OneWest and CIT Bank were fabricated or manufactured, and whether the purported authors of these emails or letters of support actually supported the merger, or even existed."

AFTER A YEARLONG effort to obtain the information, which included ongoing litigation, the OCC made available 15 pages. They contain emails to and from David Finnegan, an OCC senior licensing analyst who was a point of contact for public comment on the merger.

Four individuals contended in emails to Finnegan that they never sent the comment letters supporting the merger. "This is to bring to your attention that I received an email from the office of OCC regarding a subject I am completely unaware of," wrote one individual (the OCC redacted the emailers' identifying information). "I DID NOT send the email below that you responded to. This is a fraudulent use of my email account." The other three sent similar complaints.

The letter of support attributed to these individuals was identical to the letter posted at the OneWest Bank website.

Matthew Lee of Inner City Press expressed outrage at the fake comments. “There’s nothing more offensive of speech rights than artificially presenting someone as saying something you don’t believe,” Lee said. “You have the right to be silent. It’s so beyond the pale.”

Finnegan responded to these emailers, thanking them for letting him know. He also sent two emails to Stephen Salley, an attorney with Sullivan & Cromwell, who was representing OneWest in the merger. “FYI and review. We would appreciate any information you can provide regarding this submission,” Finnegan wrote to Salley on both occasions.

Presumably, Finnegan reached out to OneWest’s lawyer about the fake comments because they featured the same form letter that OneWest had written to encourage public support. But the two emails are the only record that OCC did any investigation of the fake comments. There is no reply from Salley or Sullivan & Cromwell to the OCC, at least not in written form. “By reaching out to the attorneys immediately, it suggests something serious, and yet there’s no follow-up that’s apparent whatsoever,” said Stein of the California Reinvestment Coalition. His organization has asked the OCC for clarification on how it investigated the fake comments, but he has yet to receive any information.

Stein believes that OneWest had to have been behind the fake comments. “Who else would do it?” he said. “Why would anyone else say, ‘I’ve got an idea, let’s hack into a bank website for the purposes of creating fabricated comment regulatory letters?’”

Olivia Weiss, a spokesperson for CIT, forwarded a request for comment to her colleague Gina Proia, who declined to comment. Salley did not respond when asked whether he or his law firm responded to the OCC. The OCC acknowledged receipt of The Intercept’s questions, but did not respond to most of them.

THE MYSTERY OF the fake merger support comments has taken on new relevance since Otting became head of the OCC, and made his announcement to revise the Community Reinvestment Act. The Fed and the FDIC share in the responsibility for the CRA, but did not join the OCC in issuing an advance notice of proposed rule-making. Critics believe the OCC's hinted-at changes would eliminate bank commitments to low-income residents and local communities.

The CRA, enacted in 1977, hasn't been updated since the 1990s. Its goal is to prevent redlining and other forms of discrimination, by encouraging lending to lower-income borrowers in the communities that banks serve. Banks are assessed every few years and get a grade on their local lending efforts. Advocates say it has moved trillions of dollars into the hands of those who need credit, and made banks more accountable to their communities.

Compromises and loopholes have made the CRA a less effective tool, however. Since its enactment, 97 percent of all banks examined have received a "satisfactory" or "outstanding" grade, according to a 2015 Congressional Research Service report. Despite near-universal compliance with low-income lending, poor people still find loans hard to come by, a testament to banks' persistent and successful efforts to game the system, including getting credits for financing payday lenders, as well as landlords that evict low-income families from apartments. Community groups have consistently called for the CRA to be strengthened, not weakened; a bill released this week by Sen. Elizabeth Warren, D-Mass., would do just that.

No financial penalties are attached to a bad CRA grade; the only real consequence is that scores are taken into account when banks apply for mergers. During the OneWest-CIT merger, groups criticized OneWest for its weak community lending efforts. That's precisely the part of the law that Otting wants to roll back, according to his own comments. A Wall Street Journal report this week, which likened community groups' use of the CRA to "extortion," suggests that Otting and Mnuchin's experience with OneWest is fundamental to their aims. Otting said earlier this year that community groups

should not be able to “pole vault in and hold [bankers] hostage” during mergers.

That makes Otting’s potential role in inducing fake public comments a critical factor. “You have a bank regulator run by a banker who openly defrauded the bank merger process a few years earlier,” said Matthew Lee of Inner City Press. “What these documents show raise troubling questions about the effort to change the CRA.”

Somewhat ironically, Otting’s agency has initiated a public comment period about the CRA changes. “It is time for a national discussion on how we can make the CRA work better,” Otting said, once again soliciting public comments for a preferred regulatory position.

In his public comment for Inner City Press, Lee asked for Otting to recuse himself from the new rule-making, highlighting the fake comment controversy. “Public participation is key to CRA, on performance evaluations and crucially on bank merger and expansion applications,” Lee wrote. He added that it’s unclear whether the OCC has improved its processes to prevent fake comments from being submitted again in the CRA rule-making. The public comment period ends in November.

Otting is scheduled to appear at a Senate Banking Committee hearing on October 2, where his CRA push could be a topic of discussion.

Top photo: Comptroller of the Currency Joseph Otting prepares to testify during a House Financial Services Committee hearing on June 13, 2018.

BLOOMBERG

OneWest Seeks Wall Street's Help Lobbying Yellen on CIT

Matthew Monks and Elizabeth Dexheimer

January 8, 2015, 2:06 PM PST

A California group that advocates for low-income borrowers is calling on regulators to hold hearings on the biggest U.S. bank sale of 2014. The target of that deal, OneWest Bank, is pushing back in an unusual way.

OneWest Chief Executive Officer Joseph Otting sent an e-mail to his contacts on Wall Street this week asking for help to discourage bank overseers from holding public hearings on its \$3.4 billion takeover by CIT Group Inc.

Otting's e-mail includes a link to a petition addressed to Federal Reserve Chair Janet Yellen and others stating that "there is no need for a public hearing." The contents of the e-mail were described by executives at investment banks who received the message and spoke on the condition that they not be named so as not antagonize a potential client.

"I have never heard anything like this," said Bert Ely, an independent banking consultant. "It strikes me as unusual and kind of overkill, unless possibly there is a problem that hasn't surfaced publicly yet that they are trying to mitigate or minimize."

OneWest is the former IndyMac Bancorp, which failed in 2008 and was acquired by a group of investors including George Soros and John Paulson the next year.

"It's general business practice to solicit comments from key constituencies, including customers, community organizations and trade associations, to highlight the support a proposed merger/transaction has within the community," David Isaacs, a spokesman for OneWest, said in an e-mailed statement. Representatives of CIT and the Fed declined to comment.

Sale Criticism

IndyMac's 2009 sale by the Federal Deposit Insurance Corp. was the target of protests by foreclosed homeowners outside the residence of Steven Mnuchin, its chairman. Mnuchin, a former Goldman Sachs Group Inc. partner, brought together Soros, Paulson and others including Michael Dell to acquire IndyMac for about \$1.5 billion.

Those backers agreed last July to sell Pasadena, California-based OneWest to CIT, the New York business lender run by John Thain, and that's revived the protests.

A copy of Otting's e-mail was forwarded to Bloomberg News by Kevin Stein, associate director of the California Reinvestment Coalition, or CRC, which advocates for low-income borrowers and is a primary opponent of the deal.

His group, which organized a protest at OneWest's headquarters in December, has argued in letters to state and federal regulators that the deal will create another "too-big-to fail" bank. The transaction would enrich OneWest management with little benefit to the community, CRC said.

Yellen Letter

Below a message titled "Show your support for OneWest Bank," visitors to the OneWest website are encouraged to add their name and address to a form letter to Yellen.

"This merger will retain and create new jobs in California," the letter reads. "I believe the management team and OneWest have demonstrated its commitment to our community and to serving the needs of not only their clients but the community at large and due to this, I do not believe there is a need for a public hearing."

Regulators have made it harder for big banks to merge since taxpayers bailed out the largest U.S. lenders during the financial crisis. M&T Bank Corp.'s \$3.7 billion deal for Hudson City Bancorp. Inc. has been stalled since 2012. The Fed delayed Capital One Financial Corp.'s \$9 billion acquisition of ING Groep NV's online bank for public hearings.

The CIT deal is slated to close in the first half of 2015, pending approval from the Fed and Office of the Comptroller of the Currency.

CIT would have \$67 billion in assets and 73 branches after buying OneWest, according to an investor presentation in July. At that size, CIT would become the 36th largest bank holding company by assets, according to regulatory data.



December 11, 2019

VIA Electronic Delivery

Chief FOIA Officer
Communications Division
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

Re: Freedom of Information Act Records Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., and the Office of the Comptroller of the Currency (OCC) and the Department of the Treasury regulations at 12 C.F.R. Part 4 and 31 C.F.R. Part 1, respectively, Democracy Forward Foundation and California Reinvestment Coalition make the following request for records.

Records Requested

In an effort to understand and explain to the public how OCC is responding to community groups' concerns with its effort to revise the Community Reinvestment Act regulations,¹ Democracy Forward Foundation and California Reinvestment Coalition request that the OCC produce the following within twenty (20) business days:

1. All emails related to the revision of the Community Reinvestment Act regulations whose sender and/or recipient fields include one or more email addresses with a top-level domain ".com," ".org," or ".edu." This does not include comments filed in the public rulemaking docket number OCC-2018-0008, "Reforming the Community Reinvestment Act Regulatory Framework."²
2. All records containing or reflecting communications, conversations, complaints, interpretations, decisions or actions taken relating to whether public comments related to the Advanced Notice of Proposed Rulemaking (ANPR) "Reforming the Community Reinvestment Act Regulatory Framework" were fabricated, manufactured, or otherwise not authored by the putative signatory.
3. All records containing or reflecting communications to or from Comptroller Joseph Otting or Deputy Comptroller for Community Affairs Barry Wides concerning or relating

¹ Advanced Notice of Proposed Rulemaking, Reforming Community Reinvestment Act Regulatory Framework, OCC (Sept. 5, 2018), <https://www.regulations.gov/document?D=OCC-2018-0008-0001>.

² Docket Folder, Reforming Community Reinvestment Act Regulatory Framework, OCC (last accessed Dec. 2, 2019), <https://www.regulations.gov/docket?D=OCC-2018-0008>.

to California Reinvestment Coalition (CRC) or the American Banker articles “BankThink Why is OCC scared of public input?”³ or “Setting the record straight on CRA reform.”⁴

4. All records containing or reflecting communications from Deputy Comptroller for Community Affairs Barry Wides to persons or entities outside the government seeking corrections of or responding to statements, whether inside or outside the ANPR/rulemaking process, by such persons or entities about the OCC effort to revise the Community Reinvestment Act regulations.

The timeline for this search is September 5, 2018 to the date the search is completed.

Scope of Search

Please search for records regardless of format, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical materials. This request includes, without limitation, all correspondence, letters, emails, text messages, calendar entries, facsimiles, telephone messages, voice mail messages, and transcripts, notes, minutes, or audio or video recordings of any meetings, telephone conversations, or discussions. In searching for responsive records, however, please exclude publicly available materials such as news clips that mention otherwise responsive search terms.

FOIA requires agencies to disclose information, with only limited exceptions for information that would harm an interest protected by a specific exemption or where disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A). In the event that any of the requested documents cannot be disclosed in their entirety, we request that you release any material that can be reasonably segregated. *See id.* 5 U.S.C. § 552(b). Should any documents or portions of documents be withheld, we further request that you state with specificity the description of the document to be withheld and the legal and factual grounds for withholding any documents or portions thereof in an index, as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Should any document include both disclosable and non-disclosable material that cannot reasonably be segregated, we request that you describe what proportion of the information in a document is non-disclosable and how that information is dispersed throughout the document. *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

If requested records are located in, or originated in, another agency, department, office, installation or bureau, please refer this request or any relevant portion of this request to the appropriate entity.

To the extent that the records are readily reproducible in an electronic format, we would prefer to receive the records in that format. However, if certain records are not available in that format, we are willing to accept the best available copy of each such record.

³ Paulina Gonzalez-Brito, BankThink: Why is OCC scared of public input?, Am. Banker (April 08, 2019), <https://www.americanbanker.com/opinion/why-is-occ-scared-of-public-input>.

⁴ Barry Wides, BankThink: Setting the record straight on CRA reform, Am. Banker (March 25, 2019), <https://www.americanbanker.com/opinion/setting-the-record-straight-on-cra-reform>.

Please respond to this request in writing within 20 working days as required under 5 U.S.C. § 552(a)(6)(A)(i). If all of the requested documents are not available within that time period, we request that you provide us with all requested documents or portions of documents that are available within that time period. If all relevant records are not produced within that time period, we are entitled to a waiver of fees for searching and duplicating records under 5 U.S.C. § 552(a)(4)(A)(viii)(I).

Request for Fee Waiver

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), 12 C.F.R. § 4.17, and 31 C.F.R. § 1.7, Democracy Forward Foundation (DFF) and California Reinvestment Coalition (CRC) request a waiver of all fees associated with processing records for this request. FOIA requires documents to be furnished to requesters at no fee or reduced fees when “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A); *see also* 12 C.F.R. § 4.17(4), 31 C.F.R. § 1.7(k)(1).

The disclosure of records sought by this Request is likely to contribute significantly to the public understanding of the operations or activities of the government.

The OCC has begun the process of taking public comment on revised regulations under the Community Reinvestment Act (CRA). The CRA is a crucial fair lending law designed to combat redlining and encourage financial institutions to meet the credit needs of their communities. In September 2018, the OCC published an Advanced Notice of Proposed Rulemaking to take comment on a new CRA regulatory framework.⁵ The ANPRM received over 1,500 public comments in response. The OCC’s behavior toward commenters, particularly from community groups, has raised significant flags. In January and March 2019 respectively, the OCC Deputy Comptroller for Community Affairs Barry Wides sent a letter to CRC expressing offense at its advocacy around the CRA and published an article that took the unusual step of criticizing commenters that in his view “have not contributed positively to the public discussion” and “opted to distort facts by inaccurately portraying the purpose and content of the ANPR.”⁶ And the following October, Wides again sent a letter to the California Reinvestment Coalition asking CRC to alter its stance on the ANPRM.⁷ This request seeks more information about OCC’s views of community groups like California Reinvestment Coalition, how it decided to take these unusual steps, and whether there are other irregularities in the ANPRM comment process.⁸ The

⁵ Advanced Notice of Proposed Rulemaking, Reforming Community Reinvestment Act Regulatory Framework, OCC (Sept. 5, 2018), <https://www.regulations.gov/document?D=OCC-2018-0008-0001>.

⁶ Letter from Barry Wides, Deputy Comptroller, OCC, to Paulina Gonzalex-Brito, Executive Director, CRC (January 9, 2019), <http://calreinvest.org/wp-content/uploads/2019/03/Wides-Letter-to-CRC.pdf>; Barry Wides, BankThink: Setting the record straight on CRA reform, Am. Banker (March 25, 2019), <https://www.americanbanker.com/opinion/setting-the-record-straight-on-cra-reform>.

⁷ @CalReinvest, Twitter (Oct. 2, 2019), <https://twitter.com/CalReinvest/status/1179491967308185600?s=20>.

⁸ Cf. David Dayen, *The Fake Public Comments Supporting a Bank Merger are Coming from Inside the House*, The Intercept (Sept. 29, 2018), <https://theintercept.com/2018/09/29/joseph-otting-occ-onewest-bank-merger-cit/> (documenting “fake” public comments in a previous OCC notice-and-comment process).

requested records will therefore have a connection that is “direct and clear” to operations or activities of the Federal Government, and because these records will shed new light on this important topic, they also will be “meaningfully informative” about government operations or activities. 31 C.F.R. § 1.7(k)(2).

Democracy Forward Foundation and California Reinvestment Coalition are able to, and regularly do, disseminate Records obtained through FOIA requests to a broad audience of persons interested in the subject matter.

In determining whether a fee waiver is appropriate, courts consider whether a requester has a “demonstrated . . . ability to disseminate the requested information,” *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1116-17 (D.C. Cir. 2015), and whether the requester regularly disseminates records obtained through FOIA to “a reasonably broad audience of persons interested in the subject” of its work. *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994). FOIA does not require a requester to describe exactly how it intends to disseminate the information requested, as that would require “pointless specificity”; all that is necessary is for a requester to adequately demonstrate its “ability to publicize disclosed information.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003). In evaluating a fee waiver request, courts consider how a requester actually communicates information collected through FOIA to the public, including press releases or a website where documents received are made available, *see id.*, or whether the requester has a history of “contacts with any major news[] companies” that suggest an ability to disseminate materials of interest through the press. *Larson v. C.I.A.*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (upholding a denial of a fee waiver to a requester who had failed to identify his relationships with newspaper companies that could disseminate documents).

DFF has a demonstrated ability to disseminate information of public interest requested through FOIA, and intends to publicize records DFF receives that contribute significantly to the public’s understanding of the operations of government.

DFF operates a dedicated communications staff with deep relations with a wide variety of national publications. When DFF obtains materials through FOIA requests that are of significant public interest, DFF’s communications staff regularly works to ensure that these materials and their contents are featured in press articles educating the public about the operation of government; many articles feature additional commentary and analysis from DFF staff about those materials and their relevance to policy issues of public interest.⁹

⁹ See, e.g., Alexander Nazaryan, *Why did right-wing troll Charles C. Johnson meet with Commerce Secretary Wilbur Ross?*, Yahoo News (May 14, 2019), <https://news.yahoo.com/why-did-rightwing-troll-charles-c-johnson-want-to-meet-with-commerce-secretary-wilbur-ross-090000636.html>; Derek Kravitz and Jack Gillum, “Happy to Do It”: *Emails Show Current FAA Chief Coordinated With Ex-Lobbyist Colleagues on Policy*, ProPublica (Mar. 27, 2019), <https://www.propublica.org/article/dan-elwell-current-faa-chief-coordinated-with-ex-lobbyist-colleagues-on-policy>; Hamid Aleaziz, *Emails Show US Border Officials Didn’t Receive “Zero Tolerance” Guidance Until After the Policy Was Enacted*, BuzzFeed News (Feb. 28, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/zero-tolerance-policy-guidance-dhs-family-separation>; Jonathan Cohn and Jeffrey Young, *Emails Show Trump Administration Was Told Obamacare Ad Cuts Could Hurt Enrollment*, HuffPost (Dec. 17, 2018), https://www.huffingtonpost.com/entry/trump-verma-obamacare-advertising-cut_us_5c115061e4b084b082ff8dba; Madison Pauly, *When the Biggest Prison Company Complained About a California Sanctuary Law, ICE Listened*, Mother Jones (Dec. 7, 2018), <https://www.motherjones.com/politics/2018/12/geo-memo-private-prison-california-immigration/>; Eliza Rellman,

Additionally, DFF regularly sends press releases and other materials to over 6,000 members of the press and the over 7,000 members on our organization's email list, discussing ongoing legal developments related to executive branch policymaking. These materials often include descriptions and analysis of information obtained by DFF through its FOIA requests.¹⁰ In

'Just answer the question and kill this story': In internal emails, Heather Nauert criticized Rex Tillerson's refusal to deny reports that he called Trump a 'moron,' Business Insider (Nov. 2, 2018), <https://www.businessinsider.com/heather-nauert-rex-tillerson-trump-moron-2018-11>; Rebecca Klein, *Lawsuit Accuses Betsy DeVos And Her Deputies Of Being Motivated By Sexism*, HuffPost (Oct. 31, 2018), https://m.huffpost.com/us/entry/us_5bd9ff6ce4b01abc6a1ad4a9; Nick Penzenstadler, *A year after Vegas shooting, ATF emails reveal blame, alarm over bump stocks*, USA Today (Oct. 1, 2018), <https://www.usatoday.com/story/news/2018/10/01/year-after-vegas-shooting-atf-emails-reveal-blame-alarm-over-bump-stocks/1432137002/>; Jessica Kwong, *Ivanka Trump was more than complicit in Obama equal pay rollback—she had a hand in it, watchdog alleges*, Newsweek (Aug. 29, 2018), <https://www.newsweek.com/ivanka-trump-equal-pay-complicit-obama-1093833>; Vera Bergengruen, *New Emails Show What Happens When The Pentagon Has To Scramble To Catch Up To Trump*, BuzzFeed News (July 25, 2018), <https://www.buzzfeednews.com/article/verabergengruen/these-emails-show-what-happens-when-the-white-house-keeps>; Erin Dooley, *Exclusive: Former for-profit college executive shaped Education Department policy that could benefit former employers: Documents*, ABC News (May 15, 2017), <https://abcnews.go.com/US/exclusive-profit-college-executive-shaped-education-department-policy/story?id=55108981>; Heidi Przybyla, *Notes, emails reveal Trump appointees' war to end HHS teen pregnancy program*, NBC News (Mar. 20, 2018), <https://www.nbcnews.com/politics/politics-news/notes-emails-reveal-trump-appointees-war-end-hhs-teen-pregnancy-n857686>; Dominic Holden, *Documents Show The Trump Administration Approved Bump Stocks Before It Opposed Them*, BuzzFeed News (Mar. 22, 2018), <https://www.buzzfeednews.com/article/dominicholden/trump-administration-bump-stocks>; Bernard Condon, *Trump Advisor Denies He Cheered End of Tunnel Funding Deal*, Associated Press (Feb. 13, 2018), available at <https://www.usnews.com/news/business/articles/2018-02-13/trump-adviser-denies-he-cheered-end-of-tunnel-funding-deal>; Celeste Katz, *Interior Department tapped wildfire preparedness funds for Ryan Zinke helicopter tour*, Newsweek (Dec. 29, 2017), <https://www.newsweek.com/ryan-zinke-interior-department-helicopters-wildfires-757857>.

¹⁰ See, e.g., *BREAKING: At Congressional Hearing, Sec. DeVos Confronted With Records Revealing Trump Administration's Unlawful Decision to Permit Federal Funds to Arm Teachers* (Apr. 10, 2019), <https://democracyforward.org/press/breaking-at-congressional-hearing-sec-devos-confronted-with-records-revealing-trump-administrations-unlawful-decision-to-permit-federal-funds-to-arm-teachers/>; *BREAKING: New Evidence Reinforces Claim Trump's Title IX Policy Was Based on Sexist Stereotypes, Rendering it Unconstitutional* (Nov. 1, 2018), <https://democracyforward.org/press/breaking-new-evidence-reinforces-claim-trumps-title-ix-policy-was-based-on-sexist-stereotypes-rendering-it-unconstitutional/>; *On 1-Year Anniversary of Equal Pay Roll Back, New Documents Reveal Ivanka Trump's Role in Trump Administration Decision to Roll Back Protections for Women and Working Families* (Aug. 29, 2018), <https://democracyforward.org/press/on-1-year-anniversary-of-equal-pay-roll-back-new-documents-reveal-ivanka-trumps-role-in-trump-administration-decision-to-roll-back-protections-for-women-and-working-families/>; *Democracy Forward Demands Ethics Investigation into White House Official's Role in Developing Special Drug Pricing Project With Novartis* (July 11, 2018), <https://democracyforward.org/press/democracy-forward-demands-ethics-investigation-into-white-house-officials-role-in-developing-special-drug-pricing-project-with-novartis/>; *BREAKING: New Records Reveal DeVos Senior Advisor And Former For-Profit College Executive Directed Rollback of Protections Against Predatory Student Loans* (May 15, 2018), <https://democracyforward.org/press/breaking-new-records-reveal-devos-senior-advisor-former-profit-college-executive-directed-rollback-protections-predatory-student-loans/>; *BREAKING: New Records Suggest Trump-Appointed Political Officials Drove HHS Decision To End Program Grants That Have Helped Reduce Teen Pregnancy Rates To All-Time Low* (Mar. 20, 2018), <https://democracyforward.org/press/breaking-new-records-suggest-trump-appointed-political-officials-drove-hhs-decision-end-program-grants-helped-reduce-teen-pregnancy-rates-time-low/>.

addition, DFF operates a verified Twitter account with over 6,000 followers, and frequently uses the account to circulate significant documents received through FOIA requests.¹¹

DFF's website also houses a great deal of information obtained through its FOIA requests, accessible to the public at no cost. DFF's website logged over 187,000 pageviews in 2018 alone.

DFF frequently incorporates documents received through FOIA into related legal actions brought by DFF on behalf of its clients, and in doing so further publicizes documents received by explaining their legal significance.¹²

Similarly, CRC frequently submits FOIA requests to enhance the public's understanding of the actions of financial regulatory agencies.¹³ It publicizes the government's responses to its requests in its newsletter and on its website. CRC also use this information to further enhance public discourse through comments and communications to various administrative agencies, and through its media work to educate the public, regulatory agencies and policymakers about the plight of vulnerable residents and communities and the need for regulators and legislators to more closely scrutinize financial institution practices.¹⁴

Democracy Forward Foundation and California Reinvestment Coalition are purely noncommercial requesters.

¹¹ See, e.g., the following tweets and tweet threads from @DemocracyFwd: <https://twitter.com/DemocracyFwd/status/910123899035226112> (Sep. 19, 2017); <https://twitter.com/DemocracyFwd/status/976991060680462336> (Mar. 22, 2018); <https://twitter.com/DemocracyFwd/status/996480908877271042> (May 15, 2018); <https://twitter.com/DemocracyFwd/status/998986714105483264> (May 22, 2018); <https://twitter.com/DemocracyFwd/status/1022870550769754112> (July 27, 2018); <https://twitter.com/DemocracyFwd/status/1035144352345903105> (Aug. 30, 2018); <https://twitter.com/DemocracyFwd/status/1053294640382779392> (Oct. 19, 2018); <https://twitter.com/DemocracyFwd/status/1071105652867690496> (Dec. 7, 2018).

¹² See, e.g., Second Amended Complaint for Injunctive Relief at 31, *SurvJustice, Inc., et al. v. DeVos et al.*, No. 3:18-cv-00535-JSC (N.D. Cal. Oct. 31, 2018), ECF No. 86, reported on in Klein, *supra* n. 4; Memorandum of Law in Support of Plaintiffs' Motion for Preliminary and Permanent Injunction at 14-15, *Healthy Teen Network and Mayor and City Council of Baltimore v. Azar and U.S. Dep't of Health and Human Services*, No. 1:18-cv-00468-CCB (D. Md. Mar. 27, 2018), ECF No. 18-1, reported on in Przybyla, *supra* n. 4.

¹³ See, e.g., *Federal Reverse Mortgage Program Results In Widows Losing Their Homes After Death Of Spouse* (March 12, 2018), <http://calreinvest.org/press-release/federal-reverse-mortgage-program-results-in-widows-losing-their-homes-after-death-of-spouse-2/>; *Fact Sheet: CIT Group's Financial Freedom is Responsible for nearly 40% of HECM Reverse Mortgage Foreclosures*, <http://calreinvest.org/wp-content/uploads/2018/08/CRC20Fact20Sheet20about20Financial20Freedom20Foreclosures20Since20April202009.pdf>; *Fact Sheet: OneWest Bank Expected to Receive Over \$2.4 billion from the FDIC*, <http://calreinvest.org/wp-content/uploads/2018/08/CRC-FDIC-Loss-Share-Fact-Sheet.pdf>.

¹⁴ See, e.g., David Dayen, *The Fake Public Comments Supporting a Bank Merger are Coming from Inside the House*, The Intercept (Sept. 29, 2018), <https://theintercept.com/2018/09/29/joseph-otting-occ-onewest-bank-merger-cit/>; David Wharton, *HUD Addresses Concerns About Reverse Mortgage Foreclosures*, DS News (March 14, 2018), <https://dsnews.com/daily-dose/03-14-2018/hud-addresses-concerns-reverse-mortgage-foreclosures>; Matthew Goldstein and Alexandra Stevenson, *Trump's Treasury Pick Moves in Secretive Hedge Fund Circles*, NYT (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/business/dealbook/steven-mnuchin-trump-treasury-hedge-funds.html>.

Neither Democracy Forward Foundation nor California Reinvestment Coalition are filing this request to further a commercial interest, and any information disclosed by DFF or CRC as a result of this FOIA request will be disclosed at no cost. A fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch*, 326 F.3d at 1312 ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (quotation marks omitted)).

Democracy Forward is a representative of the news media.

A representative of the news media is one that "publishes or otherwise disseminates information to the public," and in particular one that "gathers information from a variety of sources; exercises a significant degree of editorial discretion in deciding what documents to use and how to organize them; devises indices and finding aids; and distributes the resulting work to the public." *Nat'l Sec. Archive v. US Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Representatives of the news media qualify for a waiver of all fees except "reasonable standard charges for document duplication" as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II).

As documented above, DFF extensively disseminates information gathered through FOIA requests to the public, via sharing that information with other news outlets, publishing and sending press releases and other updates to our website and email list, and alerting our followers on social media to new developments in our work, including highlights from documents obtained through FOIA. This process entails a great degree of editorial discretion in deciding which documents to highlight and how to organize them for the public, as our team of lawyers and policy experts carefully examine and build a thorough understanding of the documents we receive from FOIA and their relationship to policies of interest to the public.

Beyond disseminating information to reporters for them to publish, and sharing press releases and updates, Democracy Forward has also sought to disseminate information directly to the public through reports and opinion pieces written by our staff.¹⁵

¹⁵ See, e.g., *A Blueprint for Cronyism: President Trump's Illegal Infrastructure Plan to Enrich His Friends*, Democracy Forward Foundation (Jan. 30, 2018), <https://democracyforward.org/wp-content/uploads/2018/01/Infrastructure-Report.pdf>; Elana Schor, *Trump critics seize on developer ties to infrastructure plan*, Politico (Jan. 30, 2018), <https://www.politico.com/story/2018/01/30/trump-infrastructure-developers-state-of-union-376326> (press coverage of DFF's report on White House infrastructure policy); *Airlines and the Trump Administration*, Democracy Forward Foundation (Jan. 11, 2018), <https://democracyforward.org/updates/airlines-and-the-trump-administration/>; Bart Jansen, *Lost bags, airline fees: Protections for travelers rights stall under Trump*, USA Today (Jan. 19, 2018), <https://www.usatoday.com/story/news/2018/01/19/lost-bags-airline-fees-protections-travelers-rights-stall-under-trump/1043879001/> (press coverage utilizing the information DFF organized regarding regulatory changes); *What Has Trump Done on Guns? A Lot.*, Democracy Forward Foundation (Feb. 21, 2018), <https://democracyforward.org/updates/trump-done-guns-lot/>; Christi Parsons, *Trump 'supportive' of tougher gun law, but his record suggests that may not mean much*, LA Times (Feb. 20, 2018) (press coverage utilizing the information DFF organized regarding regulatory changes); Anne Harkavy and Farhana Khera, *When the Trump administration lies, it might literally be illegal: Learn about the Information Quality Act*, NY Daily News (Feb. 14, 2019), <https://www.nydailynews.com/opinion/ny-oped-when-the-trump-administration-lies-it-might-literally-be-illegal-20190213-story.html> (piece co-authored by DFF executive director); Meg Uzzell and Rachael Klarman, *Why These Women Are Suing Trump to Help End the Gender Pay Gap*, Teen Vogue (Nov. 28, 2017),

California Reinvestment Coalition is an "other requester."

CRC is a nonprofit institution advocating for fair and equal access to banking and other financial services for low-income and communities of color. CRC is a 501(c)(3) non-profit corporation and accordingly falls under the "all other requesters" category. 12 C.F.R. § 4.17(b)(2)(iii).

For all the foregoing reasons, Democracy Forward Foundation and California Reinvestment Coalition qualify for a fee waiver.

Conclusion

If you need clarification as to the scope of the request, have any questions, or foresee any obstacles to releasing fully the requested records within the 20-day period, please contact Democracy Forward as soon as possible at foia@democracyforward.org.

We appreciate your assistance and look forward to your prompt response.

Sincerely,

Nitin Shah
Democracy Forward Foundation

Kevin Stein
California Reinvestment Coalition

<https://www.teenvogue.com/story/women-sue-trump-gender-pay-gap> (piece authored by two members of DFF's staff).

Finnegan, David

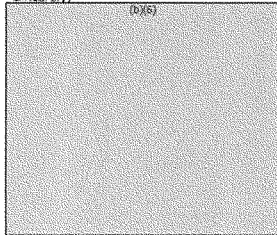
From: (b)(6)@gmail.com on behalf of (b)(6)
Sent: Friday, January 16, 2015 12:57 PM
To: Finnegan, David
Subject: Fraudulent use of my email account (RE: Support for the OneWest and CIT Merge)
Categories: Red Category

Mr. David Finnegan
 OCC

This is to bring to your attention that **I received an email from the office of OCC regarding a subject I am completely unaware of.** I DID NOT send the email below that you responded to. This is a fraudulent use of my email account. I will be working with my email hosting provider to ensure that this does not happen again.

I will appreciate your reply acknowledging this very important notice. Thank you very much!

Sincerely,



----- Forwarded message -----

From: WE Licensing <WE.Licensing@occ.treas.gov>
Date: Fri, Jan 16, 2015 at 11:34 AM
Subject: RE: Support for the OneWest and CIT Merger
To: (b)(6) <(b)(6)>

Dear Commenter,

The Office of the Comptroller of the Currency (OCC) acknowledges receipt of your comments regarding the merger of CIT Bank, Salt Lake City, Utah with and into OneWest Bank, National Association, Pasadena, CA.

At this time, the OCC has not made a decision as to whether it will hold public hearings. Should the OCC decide to hold public hearings, we will notify you promptly.

For more information regarding the OCC's practice on receipt and review of public comments received in connection with pending applications, please see Comptroller's Licensing Manual (Public Notice and Comments) at

<http://occ.gov/publications/publications-by-type/licensing-manuals/PublicNCbooklet.pdf>

We appreciate your comments and will consider them during our review of the application. If you have questions, please contact David Finnegan at (720) 475-7650 or

David.finnegan@occ.treas.gov.

Please be advised that a representative of OneWest Bank, National Association has been provided a copy of your comment.

-----Original Message-----

From: (b)(6) mailto: (b)(6)
Sent: Friday, January 16, 2015 11:42 AM
To: comments.applications@ny.frb.org; WE Licensing
Subject: Support for the OneWest and CIT Merger

(b)(6)

E-Mail: (b)(6)

Subject: Support for the OneWest and CIT Merger

Dear Chair Yellen, President Dudley and Comptroller Curry,

I am writing to offer my support for the pending OneWest and CIT merger. OneWest serves as a strong source of capital and banking services to the Southern California community. This merger will retain and create new jobs in California. I believe the management team and OneWest have demonstrated its commitment to our community and to serving the needs of not only their clients but the community at large and due to this, I do not believe there is a need for a public hearing.

Kind regards,

(b)(6)

Finnegan, David

From: (b)(6)
Sent: Friday, January 16, 2015 7:56 PM
To: Finnegan, David
Subject: OneWest/CIT

Follow Up Flag: Follow up
Flag Status: Flagged

Categories: Red Category

I am NOT the writer of the communication below -- name, address & zip are wrong:

Dear Commenter,

The Office of the Comptroller of the Currency (OCC) acknowledges receipt of your comments regarding the merger of CIT Bank, Salt Lake City, Utah with and into OneWest Bank, National Association, Pasadena, CA.

At this time, the OCC has not made a decision as to whether it will hold public hearings. Should the OCC decide to hold public hearings, we will notify you promptly.

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We appreciate your comments and will consider them during our review of the application. If you have questions, please contact David Finnegan at (720) 475-7650 or David.Finnegan@occ.treas.gov.

Please be advised that a representative of OneWest Bank, National Association has been provided a copy of your comment.

-----Original Message-----

From: (b)(6) [mailto:(b)(6)]
Sent: Friday, January 16, 2015 12:13 PM
To: comments.application@weh.org; WE Licensing
Subject: Support for the OneWest and CIT Merger

(b)(6)
 E-Mail: (b)(6)

Subject: Support for the OneWest and CIT Merger

Dear Chair Yellen, President Dudley and Comptroller Curry,

I am writing to offer my support for the pending OneWest and CIT merger. OneWest serves as a strong source of capital and banking services to the Southern California community. This merger will retain and create new jobs in California. I believe the management team and OneWest have demonstrated its commitment to our community and to serving the needs of not only their clients but the community at large and due to this, I do not believe there is a need for a public hearing.

Finnegan, David

From: Finnegan, David
Sent: Tuesday, January 20, 2015 8:02 AM
To: (b)(6)
Subject: RE: OneWest/CIT

Thank you for letting us know.

David W. Finnegan
 Senior Licensing Analyst/NBE
 Western District
 720/475-7653

From: (b)(6)
Sent: Friday, January 16, 2015 7:56 PM
To: Finnegan, David
Subject: OneWest/CIT

I am NOT the writer of the communication below – name, address & zip are wrong:

Dear Commenter,

The Office of the Comptroller of the Currency (OCC) acknowledges receipt of your comments regarding the merger of CIT Bank, Salt Lake City, Utah with and into OneWest Bank, National Association, Pasadena, CA.

At this time, the OCC has not made a decision as to whether it will hold public hearings. Should the OCC decide to hold public hearings, we will notify you promptly.

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We appreciate your comments and will consider them during our review of the application. If you have questions, please contact David Finnegan at (720) 475-7650 or David.finnegan@occ.treasury.gov.

Please be advised that a representative of OneWest Bank, National Association has been provided a copy of your comment.

-----Original Message-----

From: (b)(6)
Sent: Friday, January 16, 2015 12:13 PM
To: comments.applications@ny.frb.org; WE Licensing
Subject: Support for the OneWest and CIT Merger

(b)(6)

E-Mail: (b)(6)

Subject: Support for the OneWest and CIT Merger

Dear Chair Yellen, President Dudley and Comptroller Curry,

I am writing to offer my support for the pending OneWest and CIT merger. OneWest serves as a strong source of capital and banking services to the Southern California community. This merger will retain and create new jobs in California. I believe the management team and OneWest have demonstrated its commitment to our community and to serving the needs of not only their clients but the community at large and due to this, I do not believe there is a need for a public hearing

Kind regards,

(b)(6)

Finnegan, David

From: (b)(6)@yahoo.com
Sent: Wednesday, February 18, 2015 9:46 AM
To: WE Licensing
Subject: Re: Support for the OneWest and CIT Merger

I did not write this letter!

Sent from (b)(6)

> On Feb 18, 2015, at 8:18 AM, WE Licensing <WE.Licensing@occ.treas.gov> wrote:
 >
 > Dear Commenter,
 >
 > The Office of the Comptroller of the Currency (OCC) acknowledges receipt of your comments regarding the merger of CIT Bank, Salt Lake City, UT with and into OneWest Bank, National Association, Pasadena, CA.
 >
 > The OCC has decided it will hold a public meeting regarding the merger. Please refer to the following link for more information: <http://www.occ.gov/news-issuances/news-releases/2015/nr-ia-2015-17.html>
 >
 > For more information regarding the OCC's practice on receipt and review of public comments received in connection with pending applications, please see Comptroller's Licensing Manual (Public Notice and Comments) at <http://occ.gov/publications/publications-by-type/licensing-manuals/PublicNCbooklet.pdf>
 >
 > Please be advised that comments are published without redaction of personally identifiable information including any business or personal information such as name and address, e-mail addresses, or telephone numbers. A representative of OneWest Bank, National Association has been provided a copy of your comment.
 >
 > We appreciate your comments and will consider them during our review of the application. If you have questions, please contact David Finnegan at (720) 475-7650 or David.finnegan@occ.treas.gov.
 >
 > -----Original Message-----
 > From: (b)(6)@yahoo.com (mailto:(b)(6)@yahoo.com)
 > Sent: Saturday, February 14, 2015 4:36 AM
 > To: comments.applications@ny.frb.org, WE Licensing
 > Subject: Support for the OneWest and CIT Merger
 >
 > (b)(6)
 >
 > (b)(6)
 > E-Mail: (b)(6)@yahoo.com
 >
 > Subject: Support for the OneWest and CIT Merger
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serving the needs of not only their clients but the community at large and due to this, I do not believe there is a need for a public hearing.

>

> Kind regards,

> (b)(6)

>

>

>

>

Finnegan, David

From: (b)(6) [mailto:(b)(6)@yahoo.com]
Sent: Monday, February 23, 2015 11:24 PM
To: WE Licensing
Subject: Re: Support for the OneWest and CIT Merger

To whom it may concern-
 I never send this email. I am not aware of the merge of the companies
 Someone got a hold on my email address. Sorry
 Thanks,
 (b)(6)

On Wednesday, February 18, 2015 8:18 AM, WE Licensing <WE.Licensing@occclearing.com> wrote:

Dear Commenter,

The Office of the Comptroller of the Currency (OCC) acknowledges receipt of your comments regarding the merger of CIT Bank, Salt Lake City, UT with and into OneWest Bank, National Association, Pasadena, CA.

The OCC has decided it will hold a public meeting regarding the merger. Please refer to the following link for more information: <http://www.occ.gov/news-issuances/news-releases/2015/nr15-17.html>

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Please be advised that comments are published without redaction of personally identifiable information including any business or personal information such as name and address, e-mail addresses, or telephone numbers. A representative of OneWest Bank, National Association has been provided a copy of your comment.

We appreciate your comments and will consider them during our review of the application. If you have questions, please contact David Finnegan at (720) 475-7650 or David.finnegan@occclearing.com.

-----Original Message-----

From: (b)(6) [mailto:(b)(6)@yahoo.com]
Sent: Saturday, February 14, 2015 4:35 AM
To: comments.applications@ny.frb.org, WE Licensing
Subject: Support for the OneWest and CIT Merger

(b)(6)

(b)(6)

E-Mail: (b)(6)@yahoo.com

Finnegan, David

From: Finnegan, David
Sent: Tuesday, January 20, 2015 8:04 AM
To: (b)(6)
Subject: RE: Fraudulent use of my email account (RE: Support for the OneWest and CIT Merge)

Thank you for letting us know about this situation.

David

David W. Finnegan
 Senior Licensing Analyst/NBE
 Western District
 720/475-7653

From: (b)(6)@gmail.com [mailto:(b)(6)@gmail.com] On Behalf Of (b)(6)
Sent: Friday, January 16, 2015 12:57 PM
To: Finnegan, David
Subject: Fraudulent use of my email account (RE: Support for the OneWest and CIT Merge)

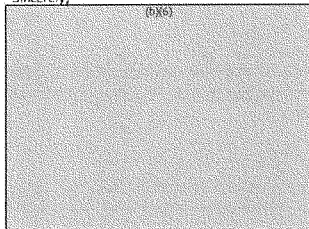
Mr. David Finnegan
 OCC

This is to bring to your attention that **I received an email from the office of OCC regarding a subject I am completely unaware of.** I DID NOT send the email below that you responded to. This is a fraudulent use of my email account. I will be working with my email hosting provider to ensure that this does not happen again.

I will appreciate your reply acknowledging this very important notice. Thank you very much!

Sincerely,

(b)(6)



----- Forwarded message -----

From: WE Licensing <WE.Licensing@occ.treas.gov>
Date: Fri, Jan 16, 2015 at 11:34 AM
Subject: RE: Support for the OneWest and CIT Merger

To: (b)(6) (b)(6)

Dear Commenter,

The Office of the Comptroller of the Currency (OCC) acknowledges receipt of your comments regarding the merger of CIT Bank, Salt Lake City, Utah with and into OneWest Bank, National Association, Pasadena, CA.

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David.finnegan@occ.treas.gov.

Please be advised that a representative of OneWest Bank, National Association has been provided a copy of your comment.

-----Original Message-----

From: (b)(6) [mailto:(b)(6)]
Sent: Friday, January 16, 2015 11:42 AM
To: comments.applications@ny.frb.org; WE Licensing
Subject: Support for the OneWest and CIT Merger

(b)(6)

E-Mail: (b)(6)

Subject: Support for the OneWest and CIT Merger

Dear Chair Yellen, President Dudley and Comptroller Curry,

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Kind regards,

(b)(6)

Finnegan, David

From: Finnegan, David
Sent: Tuesday, January 20, 2015 8:13 AM
To: Salley, Stephen M (Salleys@sulicrom.com)
Subject: FW: OneWest/CIT

FYI and review. We would appreciate any information you can provide regarding this submission.

Thank you,
 David

David W. Finnegan
 Senior Licensing Analyst/NBE
 Western District
 720/475-7653

From: (b)(6) mailto:(b)(6)
Sent: Friday, January 16, 2015 7:56 PM
To: Finnegan, David
Subject: OneWest/CIT

I am NOT the writer of the communication below – name, address & zip are wrong:

Dear Commenter,

The Office of the Comptroller of the Currency (OCC) acknowledges receipt of your comments regarding the merger of CIT Bank, Salt Lake City, Utah with and into OneWest Bank, National Association, Pasadena, CA

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Sent: Friday, January 16, 2015 12:13 PM
To: comments.applications@ny.frb.org WE Licensing
Subject: Support for the OneWest and CIT Merger

(b)(6)

E-Mail: [REDACTED]

Subject: Support for the OneWest and CIT Merger

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[REDACTED]

Finnegan, David

From: Finnegan, David
Sent: Tuesday, January 20, 2015 8:13 AM
To: Salley, Stephen M (Salleys@sulicrom.com)
Subject: FW: Fraudulent use of my email account (RE: Support for the OneWest and CIT Merge)

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Thank you,
David

David W. Finnegan
Senior Licensing Analyst/NBE
Western District
720/475-7853

From: (b)(6)@gmail.com [mailto:(b)(6)@gmail.com] **On Behalf Of** (b)(6)
Sent: Friday, January 16, 2015 12:57 PM
To: Finnegan, David
Subject: Fraudulent use of my email account (RE: Support for the OneWest and CIT Merge)

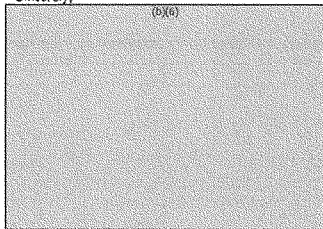
Mr. David Finnegan
OCC

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I will appreciate your reply acknowledging this very important notice. Thank you very much!

Sincerely,

(b)(6)



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From: WE Licensing <WE.Licensing@occ.treas.gov>
Date: Fri, Jan 16, 2015 at 11:34 AM

Subject: RE: Support for the OneWest and CIT Merger

To: (b)(6) (b)(6)

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From: (b)(6) mailto:(b)(6)
Sent: Friday, January 16, 2015 11:42 AM
To: comments.applications@ny.frb.org; WE Licensing
Subject: Support for the OneWest and CIT Merger

(b)(6)

E-Mail: (b)(6)

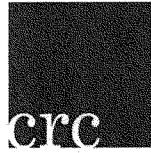
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Kind regards,

(b)(6)



CALIFORNIA
REINVESTMENT
COALITION



October 15, 2015

Comptroller Thomas J. Curry
Office of the Comptroller of the Currency

Re: CRC and Greenlining Institute urge the OCC to object to the CITBNA revised CRA Plan,
Recommendations for an adequate CRA Plan that responds to OCC Order and helps meet community
credit needs

Dear Comptroller Curry,

We write to raise final concerns in order to inform the OCC's evaluation of the CITBNA CRA Plan and process. We believe that CITBNA did not adequately respond to the OCC's Conditional Merger Approval Order, and has not developed a CRA Plan that will help meet community credit needs. As such, we urge the OCC to object to the CITBNA Plan, instruct the bank to meet with community groups in a manner consistent with precedent set by prior mergers, and to develop a stronger plan that will help southern California communities and households stabilize and grow.

Who We Are

The California Reinvestment Coalition (CRC), based in San Francisco, is a membership organization of three hundred nonprofit organizations and public agencies across the state of California. We work with community-based organizations to promote the economic revitalization of California's low-income communities and communities of color through access to financial institutions. CRC promotes increased access to credit for affordable housing and economic development for these communities.

The Greenlining Institute (Greenlining), is policy, research, organizing, and leadership institute working for racial and economic justice. The web of opportunity is dynamic, therefore we work on a variety of issues affecting economic opportunity from the economy to telecommunications and environmental policy. Our mission and advocacy is supported by Greenlining's Coalition, a diverse group of nearly 40 African American, Asian American, and Latino community-based organizations that comprise one of the nation's most effective and longest lasting multi-ethnic coalitions. By combining the grassroots energy of these organizations with the institutional strength of Greenlining, we are able to leverage the unique capabilities of each into an effecting engine of social change.

Our Concerns

We have consistently shared our concerns regarding the non-inclusive outreach process employed by the Bank as it developed its revised CRA Plan. Our September 23, 2015 letter outlined concerns relating to the Bank's: refusal to meet with our organizations and our southern California member organizations; inadequate survey instrument; unwillingness to survey most groups in the Bank's assessment area that opposed the merger; exclusion of most merger opponents to its October 2015 community meeting, including organizations previously invited to its Fall of 2014 community meeting. We are concerned that these non-profits were excluded as a form of retribution after pushing the Bank to improve its plan for reinvesting in LA communities.

Inadequate Community Needs Assessment. We are concerned that the Bank's assessment tool used to measure community need was solely a method to justify the size and scope of its current commitment, rather than to measure the needs of LMI neighborhoods where they do business. At the community meeting, the Bank shared that only 27 groups responded to its survey, billed as a "community needs assessment" designed to help the bank craft its plan. We previously provided our analysis of the survey and why it falls short as an adequate assessment tool, and the low number of replies further exacerbates the problems with using the tool to measure community need. During the community meeting, the Bank clearly communicated that it has no intention to increase the size of its commitment or open new branches in the LMI neighborhoods and communities of color where the Bank has little retail branch presence.

Unwillingness to Share Draft Plan. At the community meeting, we asked if the Bank would share its presentation and provide a copy of its draft CRA Plan. The Bank seemed to indicate that it would check with its new Community Advisory Committee (most or all of whom appear to be connected to organizations that supported the merger, did not oppose, or received grants from the Bank) and follow that body's recommendation. To date, we have not received these items. This of course makes it challenging to provide meaningful comments on the Bank's Plan.

Neglecting OCC Conditional Merger Approval Guidelines. We question whether the Bank has responded to the OCC's Conditional Merger Approval Order. The Order requires the Bank to revise its Plan to "contain a complete description of the actions that are necessary and appropriate to ensure that on a prospective basis the bank is helping to meet the credit needs of its AAs, in particular the needs of the Los Angeles-Long Beach-Glendale MD, including but not limited to affordable multifamily housing lending and investment in LMI geographies and to benefit LMI individuals..."

While we were pleased to hear at the community meeting that the Bank will attempt to focus more on affordable housing, it remains unclear how the Bank will do so. The Bank appears to acknowledge it currently has no or limited capacity to originate community development loans for affordable housing development, and we understand that the Bank will likely not be a big Low Income Housing Tax Credit investor, since it plans to use its Net Operation Losses from CIT Group's 2009 bankruptcy. Yet, these are two of the main ways that Banks help meet the affordable multifamily housing needs of their communities. CITBNA needs to make a substantial, clear, and measurable commitment to meet this most compelling need, and to clearly explain exactly how it will do so.

In fact, the Bank's prior 2012-2015 CRA Strategic Plan (which the bank originally tried to keep out of the public view), called for the Bank to address the severe affordable housing needs in its communities. "As a result of decrease affordability in housing stock and mismatch of jobs, wages, rent, and for-sale price and the shortage of apartments able to accommodate large families, housing is still a pressing issue in Los Angeles-Long Beach-Glendale, CA MD." Yet despite a Plan that called for the Bank to do more to facilitate the development of affordable housing, the Bank significantly trails in this regard. Which raises the question, why will this Plan be any different?

The Order further requires the Bank to "describe a means of assessing and demonstrating the extent to which CITBNA's alternative systems for delivering retail banking services are available to provide, and effective in providing, needed retail banking services in LMI geographies or to LMI individuals."

But the Bank appears ready to ignore this charge, insisting instead that it will not open the new branches that are needed in communities, and offering only alternatives to branch banking, regardless of the effectiveness of these approaches. The Bank's survey and community day meeting asked community members only which alternatives to branch banking they prefer, not whether branch banking is preferred and necessary, and not whether the alternatives to branch banking are adequate and effective in serving community need. Any responses to the survey or community day meeting should in no way be construed as an assessment of the effectiveness of alternatives, or even the support of community organizations and members for these alternatives.

Neglecting Fed Merger Approval Guidelines. The Federal Reserve Board Approval Order noted that "the Board expects the CIT Group to engage in activities that help to meet the credit needs of the communities CIT Group serves at a level commensurate with the expanded size and scope of the combined organization." The CITBNA Plan fails to meet this requirement.

We note again for the record that CITBNA appears poised to commit itself over the next four years to one of the weakest CRA Plans we have seen, and one that is certainly below that of its peers. It has been difficult to ascertain which institutions the Bank considers to be among its peers. But in an early submission to the regulators as part of the merger process, the Bank in a chart entitled "Peer Comparison of Annual CRA Grants," identifies the following as peers: Wells Fargo, Union Bank, City National Bank, BOKF, NA (Oklahoma), Webster Bank, NA (Connecticut), EverBank (Florida), BankUnited (Florida), FirstMerit Bank (Ohio), Old National Bank (Evansville), First National Bank of Pennsylvania, Texas Capital Bank, NA, and Banc of California.

Focusing only on the California institutions, we believe the Bank's Plan is below its peers. Banc of California commits roughly 4x what CITBNA does. City National Bank, a peer of CITBNA in a number of ways, commits roughly 2x what CITBNA does. Even Pacific Western Bank, in the context of a merger that both our organizations opposed, commits to more reinvestment in California than CITBNA.

In its defense, CITBNA appears to be raising a few arguments which seem reasonable on their face. One, is that the Bank is young, being in existence for only six years. The bank might not have the products and infrastructure in place to make a substantial commitment to CRA at this time.

But OneWest did purchase the assets of Indymac Bank, and though the Bank failed, presumably the purchase did come with some lending and banking infrastructure. In contrast, Banc of California is essentially a new bank, having resurrected a defunct financial institution over the last two years. In other words, Banc of California has come from further back, more recently, and is doing substantially more than CITBNA.

CITBNA might also assert that its model does not allow it to commit to CRA at the level of a Banc of California which does significant mortgage lending, sells its loans on the secondary market, and can readily re-lend. Assuming this to be true, CITBNA actually does more mortgage lending than City National Bank, and significantly more than Pacific Western which does not even report HMDA because its mortgage lending is almost non-existent. Yet all of these institutions have made significantly greater commitments to help local credit needs in Southern California than CITBNA, even though each of those institutions has fewer deposits than CITBNA against which to lend.

Further, and importantly, none of the bank's peer institutions, have received the level of public subsidy, or caused the level of harm to Southern California communities, as has CITBNA. As noted previously, CITBNA has foreclosed on over 36,000 California households, including over 2,000 seniors and their families, with more than one in five of those foreclosures happening in the LA area. The Bank has engaged in problematic mortgage servicing, being identified as one of the worst servicers during the financial crisis by California housing counselors, and being identified more recently as a problematic reverse mortgage servicer. Given the history of these two banks, both of which received billions in taxpayer and FDIC subsidies, and given OneWest's thousands of foreclosures in California (and an unknown number throughout the US), CITBNA should not be only keeping pace with its peers relating to reinvestment commitments (though it actually is below its peers), it should be exceeding its peers.

Set a Precedent that CRA Investments are a Priority, Not an Afterthought. If CITBNA is allowed to proceed with such a weak plan with the excuse that it has not developed an appropriate CRA infrastructure during the time it has grown its other business in the last six years, regulators will be sending a clear message that CRA lending, investing and services can be left for last by any bank wishing to expand. The argument that a young bank needs more time to develop a CRA infrastructure than it does its preferred lines of business does not wash. The very purpose of the CRA is to ensure that low income consumers and communities in bank assessment areas should not be afterthoughts.

Which raises the question – what has CITBNA (OneWest) been doing for the last six years that it does not have the products necessary to help meet community credit needs? Even if it were true that the Bank had somehow faced real challenges developing loan products, there should be no similar constraints to increasing investments, expanding philanthropy, opening branches, providing greater protection for servicing clients, offering accessible bank accounts, and engaging in the many services and product offerings that do not require a lending infrastructure. Yet the bank has not offered to do more in these areas. The question becomes, is there really a challenge here, or just a refusal to do more in all of these areas, including lending?

Unsettling Email. As a final note, CRC recently received a disturbing email on September 21, 2015. An individual, apparently under the misunderstanding that CRC supported this merger, expressed dismay that a letter of support for the OneWest CIT Bank merger was sent to the regulators in his name. He decried the “bogus email” support letter, and noted it “is not mine and I did not authorize or send this email, and I did not authorize for you to use my name and address to be used for any support of One West and CIT Merger, I have no affiliation or whatsoever to this companies and would like you to stop using my name, address or email address...” Most disturbingly, the individual indicates that somebody created a yahoo email address using his full name, without his knowledge.

It appears that this same email (from the concerned individual) was also sent to the OCC and the Federal Reserve Board.

This email is shocking and suggests that one or more people may have manipulated the public input process and committed a fraud on the federal regulatory agencies which rely on public input to inform their deliberations. In follow up “spot checks” of about 150 email addresses attributed to the petition organized by OneWest’s CEO, at least 25 of the email addresses appear to be non-existent. However, as was the case with the individual mentioned above, if email addresses were created in the name of real people without their knowledge- for example, if somebody created a Janet.Yellen@yahoo.com account - then it may be difficult to detect the fraud because emails to that account wouldn’t necessarily bounce back as non-existent.

In an attachment of 593 petitions in support of the OneWest’s petition to not hold a public hearing, 100% of the petition signers had Yahoo email accounts- an oddity that adds to our concerns.¹ Moreover, if the “time stamps” on the emails are accurate, there was an extremely large number of people who cared enough about this merger petition to sign onto their computers in the middle of the night- with a large number of emails being sent to the Federal Reserve and OCC around 2am on the night of February 13, 2015. In addition, in a review of 25 of the petitions, twelve of the addresses listed had street addresses that couldn’t be verified by the United State Postal Service as legitimate addresses.

It occurs to us that it is only happenstance that the individual noted above discovered that his name was used improperly and fraudulently, and that it is not to be expected that this information would have ever found its way to us or to the regulators. In other words, if other people had their names used without their authorization, and if unauthorized Yahoo email accounts were created on their behalf, this fraud may have gone undetected.

We accuse no specific person or organization of wrongdoing. But at the same time we are greatly disturbed at the possibility that the OCC’s and the Federal Reserve’s community input process may have been compromised. The CRA is a law that allows for and encourages community participation and in so doing, allows for a community perspective to be considered by regulators as they determine how best to supervise, regulate and oversee financial institutions.

¹ <http://www.occ.gov/topics/licensing/corporate-activities-weekly-bulletin/public-comments-cit-onewest-feb-8-2015.pdf>

We request in the strongest terms that the OCC and the Federal Reserve investigate this matter further. How many letters of support were submitted to the regulators without the knowledge of the purported author? Who is responsible? And what are the regulators going to do about it? Does the Federal Reserve and OCC public comment email system have safeguards to “catch” such oddities? A similar issue occurred in the recent “net neutrality” debate, and the system used to process Congress’ email was able to catch fraudulent emails.

We believe the Plan being submitted by CITBNA is essentially the same Plan that the Bank put forth a year ago. We appreciate the efforts of the OCC in terms of considering all of the evidence put forth during the merger process, agreeing to hold a public meeting on the matter, and imposing important conditions on the merger approval.

Community groups throughout the nation and the public will be looking to see what the results of this process will be. Will banks that caused so much harm to taxpayers and communities be able to get away with doing no more to help meeting community credit needs or demonstrate a public benefit from the merger than they proposed at the start of this process?

Solutions

We attach to this letter a proposed CRA Plan for CITBNA drafted by our organizations which provides a framework for what the CITBNA Plan should look like. This Plan is modeled after the City National Bank Plan, which was ultimately supported by CRC, Greenlining and the National Diversity Coalition. We handed an earlier draft of this document to CITBNA at the community day meeting on October 6. This Plan represents a good place for the Bank to start as it refines its plan to serve communities.

CRC and Greenlining and our members remain willing and ready to meet with the bank, as we have suggested and requested during the course of the merger, including after the Bank was required to revise its CRA Plan based on community input. The OCC’s conditional approval order appears informed by the Valley National Bank process. Yet nothing since the conditional approval order mirrors the positive process followed by Valley National Bank and stakeholders. The OCC should require the Bank to follow a similar path of reaching out to merger opponents (and others) to develop a Plan that reflects comments received by community groups and not just responses to narrow multiple choice questions put forth by the Bank. This would lead to the ultimate goal of having the Bank commit to helping to meet community credit needs and providing a public benefit to its communities.

On behalf of the hundreds of Southern California and California organizations we represent, we thank the OCC for scrutinizing this deal and this proposed Plan, and we urge you to object to the Plan submitted and ensure that CITBNA finally does right by communities. This merger presents a test to the OCC - will it stand strong and ensure a fair process and a CRA Plan commensurate with CITBNA’s size, or will it allow this merger to move forward with an inferior plan and unanswered questions about the public process?

We also note this merger has drawn national attention and opposition from organizations outside of California, many of whom work with homeowners who lost their homes (perhaps unnecessarily) due to

OneWest and Financial Freedom foreclosures, many of whom believe financial institutions must be held accountable for causing community harm, and many of whom believe that banks must clearly demonstrate they are helping to meet community credits needs and that their mergers are providing a clear public benefit.

If you have any questions about this request, please feel free to contact Kevin Stein of California Reinvestment Coalition at (415) 864-3980. Thank you for your consideration of our views.

Very Truly Yours

Paulina Gonzalez
Executive Director, CRC

Orson Aguilar
Executive Director, GLI

Kevin Stein
Associate Director

Enclosures: CRC and Greenlining Institute Recommendations for CITBNA CRA Plan
National sign-on letter
Email from merger "supporter" (redacted to protect personally identifying information)
CRC and Greenlining Institute Letter from September 23, 2015

cc: Janet Yellen, Chair, Federal Reserve Board of Governors



October 15, 2015

Comptroller Thomas J. Curry
Office of the Comptroller of the Currency

Dear Comptroller Curry,

We write in regards to the highly problematic merger of CIT and OneWest. A record number of groups opposed this merger, raising serious concerns about:

1. The failure of the banks to help meet community credit needs;
2. Potential violations of fair housing and fair lending laws;
3. Private gains to billionaires from nearly \$5 billion in corporate welfare to these two banks; and
4. Thousands of foreclosures in the bank's assessment area which have displaced families and destabilized communities, and disproportionately impacted seniors and people of color.

We applaud the OCC for holding public hearings on the merger in February, for noting the large litany of concerns in the final approval order, and for imposing conditions on the bank that require it to revise its CRA Plan. The conditional approval created an opportunity for the Bank to reset its approach and to develop a CRA Plan that reflects the needs of its communities and that meaningfully addresses those community needs via a commitment that is commensurate with the bank's Too Big to Fail size.

Unfortunately, the Bank has decided not to take advantage of this opportunity. Instead the new CITBNA:

- **Refused requests to meet with merger opponents.** This is in contrast to Valley National Bank which met several times with all of the groups that opposed its merger, and worked with those groups to develop a Plan that sought to address the concerns of all stakeholders.
- **Excluded groups from its "community" planning process.** The Bank sent out surveys ostensibly designed to assess community needs, but did not send them to several strong Los Angeles groups that opposed the merger (the Bank reported out that only 27 individuals completed a survey). The bank also held a "community meeting" but failed to invite most of the groups that opposed the merger. In fact, CRC spoke with several large, established nonprofits who were invited to the bank's community meeting in 2014, who later opposed this merger, and who were then NOT invited to the "community meeting" that happened on October 6, 2015.
- **Failed to meaningfully revise its CRA Plan.** While VNB developed a stronger and more ambitious Plan to meet community needs after several meetings with merger opponents, CITBNA appears poised to submit to the OCC a CRA Plan at the same level of commitment as its Plan from last year.
- **Clings to a meager CRA commitment that is below that of its peers.** While a much smaller Banc of California has committed to devote 20% of its deposits to CRA activity every year for five years,

CITBNA commits closer to 5% per year for four years. City National Bank, a peer of CITBNA, recently committed \$11 billion over five years for community reinvestment. CITBNA, with more deposits in California, commits only \$5 billion over four years, roughly 50% of what City National agreed to do.

- **Fails to address concerns about its negative and disparate impact on communities**, including:
 - 68% of OneWest's 36,382 foreclosures in California occurred in neighborhoods of color;
 - Low home lending to Asian American Pacific Islander and African American borrowers;
 - Sparse bank branch presence in LMI communities and communities of color, including closing branches that served these communities;
 - Disparate foreclosed property maintenance practices in neighborhoods of color; and
 - Foreclosures on widows of reverse mortgage borrowers.

While the Bank has not publicly shared its CRA Plan, based on its Community Day presentation and "Community Needs Assessment" survey, it appears that CITBNA's Plan will be short on dollars, and short on details.

The California Reinvestment Coalition and the Greenlining Institute have put forth suggestions for CITBNA, based on the City National Bank Plan, which calls on the Bank to achieve the following goals:

COMMUNITY PROPOSAL FOR CIT BANK CRA PLAN:

- Achieve a minimum of \$11 billion in cumulative qualified CRA activity over four years in its assessment area, including:
 - \$4.2 billion in small-business loans or leases of \$1 million or less;
 - \$4.4 billion in qualified CRA community development loans;
 - \$1.5 billion in qualified CRA investments;
 - \$700 million in residential mortgage loans funded for borrowers of color;
 - Over \$80 million in minority and woman-owned business supplier diversity expenditures;
 - \$30 million in charitable contributions.
- Develop an annual CRA plan with an objective of receiving an "Outstanding" CRA rating.
- Set certain diversity goals in the areas of employees, board members, and suppliers to ensure the Bank represents the community in which it operates.
- Maintain the goal of consistently increasing its annual qualified CRA-related activity to achieve a level of 15% of its California deposits by year-end 2021.

Small Business Lending:

- Aspire to become a leader in California small-business lending. In particular, CITBNA should focus its marketing and outputs on smaller-dollar loans by committing that 50% or more of its CRA-reportable small-business loans and small ticket leases, by number, are in the amount of \$100,000 or less, and will go to businesses with less than \$1 million in revenue.
 - Refer a minimum of 20% of small-business loan denials to local technical assistance providers, CDFIs and other community lenders in CITBNA's assessment areas, subject as always to the willingness of declined clients to be referred.
 - Actively participate in the California state loan guaranty program and commit to increasing participation in order to help the bank reach underserved businesses.
 - Commit to increasing overall SBA lending to \$140 million a year, 50% of which each year shall be made available to underserved communities and low- and moderate-income

census tracts. A goal of 40% each year shall be made to minority business enterprises. And, \$5 million of SBA lending annually shall be in loan amounts of \$150,000 or less.

Community Development Lending:

- Devote a minimum of \$300 million a year in community development loans for affordable housing. The goal is to develop a one-stop, construction-to-permanent-loan product for multi-family housing and a line-of-credit facility for nonprofit housing developers. CITBNA will explore lending for transit-oriented development and maintain an annual goal of \$5 million annually.

Mortgage Lending:

- Make available affordable mortgage loan products with flexible, yet sustainable, underwriting that enable LMI homeownership.
- Comply with the California Homeowner Bill of Rights, and refrain from arguing preemption as a means to circumvent the protections for homeowners included in the Homeowner Bill of Rights. In addition the Bank will, in good faith, work with the California Chamber of Commerce to remove AB244 (Eggman) from the "jobs killer" list. AB244 clarifies that HBOR protections extend to successors in interest ("widows and orphans"). As chair of the California Chamber of Commerce, OneWest CEO Joseph Otting is well-placed to work with the Chamber on this unfortunate stance which is pitting widowed grandmothers facing foreclosure against the CA Chamber of Commerce.
- Commit to implement HUD Mortgagee Letter 2015-15 in order to help all qualified Non Borrowing Spouses live out their days in their homes, without imposing unnecessary hurdles.

Investments:

- Establish an annual pool of \$14 million to invest in CDFIs, CDCs, transit-oriented development projects and other nonprofit community development funds that benefit small-business, housing and economic development in low-income and/or underserved communities.
- Invest \$10 million annually in CRA-qualified SBIC funding, with 20% targeted for minority enterprises.
- Commit .025% of California deposits, or \$7.5 million, annually to charitable contributions in California over the next four years. In addition, the Bank commits that 50% of annual contributions will be dedicated to CRA-qualified affordable housing and economic development initiatives.
- Support small-business technical assistance provided by nonprofits and faith-based providers that help to improve and enhance access to capital. In addition, CITBNA shall commit to specifically allocate at least \$300,000 annually for small-business pre- and post-loan technical assistance and supplier development and \$200,000 annually for loan-loss reserve funding, with emphasis on SBA micro-lenders doing loans less than or equal to \$50,000. This will be on top of the .025% of deposits annually CITBNA allocates for philanthropy generally.
- Make a \$1 billion commitment to investments in affordable housing over 4 years. Investments should be focused in the low and moderate income communities in Southern California that were hardest hit by the foreclosure crisis.

Services:

- Develop, implement, actively market and service an account that serves the banking needs of the unbanked, underbanked and low- to moderate-income communities within the Bank's assessment areas within one year from the date of this commitment. This will be done in accordance with CRC's Safe Money Account or the Model Safe Account guidelines developed by

the FDIC and will include savings, checking and cash-secured credit card features. CITBNA also commits to continue to configure its ATMs so as to waive out-of-network surcharges for California public-assistance recipients who use Electronic Benefits Transfer (EBT) cards.

- Open three (3) branches in neighborhoods that are LMI and neighborhoods of color.
- Provide up to \$250,000 annually to specifically target, sponsor and support financial education and literacy within the Bank's LMI and underserved communities.
- Conduct at least annual community meetings open for participation by all interested community and faith-based organizations. These meetings will provide updates on CITBNA's progress under these commitments and goals, the Bank's most recent related initiatives, and future plans.

Other Community Goals:

- Develop a strong and transparent procurement diversity program to increase Minority and Women Owned Business Enterprises spending in California to 20% annually by 2019, evenly balance spending between MBEs and WBEs, and report the data in accordance with best practices.
- Seek to have representatives from the Latino, Asian American and Pacific Islander, and African American community on its board of directors by year 3 of this agreement.
- Commit to increasing the diversity of management employees by year 4. This includes 30% ethnic diversity of employees classified as Executive or Senior Level Managers AND 40% ethnic diversity of employees classified as First or Mid-level Managers. The Bank will commit to reflecting the ethnic and linguistic diversity of the population where it does business, with a short term goal of reaching 30% ethnic diversity of customer-facing employees within 4 years of this CRA Plan.

In light of the troubling track records of OneWest and CIT, the great credit needs that exist in the Bank's assessment area, the harm caused to area residents and communities as a result of OneWest's lending and foreclosure practices, and the exclusionary and faulty "community" process the Bank employed in responding to the conditional approval order, the OCC should require CITBNA to go back to the drawing board and develop a plan, in collaboration with community groups, that reflects community needs and looks substantially like the proposed Community Plan, above.

Southern California communities deserve a robust, transparent CRA plan. In other words, CITBNA should not be allowed by the regulators to get away with doing less than its peers, excluding the community, and failing to make any meaningful changes to its CRA Plan.

If you have any questions about this letter, please feel free to contact Kevin Stein of California Reinvestment Coalition at (415) 864-3980.

Thank you for your consideration of our views,

California Reinvestment Coalition
 The Greenlining Institute
 Advocates for Neighbors, Inc.
 Allen Temple Baptist Church
 Alliance of Californians for Community Empowerment (ACCE)
 Asian Economic Development Association
 Asian Pacific Islander Small Business Program
 Asian Pacific Policy & Planning Council (A3PCON)
 Association for Neighborhood and Housing Development, Inc.

Azul Management Systems Institute, Inc.
 Baltimore Neighborhoods, Inc.
 Bet Tzedek Legal Services
 Brooklyn Coop
 Building Alabama Reinvestment
 California Alliance for Retired Americans (Nan Brasmer, Pres
 California Capital Financial Development Corporation
 California Coalition for Rural Housing
 California Resources and Training
 CDC Small Business Finance
 Center for Urban Economics and Design -San Diego
 Center for Sustainable Neighborhoods
 Central Baptist Community Development Corporation
 Chicana/Latina Foundation
 City of Commerce American GI Forum Chapter
 Civic Center Barrio Housing
 Communities Actively Living INDEPENDENT & Free (CALIF)
 Community Action Agency of Butte County
 Community and Shelter Assistance Corp
 Community Development Corporation of Marlboro County
 Community Housing Opportunities Corporation
 Community HousingWorks
 Community Legal Services in East Palo Alto
 Connecticut Fair Housing Center
 Consumer Action
 Courage Campaign
 Delaware Community Reinvestment Action Council, Inc.
 Dr. Charlotte Hayes
 East Bay Housing Organizations
 East Los Angeles Community Corporation
 Eastmont Community Center of East Los Angeles
 Elder Abuse Prevention Program, Institute on Aging
 Empire Justice Center
 Fair Housing Council of San Diego
 Fair Housing of Marin
 Fresno CDFI
 G&H Environmental Consulting
 Good Neighbor Foundation – Housing Counseling
 Grow Brooklyn
 Hamilton County Community Reinvestment Group
 Henderson and Company
 Housing and Economic Rights Advocates
 Housing California
 Housing Rights Center of Southern California
 Inland Empire Latino Coalition
 Inland Fair Housing and Mediation Board
 Korean Churches for Community Development

Law Foundation of Silicon Valley
Missourians Organizing for Reform and Empowerment
Multicultural Real Estate Alliance for Urban Change
National Committee for Responsive Philanthropy (NCRP)
National Community Reinvestment Coalition
National Housing Law Project
NeighborWorks Orange County
Neighborhood Housing Services of the Inland Empire
Neighborhood Legal Services of Los Angeles
New Economy Project
New Frontier CDC
New Jersey Citizen Action
Northern California Community Loan Fund
Oakland Business Development Corporation
Ohio Fair Lending
Open Communities
Opportunity Fund
Pacific Asian Consortium in Employment (PACE)
Partners in Community Building, Inc.
PathStone Enterprise Center, Inc.
Project Sentinel
Prospera
Public Interest Law Project
Reinvestment Partners
Renaissance Entrepreneurship Center
Sacramento Housing Alliance
San Francisco African American Chamber of Commerce
Sandy Jolley, Reverse Mortgage, Suitability, and Abuse Consultant
Strategic Alliance for a Just Economy (SAJE)
Urika Center for Policy Research
U.S. PIRG
Valley Economic Development Center
Vermont Slauson Economic Development Corp.
Western Center on Law and Poverty
Woodstock Institute



CALIFORNIA
REINVESTMENT
COALITION



CITBNA's California Community Commitment & Goals: 2016 thru 2019
(10/15/15)

SECTION I. INTRODUCTION

In consultation with CITBNA's many community group partners in the California communities we serve, including groups that commented on the recently completed merger of CIT Group and OneWest Bank, we provide the following four-year California community commitments and goals.

This transaction contemplates that CITBNA will be headquartered in Pasadena, California and will focus on delivering personalized, relationship-based banking to its customers. The Bank will have over 70 retail branches located in Southern California, principally in and around Los Angeles, to serve consumers and businesses.

SECTION II. COMMITMENT TO THE COMMUNITY REINVESTMENT ACT

Beginning in 2016 and extending over the next four years, CITBNA shall pledge to increase its overall qualified Community Reinvestment Act (CRA) lending, investments, charitable contributions, and its supplier diversity and related activities, to achieve a minimum of \$11 billion in cumulative qualified CRA activity, as defined below, during this four-year period. The Bank will develop and implement an annual CRA plan to meet the needs of its community with an objective of receiving an "Outstanding" CRA rating from the OCC.

In addition, as stated in the September 2014 CRA Plan, CITBNA recognizes its role in the community may in some cases require commitments or goals exceeding the standards outlined in CRA. To this end, the Bank will set certain diversity goals in the areas of employees, board members, and suppliers to ensure the Bank represents the community in which it operates.

This commitment, as with that of City National Bank, reflects the fact that the CITBNA is not primarily a mortgage lender. Should CITBNA substantially develop its mortgage origination business, CITBNA shall agree to work in good faith with community groups to determine whether the overall cumulative CRA commitment should be increased or adjusted.

To achieve this cumulative California commitment of \$11 billion over four years, we have identified the following aspirational goals for each key component of the CRA-qualified activity. Over the four-year term of CITBNA's commitment, it shall achieve the following goals:

- \$4.2 billion in small-business loans or leases of \$1 million or less;
- \$4.4 billion in qualified CRA community development loans;
- \$1.5 billion in qualified CRA investments;
- \$700 million in residential mortgage loans funded for minority borrowers;
- Over \$80 million in minority and woman-owned business supplier diversity; and
- \$30 million in charitable contributions.

CITBNA's \$11 billion commitment should correspond with the goal of consistently increasing its annual qualified CRA-related activity to achieve a level of 15% of its California deposits by year-end 2021.

To achieve these extraordinary commitments and goals, CITBNA will build on its past accomplishments and successes to develop and implement even more effective CRA strategies in the years to come. Going forward, CITBNA will continue to actively work with its community group and faith-based partners to provide qualified CRA activities including—lending, investments, charitable contributions, other related activities and supplier diversity—with special emphasis on small-business and community development loans that consist of equity equivalent investments (EQ2) in California Community Development Financial Institutions (CDFIs), Community Development Corporations (CDCs), nonprofit community development funds, microloan funds, small-business investment companies (SBICs) and other related economic development-focused small-business initiatives.

These commitments and goals shall be achieved with special attention to the following identified strategies developed in collaboration with community group and faith-based partners.

SECTION III. ASSESSMENT AREA

The anticipated assessment areas ("AAs") are as follows:

- Los Angeles-Long Beach-Glendale, CA MD (full-scope)
- Oxnard-Thousand Oaks-Ventura, CA MSA (limited-scope)
- Riverside-San Bernardino-Ontario, CA MSA (limited-scope)
- San Diego-Carlsbad, CA MSA (limited-scope)
- Anaheim-Santa Ana-Irvine, CA MD (limited-scope)

SECTION IV: CRA PLAN AND MEASURABLE GOALS

Lending:

CITBNA will commit to promoting sustainable economic development in California's low-to-moderate income communities. The Bank will also strive to ensure that the distribution of its lending reflects the ethnic diversity of the population that resides within each of its assessment areas. To achieve these commitments and goals, CITBNA will aspire to become a leader in California small-business lending. In

particular, CITNBA will focus its marketing and outputs on smaller-dollar loans by committing that 50% or more of its CRA-reportable small-business loans and small ticket leases, by number, are in the amount of \$100,000 or less, and will go to businesses with less than \$1 million in revenue.

Measurable Lending Targets:

In pursuit of this commitment, CITBNA will:

- Take affirmative steps to work with and support African-American, Latino, Asian and other minority groups, including faith-based organizations, to identify, support, and participate in their affordable housing and economic development sponsored initiatives, consistent with the community commitment and goals.
- Decrease minimum factoring line threshold to ensure that CRA qualified businesses with revenue less than \$1 million can access these loan opportunities.
- Ensure that CITBNA's direct capital lease rates will remain competitive.
- Commit to diversify its reach across all businesses with a particular focus on Minority Business Enterprises (MBE) when implementing special financing initiatives.
- Commit to the following in order to increase access to credit for smaller businesses (for businesses with less than \$1 million in revenue) and to increase lending to diverse businesses in California communities:
 - Take steps to develop a declined-loan referral program through the use of broader-based RFPs with local CDFIs, technical assistance providers and other organizations that improve and enhance access to capital in minority and low-income communities.
 - Refer a minimum of 20% of small-business loan denials to local technical assistance providers, CDFIs and other community lenders in CITBNA's assessment areas, subject as always to the willingness of declined clients to be referred.
 - Actively participate in the California state loan guaranty program and commit to increasing participation in other related programs.
 - Beginning in 2016, commit to increasing overall SBA lending to \$140 million a year during the commitment period and to taking appropriate steps to increase its SBA production throughout its assessment areas. Of the total commitment of \$140 million for SBA lending, 50% each year shall be made available to underserved communities and low- and moderate-income census tracts. A goal of 40% each year shall be made available to minority business enterprises. Finally, \$5 million of SBA lending annually shall be made available in loan amounts of \$150,000 or less.

- Actively develop an “advisory board” structure to explore, refine and improve its strategy for enhancing successful market penetration, notably within African-American, Asian, Latino and faith-based communities, and geographic representation should be proportional to where customers are drawn from in California.
- Aspire to increase its market penetration to equal the availability of businesses in LMI census tracts.
- Devote a minimum of \$300 million a year in community development loans for affordable housing in its LMI communities. The goal is to develop a one-stop, construction-to-permanent-loan product for multi-family housing and a line-of-credit facility for nonprofit housing developers. CITBNA will explore the transit-oriented development market opportunities for lending within its assessment areas and maintain a goal of \$5 million annually.
- Make available affordable mortgage loan products with flexible, yet sustainable, underwriting that enable LMI homeownership with a focus to lend to families at 0-80%, and 80-120% AMI adjusted for family size. CITBNA will actively consider creating an innovative LMI home ownership lending product in addition to exploring active participation in other LMI home lending programs targeted at minority LMI borrowers that are sponsored or developed by U.S. federal agencies, including Treasury, FHFA, Freddie Mac, and other agencies.
- Allow nonprofits, CDFIS and other affordable mortgage loan providers to become brokers through all of its distribution channels.
- For loans originated by CITBNA (including originations by its predecessor OneWest, however excluding loans acquired by OneWest), develop a first-look policy to prefer nonprofits, with a reasonable amount of time to purchase, in the sale of distressed loans and REO properties.
- Understand its responsibility to positively serve California communities, comply with the California Homeowner Bill of Rights, and work with community groups to develop a win-win policy that refrains from employing preemption. In addition the Bank will, in good faith, work with the California Chamber of Commerce to remove AB244 (Eggman) from the Chamber’s “Jobs Killer” list. AB 244 clarifies that HBOR protections extend to successors in interest (“widows and orphans”).
- Commit to implement HUD Mortgagee Letter 2015-15 in order to help all qualified Non Borrowing Spouses live out their days in their homes, without imposing unnecessary costs or hurdles, ensure Non Borrowing Spouses have an impartial referral for sound advice or a Single Point of Contact, and report publicly on CITBNA’s success in offering Mortgage Option Elections to Non Borrowing Spouses and in keeping them in their homes. CITBNA also commits to actively participate in the Keep Your Home CA Reverse Mortgage Assistance Program and to assist all qualified reverse mortgage borrowers and Non Borrowing Spouses in accessing the program, and to report publicly on the Bank’s performance in that regard.

Investments:

CITBNA benchmarks CRA investment activity against its peers, City National Bank and Union Bank, to develop the CRA investment target. In an effort to respond to community development needs, CITBNA will market and focus its investments on affordable housing projects, economic development, and sponsorships for AHP grants on behalf of nonprofits to the Federal Home Loan Bank of San Francisco.

Measurable Investment Targets:

- Establish an annual pool of \$14 million to lend to CDFIs, CDCs, transit-oriented development projects and other nonprofit community development funds that benefit small-business, housing and economic development in low-income and/or underserved communities. Funding methods will include EQ2 financing, initiated through formal broad-based “request for proposal” (RFP) processes. CITBNA commits to no more than \$1 million annually to any one organization.
- Invest \$10 million annually in CRA-qualified SBIC funding, with 20% targeted for minority enterprises.
- Commit .025% of California deposits, or \$7.5 million, annually to charitable contributions in California over the next four years, significantly increasing the Bank’s commitment to its communities. In addition, the Bank commits that 50% of annual contributions will be dedicated exclusively to CRA-qualified affordable housing and economic development projects, initiatives and organizations.
- Commit that CRA-qualified charitable contributions will be “unrestricted”.
- Support small-business technical assistance provided by nonprofits and faith-based providers that help to improve and enhance access to capital. In addition, CITBNA commits to specifically allocate \$300,000 annually for small-business pre- and post-loan technical assistance and supplier development and \$200,000 annually for loan-loss reserve funding, with emphasis on SBA micro-lenders doing loans less than or equal to \$50,000. This will be on top of the .025% of deposits annually CITBNA allocates for philanthropy generally. The Bank will develop a plan for a formalized selection and implementation process for its technical assistance and loan-loss reserve program with community input. The Bank will also actively consider investments in SBA micro lenders.
- Actively consider opportunities for CITBNA to participate and be a leader in the creation of “new models” introduced by community and faith-based groups, including, for example, a multi-bank consortia to fund capacity building grants.

- Make a \$1 billion commitment to investments in affordable housing over 4 years, which can take the form of Low Income Housing Tax Credits, investments in local government housing trust funds and other local government housing initiatives, investments in CDFIs or other mission driven entities that engage in housing activities, etc. Investments should be focused in the low and moderate income communities in Southern California that were hardest hit by the foreclosure crisis, with specific investments to be identified in consultation with community groups.

Services:

CITBNA is committed to providing retail services to low and moderate income people. On a periodic basis, the Bank will reevaluate its suite of banking products, including the personal checking account, to ensure its products and services are favorable to its local community, especially those with lower incomes, and to peer banks. CITBNA will always consider the needs of low and moderate income individuals as it contemplates its approach to marketing products and to product changes.

Measureable Services Targets:

- Develop, implement, actively market and service an account that serves the banking needs of the unbanked, underbanked and low- to moderate-income communities within the Bank's assessment areas within one year from the date of this commitment. This will be done in accordance with CRC's Safe Money Account or the Model Safe Account guidelines developed by the FDIC, and will include savings, checking and cash-secured credit card features. CITBNA also commits to continue to configure its ATMs so as to waive out-of-network surcharges for California public-assistance recipients who use Electronic Benefits Transfer (EBT) cards.
- Open three (3) branches in neighborhoods that are LMI and of color, where 50% or more of the residents are people of color and low or moderate income.
- Provide up to \$250,000 annually to specifically target, sponsor and support financial education and literacy efforts within the Bank's LMI and underserved communities.
- Conduct at least annual community meetings open for participation by all interested community and faith-based organizations. These meetings will provide updates on CITBNA's progress under the commitments and goals and the Bank's most recent related initiatives, and report on CITBNA's future plans. These meetings will provide technical assistance on a wide range of areas, including CITBNA's small business lending, community development lending, investment and charitable contribution program criteria, assistance on how community organizations can qualify and better meet these program criteria, as well as technical assistance and information on how community and faith-based groups can achieve designated non-profit, CDFI, CDC and SBIC status. These meetings will also provide opportunities for CITBNA to gain direct input and insights from community and faith-based groups on progress

under this new commitment and goals, and on opportunities to better meet the needs of CITBNA's communities within the context of these commitment and goals.

- Strive to use innovative strategic alliances, community and faith-based organizations' business referral programs, and interested enterprises to implement effective small business lending outreach efforts, provide small business lending technical assistance, and develop business referral programs to enhance identification and development of banking relationships for CITBNA with credit-worthy MWBE small business borrowers, within CITBNA's assessment areas, with particular emphasis on LMI and underserved communities.

SECTION V: OTHER COMMUNITY GOALS

CITBNA will set diversity goals in the areas of employees, board members, and suppliers to ensure the Bank represents the community in which it operates.

Measurable Targets:

- Commit that, at the start of this CRA agreement, the Bank will develop a strong and transparent procurement diversity program to increase its MWBE spending in California to 20% annually by 2019, and the Bank will evenly balance spending between MBEs and WBEs and report the data in accordance with best practices.
- Seek to have representatives from the Latino, Asian American and Pacific Islander, and African American community on its board of directors by year 3 of this agreement.
- Commit to increasing the diversity of its management employees by year 4 of this CRA Plan. This includes 30% ethnic diversity of employees classified as Executive or Senior Level Managers AND 40% ethnic diversity of employees classified as First or Mid-level Managers. In addition, the Bank will commit to reflecting the ethnic and linguistic diversity of the population where it does business, with a short term goal of reaching 30% ethnic diversity of customer-facing employees within 4 years of this CRA Plan.
- Produce a strategy and timeline, within one year of the date of this CA Commitment agreement, for how it will adopt and successfully further its workforce diversity programming.

SECTION VI: CONCLUSION

CITBNA is committed to continuing to meet the CRA needs of the diverse communities it serves. CITBNA's four-year, \$11 billion commitment represents the culmination of extensive consultation, meetings and discussions with many interested community groups.

This new 2015 commitment is the result of active consultation and dialogue with several California community advocacy organizations and many other interested community groups. Over the term of this new commitment, CITBNA representatives will annually meet with each of the Bank's willing and interested community and faith based partners, or more frequently as needed, to review and discuss the Bank's progress in fulfilling these new commitments and goals, and to gain the benefit of their unique insights on how to effectively enhance CITBNA's ability to meet its goals and fulfill its commitments.

We hope and believe that the fulfillment of these commitments and goals will result in CITBNA being considered an outstanding advocate and supporter of the Bank's communities.



Sean Coffey <scoffey@calreinvest.org>

bogus email support Support for the OneWest and CIT Merger , unauthorized email sent on my behalf

[REDACTED] <[REDACTED]@hotmail.com> Mon, Sep 21, 2015 at 10:18 AM
 To: scoffey@calreinvest.org, comments.applications@ny.frb.org,
 "WE.Licensing@occ.treas.gov" <We.licensing@occ.treas.gov>

Sean Coffey
 Media and Development Manager California Reinvestment Coalition
 phone: (415) 864-3980
 fax: (415) 864-3981
 scoffey@calreinvest.org www.calreinvest.org

To Sean Coffey,
 I am writing your this email regarding this bogus email (cut and pasted below), sent to
 comments.applications@ny.frb.org and We.licensing@occ.treas.gov by you on my behalf
 which I came across on the internet today, the email address [REDACTED]@yahoo is not mine
 and I did not authorize or send this email, and I did not authorize for you to use my name
 and address to be used for any support of One West and CIT Merger, I have no affiliation or
 whatsoever to this companies and would like you to stop using my name, address or email
 address, or I will have to go through legal action and notify proper authorities regarding this
 matter. I value my privacy and identity and take this matter seriously.

thanks, [REDACTED]

From: [REDACTED]@yahoo.com
 To: comments.applications@ny.frb.org;
 WE Licensing Subject: Support for the OneWest and CIT Merger
 Date: Saturday, February 14, 2015 6:16:34 AM
 [REDACTED]
 E-Mail: [REDACTED]@yahoo.com
 Subject: Support for the OneWest and CIT Merger

Dear Chair Yellen, President Dudley and Comptroller Curry,

I am writing to offer my support for the pending OneWest and CIT merger. OneWest serves
 as a strong source of capital and banking services to the Southern California community.
 This merger will retain and create new jobs in California. I believe the management team
 and OneWest have demonstrated its commitment to our community and to serving the
 needs of not only their clients but the community at large and due to this, I do not believe
 there is a need for a public hearing.

Kind regards, [REDACTED]

<https://mail.google.com/mail/u/1/?ui=2&ik=71e13ca1b1&view=pt&q=edexheimer%40comberg.net&qs=true&search=query&msg=14f0e5e5ecb7593&siml=14f...> 1/2



September 23, 2015

Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
Constitution Center
400 7th St SW, Suite 3E-218
Washington D.C. 20219

Re: CIT Bank CRA Needs Assessment Survey as flawed attempt to comply with the OCC Conditional Approval Order relating to the Application to Merge CIT Bank, Salt Lake City, UT with and into OneWest Bank, N.A., Pasadena, CA;

OCC Control Numbers: 2014-WE-Combination-139872

2015-WE-DirectorWaiver-141909

Dear Comptroller Curry,

We write to express our strong concerns regarding CIT's flawed efforts to respond to the OCC's conditional approval order.

Specifically, we believe that the Bank is pursuing a non-inclusive and ineffectual process that is not responsive to the OCC's Conditional Approval Order, and is not consistent with the positive precedent set by the OCC with the Valley National Bank CRA plan process, with the end result being that communities in the bank's assessment area will be poorly served by the bank's inadequate commitment to community reinvestment.

The California Reinvestment Coalition (CRC), based in San Francisco, is a nonprofit membership organization of nonprofit organizations and public agencies across the state of California. We work with community-based organizations to promote the economic revitalization of California's low-income communities and communities of color through access to financial institutions. CRC promotes increased access to credit for affordable housing and economic development for these communities.

Sixty days into the ninety days allotted to the Bank to revise its CRA Plan, the only apparent evidence of the Bank's efforts is CIT's dissemination of a survey that is billed as a "CRA Needs Assessment" and a recently announced "community day event" that is reminiscent of a past community meeting that was more show than substance.

CRC and Greenlining are troubled by the survey for a number of reasons:

1. CIT is implementing an opaque and non inclusive process. An important question needs to be answered, in order to determine if a survey will be effective: Who received the surveys? CRC did not receive one, nor did a number of CRC members and merger opponents we asked. This question of who received a survey is extremely important to ensure that a fair process was undertaken in gathering information, as well as to ensure that in analyzing results that proper weight is given to data collected. For instance, if health and human services receives a majority of responses in a certain category in rating need, it would be good know if a majority of those surveyed or of those who responded were health and human services providers. It would also be important to know if a majority of those who received the survey were merger supporters rather than a fair representation of opponents and supporters.

Additionally, if this survey is part of a larger and more extensive community needs assessment, that process has not been explained to groups, and their participation in this survey has not been explained as part of a larger context in the bank's community needs assessment. For many of the organizations we've spoken with, this survey is the only contact they've had with the bank in terms of its plan or the process of plan development.

2. This "Needs Assessment" is not connected to need. The questions in this document are sparse, leading, and off point. Although the survey appears to be six pages long, the first two pages are questions related to the respondent and not about the community's needs. With so much emphasis on the responding organizations, it reads as if it's an invitation to solicit funding from the bank.

The survey's need questions are extremely limited in scope. The survey immediately and repeatedly asks respondents to rank priority of needs, as if they are not all coexisting, intersecting, urgent, and within the proper scope of a bank's CRA plan. Further, in our experience, organizations dedicated to serving one type of community need would be hard pressed to prioritize a different one as more urgent, if only due to limited knowledge about the scope of and appropriate responses to needs beyond the ones they specialize in. We have seen that when a bank surveys a disproportionate number of education groups, for example, the responses will naturally reflect that education is the most urgent need in the community. Forcing respondents to rank urgency of different needs sends a clear message that the bank's foremost priority is to pick between them to allocate the few resources the bank has budgeted.

A proper needs assessment survey would focus instead on identifying the complexity of existing needs, including their causes, their impact and potential responses. A secondary purpose would assess the resources needed to respond effectively. Then, finally, the bank should use the information to formulate a budget or plan using the tools and capacity that they have, which in this case include the ability to provide loans, investment and services to simultaneously address housing, economic development and financial services needs.

3. The survey suggests that the Bank is probably choosing to ignore the extensive record of thoughtful comments and testimony submitted over the course of many months of debate over whether the Applicant was meeting community credit needs. For example, CDC Small Business Finance cited FFIEC data to illustrate that OneWest made zero small business loans for under \$100k in 2013; our research and testimony from several opponents cited OneWest's sparse branch presence in low income neighborhoods, as well as its failure to finance or invest significantly in the affordable housing needed as a result of OneWest and Financial Freedom foreclosures; and by the bank's own admission, its mortgage lending to Asian Americans is below the industry average.

Will the revised CRA Plan give undue weight to simple surveys completed by respondents in five minutes, as opposed to the deliberative and public process resulting in a large number of comments on the Applicant's shortcomings and how it could do better? Nearly every topic related to "meeting community credit needs" was raised through the 12 month merger process, and yet it appears the bank has chosen to turn a blind eye to the expertise of organizations already embedded in its assessment area.

4. Disturbingly, the survey suggests the Bank is not even considering, nor is it soliciting input as to, whether it should increase its commitment to community reinvestment. The survey notes that, "CIT Bank, N.A. pledged \$3.8 billion in CRA reportable lending over the next 4 years." Respondents are then asked to rank a list of four categories of lending, with an "other" category provided "to help guide us in making these loans" (Survey, p. 3). But there is no box to check if a respondent believes that the \$3.8 billion pledge is itself part of the problem, if the respondent is concerned about CIT investing less than its peers are doing, or that the initial CRA plan is not commensurate with community need.

5. In its discussion of bank services, the Bank appears to obfuscate its deficiencies instead of addressing them directly. The bank asks "of the following alternative banking services, which are the most important," and then goes on to list four alternatives that respondents are to rank in order of importance (Survey, p. 5). The "alternatives" of course, are alternatives to the branch presence that LMI communities need and that CIT Bank lacks. As noted previously, CIT Bank has a mere 15% of its branches in such communities. The industry average in California is twice that, at 30%. Respondents are not invited to discuss the importance of branches in their communities. Yet branch presence is critically important to serving all communities, especially LMI communities that are already suspicious of banks and that may lack easy access to and comfort with technological alternatives. If a bank's "Needs Assessment" doesn't ask respondents to discuss the need for branch branches (or more reinvestment, etc.), how can it be said to assess need? The Bank is dictating and pre-determining the needs based on which "needs" it is willing to meet. This is not a "needs assessment," it's a tool for respondents to reorganize predetermined priorities for the bank.

6. CIT's implementation of the order fails to meet the strong precedent and standard set in the Valley National case. There, as has been noted, the Bank developed an inclusive process, meeting directly and on several occasions with community group commenters/opponents and their chosen representatives and allies. The Bank also documented its conversations, and reflected back those discussions in its public submissions to the regulators. Importantly, the bank ultimately developed a plan that reflected the discussions held, that satisfied all stakeholders, and

that pushed the bank to meet community needs in a manner beyond which it had initially proposed to do so.

At this point, two-thirds of the way into this process, CIT appears to fail on each count. And in asking respondents if the bank can list their name when they publish the CRA plan, the survey reinforces that the Bank may attempt to frame its submission as reflecting greater community support than exists.

7. The Plan CIT appears poised to submit to the OCC is roughly half the size of the Plan City National submitted to the OCC. CIT's deposit base is roughly 20% greater than City National's California deposit base. For CIT to reinvest at a proportional level to City National, it would have to commit to meet City National's goal of \$11 billion, but to do so in four years instead of the five year City National Plan. Instead, CIT commits to only \$5 billion over four years, less than half of City National's commitment. The two banks are peers and are similar in a number of ways. Further, the City National Plan was accepted by most of the California stakeholder groups, including the main proponents and opponents of the OneWest/CIT merger.

No justification has ever been put forth as to why CIT cannot do as much, (or half as much for that matter) as City National to help meet the community credit needs of Southern California customers and communities. As many commenters in the bank's assessment area pointed out, if anything, two banks that received a tremendous amount of subsidy from the FDIC and taxpayers should be willing to make a stronger commitment to its community than its peers who did not seek such assistance. If there is a better "peer" of CIT for comparison purposes, that has never been articulated or suggested. Yet, as stated earlier, CIT is implying in its survey that it will do no more than it has already committed and has not asked respondents if indeed community needs exceed this amount.

CRC is currently analyzing 2014 performance data from California banks from which we have sought information. CIT has not responded to this request for data. But based on our preliminary analysis, CIT's pledge over the next four years would rank it 8 out of 11 institutions analyzed in terms of its commitment to meet community credit needs in its assessment areas, meaning 7 out of 11 institutions, we believe did more in 2014 than CIT will likely do each year through 2019. How is this identifying and meeting community credit needs?

8. Another community meeting, will community members be heard? While CITBNA has refused our request to meet with CRC and its members, it has invited us to a "Annual Community Day Event" scheduled for October 6 in Los Angeles. This is reminiscent of the community meeting the banks held at the beginning of this process, where the vast majority of time allotted consisted of grantee performance and bank presentation. Approximately 15 minutes was allotted for questions and comments, and the bank even then refused to answer our questions. Community groups were not able to give substantive feedback to the plan that was presented, given that this was the first time groups were viewing the plan, and there was no opportunity for meaningful dialogue and engagement. It is hard to imagine how this meeting will be any different, and how the bank will meaningfully take input on how its Plan should be refined and expanded.

This merger triggered one of the largest and most substantive merger protests in recent memory. A large number of concerns were raised about the Applicant's past performance, as well as its ability to meet community credits needs and demonstrate a public benefit from the merger. Many questions were asked of the bank and never answered.

CITBNA's survey raises serious questions about the Bank's intention of reforming or meaningfully meeting community credit needs. This is now a test for the OCC. We hope and believe the OCC will stand by southern California communities, and stand for fairness, by requiring the bank to go back to the drawing board and develop a Plan, in meaningful consultation with all parties, which truly identifies and helps meet community credit needs in a manner that is commensurate with its size.

To further inform the public record, and to suggest a way forward for the Bank to help meet community credit needs, CRC and the Greenlining Institute will be submitting a proposed CITBNA CRA Plan based on the City National Bank commitment, OWB Plan drafts, and needs identified during the merger protest process.

Thank you very much for your consideration of our views. Should you wish to discuss this letter further, please feel free to contact Kevin Stein or Paulina Gonzalez at (415) 864-3980.

Very Truly Yours,

Paulina Gonzalez
Executive Director

Orson Aguilar
Executive Director

CC: Joseph Otting, CEO, CITBNA



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February 6, 2020

House Financial Services Committee

Oversight and Investigations Subcommittee

Hearing:

**“Fake It Till They Make It: How Bad Actors Use Astroturfing to Manipulate Regulators,
Disenfranchise Consumers and Subvert the Rulemaking Process”**

Testimony of

Bartlett Collins Naylor

Financial Policy Advocate

Public Citizen’s Congress Watch Division

Chair Green, Ranking Member Barr, and members of the subcommittee: On behalf of more than 500,000 members and supporters of Public Citizen, thank you for the opportunity to testify at the House Financial Services Committee’s Oversight and Investigations Subcommittee hearing entitled, “Fake It Till They Make It: How Bad Actors Use Astroturfing to Manipulate Regulators, Disenfranchise Consumers and Subvert the Rulemaking Process.” My name is Bartlett Naylor, financial policy advocate for the Congress Watch division of Public Citizen.

We welcome the committee’s attention to this issue. The problem of astroturf comments is not new and, in fact, is an issue that warrants urgent attention.

Public Citizen promotes consumer protection and policies that attempt to restrict corporate abuse and misconduct. We approach our 50th anniversary of pursuing this mission. Public Citizen, as our name

suggests, is an organization dedicated to the concept that democracy depends on an engaged citizenry. Voting is critical in selecting responsible, enlightened lawmakers. But we believe good citizenship requires daily vigilance. Our members and supporters are self-selected Americans who share this sense of daily obligation. Our Public Citizen members are public citizens. We often promote needed new laws and strong regulation. We frequently oppose bills and efforts to relax needed regulations that we believe harm consumers. In many cases we invite our members to contact their lawmakers regarding legislation. We also invite them to submit comments to regulators.

On financial issues, for example, we've invited our members to comment on the Volcker Rule-- the notice of proposed rulemaking, the original proposed rulemaking, the revised rulemaking, and the second revised rulemaking. We invited our members to comment on the CEO/median pay ratio as provided on Section 953 of Dodd-Frank; on incentive compensation rules as provided in Section 956; on the Department of Labor's fiduciary rule; on the Securities and Exchange Commission's broker conduct rule; on the Comptroller of the Currency's Community Reinvestment Act proposals; and many others. These have resulted in tens of thousands of thoughtful comments.

In part, because of our engagement with the regulatory system in this manner, we zealously guard the integrity of this comment process. As overseen by the Administrative Procedures Act, the rulemaking comment process enshrines the goal to which Public Citizen is dedicated, namely communication between congressionally-confirmed rule-makers and the average citizens that these rules are ultimately designed to benefit.

Generally, what we argue for is common sense and widely supported by the American public. We believe our positions on financial issues relevant to this committee are strongly supported by Americans of every political persuasion, who believe that the financial crash of 2008 required a strong legal and regulatory response; who believe that consumers deserve protection from financial predators; who believe in rules to prevent discrimination in our financial markets. The positions Public Citizen promotes before this committee, the wider Congress and before regulatory agencies are positions staunchly supported by the public at large. Polls affirm this.¹

With this backdrop, we are concerned when we encounter comments in a rulemaking docket that purport to come from ordinary citizens and argue in the opposite direction, against needed regulations. Yes, we expect industry to oppose safeguards, but not the citizens those safeguards are meant to protect. When we see a comment from a small business owner who claims that investor protections will hurt her firm's retirement fund, we're puzzled. When we see a person from the heartland arguing against shareholder rights, we're curious. When we see comments from individuals who laud a bank that redlines communities, we're suspicious.

Occasionally, when we scratch the surface of these grassroots expressions of support for various corporate interests, we find that they're plastic—astroturf.

1. SEC Chair Clayton's Reliance on Fabricated Comments

The committee's attention to fabricated comments is timely and applies to an active rulemaking effort at the Securities and Exchange Commission (SEC) regarding shareholder resolutions. Earlier this week, on Feb. 3, 2020, the comment deadline ended for a pair of rules. One addresses shareholder resolutions, and the other addresses regulations for proxy advisory firms that help institutional investors decide how to

¹*New Poll Shows Significant Support for Financial Reform*, BETTERMARKETS (Set. 19, 2018) <https://bettermarkets.com/poll-key-findings-graphs>

vote at annual meetings. Resolutions are, as the name implies, proposals that shareholders submit to corporate boards for a vote at the annual shareholder meeting. One of the types that has been most successful ones include those that call on corporations to disclose all their political spending.

For years, business interests have sought to limit the ability of shareholders to bring these resolutions before annual meetings. The U.S. Chamber of Commerce has openly called for limiting these tools of corporate accountability. More recently, corporate opposition has included the creation of faux groups. One of these was the so-called Main Street Investors Coalition.² This group claimed to represent average investors who tired of shareholder activism. However, as it quickly became clear that this entity was a false front for the National Association of Manufacturers, the group's website closed. Yet the false claims persisted; on Nov. 5, 2019, the Securities and Exchange Commission held an open meeting to consider offering for public comment a series of proposals to roll back shareholder rights for investors in publicly traded companies. Chair Jay Clayton, who controls the staff at the SEC, explained how he came to his views, reflected in the proposal for which he subsequently voted to approve.³ Specifically, Chair Clayton cited the letters of seven individuals who claimed that shareholder activism undermined their interests and that proxy advisory firms required censorship by corporations. Chair Clayton did not cite any other letters that were submitted. The other letters numbered in the hundreds and generally took the opposite view of those seven letters; that is, the preponderance of letters opposed proposals that would reduce shareholder activism.

It turns out those seven letters were fabricated. An investigation by Bloomberg showed that those letters were "the product of a misleading -- and laughably clumsy -- public relations campaign by corporate interests."⁴ In his comments during the SEC's open meeting, Chair Clayton explained, "Some of the letters that struck me the most came 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, a couple of retirees who saved for retirement." Bloomberg then contacted these commenters: "That retired teacher? Pauline Yee said she never wrote the letter, although the signature was hers. Those military vets? It turns out they're the brother and cousin of the chairman of the [lobby group] paid by corporate supporters of the SEC initiative. . . . That retired couple? Their son-in-law runs [the lobby group]."⁵

The lobby group is known as 60 Plus, and is an affiliate of Main Street Investors Coalition, which is funded by the National Association of Manufacturers. 60Plus is funded, in part, by the Koch Brothers.⁶

² Nell Minow, *The Main Street Investors Coalition is an Industry-Funded Effort to Cut Off Shareholder Oversight*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION, (June 14, 2018) <https://corpgov.law.harvard.edu/2018/06/14/the-main-street-investors-coalition-is-an-industry-funded-effort-to-cut-off-shareholder-oversight/>

³ Chairman Jay Clayton, *Statement of Chairman Jay Clayton on Proposals to Enhance the Accuracy, Transparency and Effectiveness of Our Proxy Voting System*, U.S. SECURITIES AND EXCHANGE COMMISSION, (Nov. 5, 2019) <https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting>

⁴ Zachary Mider and Ben Elgin, *SEC Chairman Cites Fishy Letters in Support of Policy Change*, BLOOMBERG (Nov. 19, 2019) <https://www.bloomberg.com/news/articles/2019-11-19/sec-chairman-cites-fishy-letters-in-support-of-policy-change>

⁵ Zachary Mider and Ben Elgin, *SEC Chairman Cites Fishy Letters in Support of Policy Change*, BLOOMBERG (Nov. 19, 2019) <https://www.bloomberg.com/news/articles/2019-11-19/sec-chairman-cites-fishy-letters-in-support-of-policy-change>

⁶ Skocpol, Theda; Hertel-Fernandez, Alexander (2016). *"The Koch Network and Republican Party Extremism"*. PERSPECTIVES ON POLITICS. **14** (3): 681–699. doi:10.1017/S1537592716001122. ISSN 1537-5927.

On Dec. 10, 2019, Chair Clayton testified before the Senate Banking Committee in a general oversight hearing. Several senators, including Sen. Chris Van Hollen (D-Md.) took special exception to Clayton's reliance on these fabricated letters. "What troubled me even more was you did try to present this as sort of a concern of Main Street investors when you rolled this out. You attempted to create the impression that this was something a lot of Main Street investors care about. You got duped."⁷

Recently, a Republican operative began soliciting comment letters on this rulemaking claiming that it's aimed at stopping left wing champions of illegal immigrants and abortion.⁸ This video features Holly Turner, who identifies herself as an ordinary citizen. Nowhere does she acknowledge that she's a former Trump administration official⁹ who served at the U.S. Small Business Administration. Turner now works at Stampede Consulting, which claims to run "Award-winning grassroots campaign."^{10 11} The firm describes Ms. Turner as "always willing to speak truth and stand firm against the Left."¹²

Now, the SEC docket on this rulemaking already features letters claiming to be from Main Street investors who oppose corporate accountability. For example, one letter comes from one of the submitters that Bloomberg identified as a fabrication.¹³

2. OCC Comptroller Otting and the OneWest CRA Challenge

On January 29, 2020, the full House Financial Services Committee held a hearing on changes to the Community Reinvestment Act (CRA) proposed by Comptroller of the Currency Joseph Otting. CRA is a piece of 1977 legislation that requires banks to reinvest in their communities.

In his previous job, the CRA nearly cost Otting a \$24 million payday.

Congress approved the Community Reinvestment Act in 1977 to combat redlining and other forms of discriminatory lending. Senator William Proxmire, then chair of the Senate Banking Committee, and for

⁷ Rita Raagas De Ramos, *Senators Call Out SEC's Clayton: You Were Duped in Proxy Initiative*, FINANCIAL ADVISOR IQ, (Dec. 11, 2019)

https://www.financialadvisoriq.com/c/2596973/299793/senators_call_clayton_were_duped_proxy_initiative

⁸ *Republican Operative Holly Turner Posts Appallingly Deceptive Video in Support of Anti-Shareholder Proposal from the SEC*, VALUE EDGE ADVISORS, (Jan. 10, 2020) <https://valueedgeadvisors.com/2020/01/10/republican-operative-holly-turner-posts-appallingly-deceptive-video-in-support-of-anti-shareholder-proposal-from-the-sec/>

⁹ *Republican Operative Holly Turner Posts Appallingly Deceptive Video in Support of Anti-Shareholder Proposal from the SEC*, VALUE EDGE ADVISORS, (Jan. 10, 2020) <https://valueedgeadvisors.com/2020/01/10/republican-operative-holly-turner-posts-appallingly-deceptive-video-in-support-of-anti-shareholder-proposal-from-the-sec/>

¹⁰ *Holly Turner*, AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, (2019) <https://theaapc.org/awards/40-under-40/inaugural-class-of-2015/holly-turner-2/>

¹¹ The website explains: once we have a signed contract, our team will meet with yours to discuss the project goals and establish "what success looks like" for you.

¹² We will then launch Phase 1, during which we will deploy a team to ascertain the lay of the land and actually test messaging, targeting, conversation + conversation rates so that we can measure what it'll take to operationalize the mission.

¹³ Our team will return with a plan to achieve your goals and once discussed and approved, we will guarantee performance **or your money back**.

¹⁴ *Our Team*, STAMPEDE CONSULTING, (2019) <http://stampedeconsulting.com/our-team/>

¹⁵ Marie Reed, *letter*, SECURITIES AND EXCHANGE COMMISSION (undated) <https://www.sec.gov/comments/s7-22-19/s72219-6526201-200431.pdf>

whom I worked as chief of investigations, authored the measure amidst widespread evidence that many banks failed to serve low-income and minority residents in the communities where they operated.

The CRA calls on banks to serve their entire communities. If banks fail in this mandate, Washington regulators will “take such record into account in its evaluation of an application for a deposit facility by such institution.” In other words, a bad CRA record could prevent a bank from buying or merging with another bank. Bankers wish to purchase smaller banks to grow. Smaller banks seek to sell to cash out for a profit. As such, the CRA has become foundational in the nation’s effort to promote fair lending.

Otting encountered the CRA as the CEO of OneWest. Otting assumed this job in October 2010, nearly two years after Dune Capital hedge fund manager Steven Mnuchin (now U.S. Treasury secretary) purchased the failed IndyMac Bank from the government. Mnuchin renamed it OneWest.

Instead of fulfilling the promise of the CRA, Otting managed OneWest in the opposite direction, according to the California Reinvestment Coalition.¹⁴ Instead of “reinvesting,” Otting oversaw tens of thousands of foreclosures, including 35,000 in California alone. Victims were concentrated in minority communities. Staff at the California Attorney General’s office prepared a litigation memo summarizing their accusations of “widespread misconduct.”¹⁵ According to a media summary, OneWest “rushed delinquent homeowners out of their homes by violating notice and waiting period statutes, illegally backdated key documents, and effectively gamed foreclosure auctions.”¹⁶

What was certainly devastating for OneWest’s borrowers was attractive to investors looking for a franchise in southern California, where OneWest concentrated its business. Mnuchin shopped OneWest soon after Dune Capital acquired it and found interest from Salt Lake City-based CIT Group. CIT proposed paying more than double the \$1.5 billion that Mnuchin raised to buy IndyMac from the government. And completion of this deal promised a substantial payday for Otting.²⁰ Otting had not led a

¹⁴ Bartlett Naylor, *The Revolving Door and the Assault on the Community Reinvestment Act*, AMERICAN PROSPECT, (Nov. 21, 2018) <https://prospect.org/economy/revolving-door-assault-community-reinvestment/>

¹⁵ Document provided via David Dayan, <https://www.documentcloud.org/documents/3250383-OneWest-Package-Memo.html>

¹⁶ David Dayan, *Treasury Nominee Steve Mnuchin’s Bank Accused of “Widespread Misconduct” in Leaked Memo*, THE INTERCEPT (Jan. 3, 2017) <https://theintercept.com/2017/01/03/treasury-nominee-steve-mnuchins-bank-accused-of-widespread-misconduct-in-leaked-memo/>

¹⁷ In the reverse mortgage business, the OneWest-controlled firm Financial Freedom engaged in practices that led to more than 16,000 foreclosures, a far greater number than would be expected based on the company’s market share. Elderly individuals who had recently suffered the death of a spouse were victimized. In one case, Financial Freedom attempted to evict a 90-year-old woman from her home over a 27-cent error on an insurance payment. In another case, a New York State Supreme Court judge called OneWest’s foreclosure practices “harsh, repugnant, shocking, and repulsive.”

¹⁸ Over Otting’s signature, OneWest Bank signed a consent order with the Office of Thrift Supervision for “certain deficiencies and unsafe or unsound practices in the Association’s residential mortgage servicing and in the Association’s initiation and handling of foreclosure proceedings.”

¹⁹ OneWest affiliate Financial Freedom paid \$89 million following allegations that it violated the False Claims Act. This involved a five-year pattern from 2011 to 2016 where Financial Freedom claimed government fees that the U.S. Justice Department said “they were not entitled to receive.”

²⁰ How much Mnuchin paid Otting to run OneWest isn’t public because Dune Capital purchased IndyMac with private funds. (A publicly traded company publishes the compensation of senior executives; a private company does not.) The year before it failed, IndyMac CEO Michael Perry received \$1.4 million in total compensation. It is possible that Otting received a similar compensation package.

company before Mnuchin retained him at OneWest. The University of Northern Iowa graduate held a succession of mid-level management positions at Bank of America, Union Bank and then US Bank, helping it expand into California. (The White House announcement of his appointment as Comptroller of the Currency listed him as a graduate of the “School of Credit and Financial Management at Dartmouth College.” This program is not Dartmouth sponsored, but rents space to a program that offers four-week courses.) In other words, Otting was not a high profile CEO that Mnuchin needed to lure with a major compensation contract. Under the terms of the merger agreement, if regulators approved the deal, Otting would be paid \$24 million, guaranteed, whether or not he continued to work at the post-merger company.²¹

A sealed merger would make Otting rich. But CRA stood in the way.

The California Reinvestment Coalition contested the merger on CRA grounds. In response, OneWest fought the request. This included comments supporting the merger from business managers that may have had an association with OneWest, suggesting that they are contacts of former President Otting or his OneWest staff. They refer to the fact that the merger would benefit “our community” in “southern California.” In many cases, these letters come from business managers outside of southern California, as was the case with two accountants associated with KPMG, a major accounting firm. One of these came from Phillip Bray, whose email is pbray@kpmg.com and he lists Charlotte, N.C. as his address.²² Mr. Bray does not reference his association with KPMG. Another KPMG comment comes from Tim Phelps, also from Charlotte, NC. Like Mr. Bray, his association with KPMG comes through his email address, namely tghelps@kpmg.com. Both speak of “our community” in “southern California.” Public Citizen emailed both KPMG addressees to ask how they came to submit these letters and received no response. We also emailed KPMG’s ethics office and received no response. We then emailed the Public Company Accounting Oversight Board to ask if they considered it a conflict of interest for an independent audit firm to provide support for a client in an important business decision. PCAOB responded to our inquiry and asked for additional information. We have not heard from them since. Another comment letter comes from a CIT official named Jaison Chacko, whose address is Livingston, Montana. Mr. Chaiko also talks about “our community” in “Southern California.”²³ Neither Charlotte, N.C. nor Livingston, Mt. can be considered part of the southern California community. We can only speculate either that these managers are not attentive to the details of their own emails, or that their name and email was exploited by a third party.

The OneWest email campaign also included other irregularities. One petition was composed of 593 individuals purportedly supporting the merger with Yahoo email accounts. (Yahoo has a 3 percent market share for email.) A large number of these emails were time stamped as 2 a.m., February 13, 2015. Yahoo

²¹ According to CIT’s public filing, “Pursuant to the agreement to acquire OneWest, CIT entered into an offer letter with Mr. Otting, which provides for a total target annual compensation opportunity (including base salary and annual and long-term incentives) for each of 2015, 2016 and 2017 in the amount of \$4.5 million. In the event of Mr. Otting’s termination of employment without cause or for good reason prior to the third anniversary of the closing of the acquisition, subject to the execution of a release of claims, Mr. Otting would be entitled to a lump sum severance payment approximately equal to the remaining total target annual compensation.” A CIT’s disclosure itemized his entire promised payday at \$24 million.

²² Comment file, OCC merger, FEDERAL RESERVE, https://www.federalreserve.gov/bankinfo/reg/Comments_Letters__1-6-15_to_1-13-15_part_1.pdf

²³ Comment file, OCC merger, FEDERAL RESERVE, https://www.federalreserve.gov/bankinfo/reg/Comments_Letters__1-6-15_to_1-13-15_part_2.pdf

had suffered a security breach before this period. Other emails came from persons who, after they received receipt confirmation from the Washington regulator, denied they had originated them and theorized their email had been hacked.

In the end, regulators approved the merger. CIT retained Otting in August 2015. By December, CIT terminated him. No matter; a consummated merger promised him \$24 million, whether or not he showed up at work for three years.

We are unaware of any disciplinary action taken to address the fabrication of the email comments.

3. *The Chamber's Pawns*

Organized by the U.S. Chamber of Commerce, a handful of small business owners became the public face of a Wall Street effort to fight a years long Washington reform effort by the Obama Department of Labor (DoL). Public Citizen tracked this effort.²⁴ The DoL sought to guarantee that financial advisors provide people saving for retirement with investment advice that is in their best interests. The result of this reform was a DoL rule directing investment advisors to put their clients' interests ahead of their own personal interest whereas they previously were focused on obtaining the most lucrative commissions from selling various investment products. The current rules permit conflict of interests that cost investors an estimated \$17 billion annually—money that goes mostly to Wall Street. Since Wall Street can't argue compellingly that it deserves this money, the voices of small business owners became important to the lobbying campaign aimed at stopping this new rule, known as the fiduciary rule.

The U.S. Chamber organized this lobbying campaign, which included congressional testimony, lobby visits to Capitol Hill, and a webpage featuring a dozen small business owners it claimed were "speaking out" about the problems with the proposed fiduciary rule. These small business owners individually told stories claiming that the current system works well and is even essential to their success. But Public Citizen's Chamber Watch project found the Chamber's portrayal of these small business leaders' opposition to the fiduciary rule to be at a minimum misleading and in some cases downright false. In fact, far from a groundswell of grassroots advocacy by small business, this was more akin to an astroturf campaign organized by the Chamber.²⁵

Chamber Watch attempted to contact each of these small business owners who were "speaking out." We found:

- One Chicago non-profit leader did not have a view on the rule and didn't even know that he was listed on the webpage as being opposed to the rule. He subsequently called the Chamber and his name was removed.
- One California small business owner who said the current system helped her grow employment at her business over the last 12 years acknowledged that she had only one employee.
- One small business owner said the proposed rule is overly generous and should be stricter to prevent "mendacious" activities.

²⁴ Bartlett Naylor, *Sacrificing the Pawns*, PUBLIC CITIZEN (June 2016) <https://chamberofcommercewatch.org/wp-content/uploads/2016/06/Sacrificing-the-Pawns-final.pdf>

²⁵ Bartlett Naylor, Dan Dudis, *Taking a Hard Look at a Campaign Critical of the Fiduciary Rule*, NEW YORK TIMES June 9, 2016) <https://www.nytimes.com/2016/06/10/business/dealbook/taking-a-hard-look-at-a-campaign-critical-of-a-fiduciary-rule.html?smid=tw-dealbook&smtyp=cur&r=2>

- One person identified as a “human resources” officer is associated with a firm that no longer exists except as a website.
- One Indianapolis small business owner whose business is to make sure contractors meet construction codes said she generally opposes regulations because they raise the cost of business. This, even though her very business is predicated upon verifying that construction companies comply with government regulations.
- More than a fourth of the “small business owners” are lobbyists for the brokerage industry, including officials of the U.S. Chamber itself, which listed them in order to pad the number of critics.
- One person is a government official whose office organized a roundtable to receive comment on the proposed rule from small businesses. But the business owners whose input was solicited at this roundtable were not representative of the approximately 28 million small businesses in the United States. Twelve of the 14 small business owners at this roundtable were investment advisors. One worked for the U.S. Chamber of Commerce.
- Most of the remaining small business owners featured by the Chamber didn’t seem interested in “speaking out” and declined to respond to Chamber Watch email or telephone calls.

4. *Other Deceptions*

Allied Progress uncovered suspicious comment letters opposing reform of payday loans by the Consumer Financial Protection Bureau (CFPB). For example, the group found “at least 214 comments claim, verbatim, that the borrower took out payday loans because they “needed to replace [their] hot water tank” and their “appliances needed to be repaired and eventually replaced,” citing Cash Connection as their lender of choice.”²⁶ An investigation by David Dayen published in *Vice* explored the sophisticated way that the payday industry generated comments to the CFPB.²⁷

Corporate financial abusers do not limit their deceptions to faux comments from average citizens. Public Citizen has investigated other areas of deception. Another common ploy with which this committee is undoubtedly familiar are industry-funded studies submitted under the banner of a respected university.

In 2019, we published a lengthy examination of a Koch funded center operating under the banner of George Washington University, called the Regulatory Studies Center.²⁸ This Center focuses on submitting testimony and comments to government bodies on regulatory policies. It purports to be “objective” and “unbiased” and says that the submissions of its writers represent the writers’ views, alone. Yet, about 96 percent of its public comments on discrete proposals recommend less regulation than the proposal or status quo. The Charles Koch foundation has provided the Center more than \$1 million in funding. Three-fourths of its comments to public agencies were authored by a person with ties to other Koch organizations. These

²⁶ Press release, *Payday Industry’s Fake CFPB Comments*, ALLIED PROGRESS (May 16, 2019) <https://alliedprogress.org/news/payday-industrys-fake-cfpb-comments-criticized-at-congressional-hearing-adds-pressure-on-kathy-kraninger-to-restore-integrity-to-tainted-payday-rulemaking-process/>

²⁷ David Dayen, *How Predatory Lenders Plot to Fight Government Regulation*, *VICE* (Aug. 18, 2016) https://www.vice.com/en_us/article/8genzb/payday-lenders-consumer-protection-strategy-atlantis-bahamas

²⁸ Taylor Lincoln, *A Key Cog in Charles Koch’s Master Plan*, PUBLIC CITIZEN (June 3, 2019), <https://www.citizen.org/wp-content/uploads/A-Key-Cog-in-Charles-Kochs-Master-Plan-4.pdf>.

facts strongly suggest that the Center is something other than the independent research hub that it claims to be.

In the SEC's rulemaking about pay reform under Section 956, the Agency made reference to a Prof. Rene Stulz. But the docket fails to note his industry ties. A Reuters investigation of conflicted economists found that "Stulz is on the board of directors of Swiss financial firms Banque Paribas and Wegelin Asset Management. He is also a director at Community First Financial Group and Peninsula Banking Group." Reuters noted that he omitted these affiliations when he testified before Congress. He told Reuters he did not consider his financial ties to be relevant to his testimony.²⁹

5. Policy Choices

As noted at the outset of this testimony, Public Citizen vigorously defends the opportunity of citizens to comment on policy, including rulemakings covered by notice-and-comment. We believe this process should be made more accessible, with better, simpler plain-English explanations in the rule makings themselves.

Financial policy has enormous impact on everyday Americans as evidenced by the horrific financial crash of 2008. The roots of that devastation turned on the regulation of complex derivatives, margin requirements, Basel capital requirements, swap clearing, cross border oversight, and a blizzard of other rules whose language intentionally frustrates what a person of good faith can try to decipher. It is Public Citizen's abiding challenge to translate these dissembling terms into those that Main Street Americans can grasp, and whose needed reforms they can consider and perhaps promote to rule makers in formal comments. We are especially pleased that Rep. Madeleine Dean (D-Pa.) on this committee promotes this same goal.

Public Citizen opposes efforts to frustrate or otherwise limit the ability of average Americans to engage in this system. We do not share the view that the rising number of comments made possible by the internet is an inherently bad thing. We applaud the rising number of comments.

We believe that agencies should take individual comment letters more seriously. For example, we believe that corrupt pay practices served at the core of the 2008 financial crash; bankers profited personally from their reckless, often fraudulent behavior. In a rulemaking to implement pay reform, known as Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, we invited our members to submit comment on this rule. More than a thousand did, with individual descriptions of what the crash did to them. None of these were form letters. These letters described individual hardships—dropped piano lessons for the kids, cancelled vacations, foreclosures, lost jobs. The regulators made only glancing reference to these letters, noting they were "form" letters. Instead, the regulators gave fulsome attention to the letters from bankers. We think the Agencies should have paid little attention to what bankers said about this rule.

We believe agencies should welcome letters, even those that take exception to the current trajectory of policy. Currently, Otting's OCC staff are reaching out to co-signers of a letter drafted by the National Community Reinvestment Coalition to challenge their support of NCRC's critique.

²⁹ Emily Flitter, Kristina Cooke, and Pedro de Costa, *For Some Professors, Disclosure Is Academic*, REUTERS (Dec. 20, 2010) <http://www.reuters.com/article/us-academics-conflicts-idUSTRE6B13LF20101220>

At the same time, we welcome efforts to combat the abuse of this system by those who want to advance the interests of corporations or those who would do harm to consumers and citizens by suffocating the comment plumbing, by forging comments, or otherwise creating fictions that betray the American interest.

For the most egregious cases of comment fabrication, current law already provides penalties for fraud, 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.³⁰ That said, a review by the by the US Senate Permanent Subcommittee on Investigations³¹ found that only one agency among the dozen surveyed had contacted the FBI about fraudulent activity. And there is no record of any resulting FBI action.³²³³

We call on this committee and Congress to question why law enforcers have failed to penalize those who “knowingly and willfully ... make fraudulent representations” to the government. Without penalties, bankers seeking to hurdle CRA requirements to seal a lucrative bank merger will continue to fabricate comments. Corporate captains seeking to escape shareholder accountability will continue to generate fake comments that SEC commissioners will cite to dismantle shareholder rights. Investors will fall prey to Wall Street predators who cause small business managers to spout self-defeating fictions.

We ask this committee to commission a study on the utility of public listing of those who file fake comments, especially those who organize such efforts. This would inform rule-makers as well as media and civic organizations to readily identify such efforts. The public listing should also serve as a deterrent. We support the policy advanced by Sen. Elizabeth Warren that requires those who communicate with the government to disclose any financial backing.³⁴

In some circumstances, we think that public attention to these fabrications, such as through this hearing, or media coverage, or reports by organizations such as Public Citizen, can expose the fraud and address the damage. As noted, the Main Street Investors coalition took down their website. We assume this resulted from public attention. At George Washington University, students are circulating a petition calling on university officials to sever ties with the Koch-funded Regulatory Studies Center or come clean about its purposes and funding arrangements.³⁵ We support these sensible, proactive responses.

³⁰ 18 U.S.C. § 1001(a) (2018).

³¹ Staff Report, *Abuses of the Federal Notice-and-Comment Rulemaking Process*, U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS (undated) <https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf>

³² 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).

³³ Staff Report, *Abuses of the Federal Notice-and-Comment Rulemaking Process*, U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS (undated) <https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf>

³⁴ Sen. Elizabeth Warren, *Anti-Corruption and Public Integrity Act*, CONGRESS.GOV (August 21, 2018) <https://www.congress.gov/bills/115th-congress/senate-bill/3357>

³⁵ Lauren Lumpkin, *GWU president apologizes for ‘insensitive’ racial remark*, THE WASHINGTON POST (Feb. 3, 2020), https://www.washingtonpost.com/local/education/gwu-president-apologizes-for-insensitive-racial-remark/2020/02/03/adf33ed4-46b4-11ea-8124-0ca81effcdffb_story.html?carta-url=https%3A%2F%2Fs2.washingtonpost.com%2Fcar-ln-

In the case of the fabricated comments relied on by Chair Clayton at the SEC, we've already asked the SEC IG to investigate. We asked the IG to probe:

- Why did Chairman Clayton exclusively cite those letters fabricated by the industry lobby? Did this industry lobby help prepare Chairman Clayton's statement? What communications took place between the Chairman and this lobby, including those by his staff?
- Are there any genuine letters that bolster Clayton's position?
- Why has Chairman Clayton failed to acknowledge the preponderance of letters that oppose restrictions on shareholder resolutions? Was he made aware of these letters?

We have reason to believe that the IG is investigating this issue. We invite the committee to inquire about the status of this investigation. Given his reliance on these fabricated letters, we also believe that Chair Clayton should withdraw this rule proposal. We ask the committee to join our request.

As a matter of procedure, where a commissioner cites a letter as important grounds for adopting a policy position, the agency staff should make a minimum good faith effort to validate its authenticity. In some cases, such validation might be demonstrated from within the four corners of the letter, such as if it is from a trade association or civil rights organization. In other cases, it might require an email or telephone call to the comment filer to confirm that the person exists and acknowledges sending the letter. Presumably, such a person would find this outreach encouraging, knowing that his or her views were helping to shape policy. Where the staff finds questions with the provenance of letters, or where civic organizations or the media have highlighted irregularities, we urge the Inspectors General to investigate.

Regulatory agencies provide an invaluable service to the public by implementing safeguards. It is essential they are listening to the genuine voices of everyday citizens.

Thank you for the opportunity to present Public Citizen's views on this important subject.

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Testimony of Beth Simone Noveck

Professor and Director, The Governance Lab, New York University

U.S. House Committee on Financial Services

Subcommittee on Oversight and Investigations

Hearing – “Fake It till They Make It: How Bad Actors Use Astroturfing to Manipulate Regulators, Disenfranchise Consumers, and Subvert the Rulemaking Process”

February 6, 2020

Introduction

Chairwoman Waters, Ranking Member McHenry, thank you for the opportunity to participate in today’s House Financial Services Committee Oversight and Investigations Subcommittee hearing: “Fake It till They Make It: How Bad Actors Use Astroturfing to Manipulate Regulators, Disenfranchise Consumers, and Subvert the Rulemaking Process.”

I am a Professor of Technology, Culture and Society at New York University's Tandon School of Engineering, where I direct the Governance Lab, a nonprofit action research center focusing on the use of new technology to improve governance and strengthen democracy. At the Governance Lab, I direct our work on “CrowdLaw,” where we collaborate with public sector partners to study and design use of new technology to improve the quality of law and policymaking. I previously served as Deputy Chief Technology Officer and Director of the Open Government Initiative under President Obama, where I led White House policy and projects on citizen engagement. I currently also serve as Chief Innovation Officer of the State of New Jersey and as a Member of Chancellor Angela Merkel’s Digital Council.

In this submission, which reflects only my personal opinions, I set out the crucial importance of citizen and stakeholder engagement to increase the effectiveness and legitimacy of regulations, and to strengthen democracy and trust in policymakers when both are under severe challenge. I examine some difficulties attached to public commenting in rulemaking, and how they can be overcome using new tools and

technology. Finally, I showcase how jurisdictions around the world are turning to crowdfund, the use of online public engagement in order to improve the *quality* of the law- and rulemaking process, and provide examples that the United States could draw on as it seeks to deepen the foundations of its democracy in uncertain times.

Using New Technology to Improve the Quality of Public Participation

The Administrative Procedure Act of 1946 provides the public with an opportunity to participate in the rulemaking process through the submission of data, views, or arguments, which a federal agency is then required to consider prior to promulgation.¹ The right to public participation is not intended to elicit popular opinion about the draft rule or to have people vote on the proposal. It is not an occasion for what constitutional law scholar Alexander Meiklejohn (1872-1964) described as “unregulated talkativeness.” Instead, it is an important opportunity for the public to participate in politics, when “everything worth saying shall be said.” In other words, the goal of public participation in rulemaking is to apprise the relevant agency of the best available information, in order to inform how it crafts the rule. As the Senate Permanent Subcommittee on Investigations found in its 2019 report on Abuses of the Rulemaking process, “agencies depend on relevant, substantive information from a wide variety of parties to assist them in developing and updating federal regulations.”² Furthermore, the regulations.gov website states, “public participation is an essential function of good governance. Participation enhances the quality of law and its realization through regulations (e.g. Rules).”³

High quality participation in rulemaking is also vital for Congress in its oversight capacity. Although agencies often promulgate rules without significant oversight,⁴ Congress still retains and uses its lawmaking authority after it delegates responsibility for implementing laws to regulatory agencies. In addition to oversight hearings, members frequently communicate with agencies during the rulemaking process through meetings,

¹ 5 U.S.C. §§ 553, Pub. L. No. 79-404, 60 Stat. 237 (1946).

² United States Senate Permanent Subcommittee on Investigations, “Abuses of the Federal Notice-and-Comment Rulemaking Process,” *U.S. Senate Committee on Homeland Security & Governmental Affairs*, October 24, 2019, [https://www.hsgac.senate.gov/imo/media/doc/2019-10-24 PSI Staff Report - Abuses of the Federal Notice-and-Comment Rulemaking Process.pdf?mod=article_inline](https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf?mod=article_inline).

³ “Frequently Asked Questions,” Regulations.gov Beta, General Services Administration, accessed January 28, 2020, <https://beta.regulations.gov/faq>.

⁴ Sidney A. Shapiro, “Political Oversight and the Deterioration of Regulatory Policy,” *Admin. L. Rev.* 46 (1994): 10 (oversight of rulemaking as “limited, infrequent, and ad hoc rather than systematic.” Even as oversight has become more popular, “monitoring and reporting only reveals what an agency is doing; these activities do not automatically cause the agency to adhere to, or alter, a policy”).

letters and calls.⁵ For example, this Committee's Democratic members wrote to the Comptroller of the Currency to ensure that the upcoming Community Reinvestment Act regulatory processes would include meaningful engagement with the public and have suggested extending the period for public commenting from 60 to 120 days to facilitate more diverse participation.⁶ Moreover, since the enactment of the Congressional Review Act, Congress has possessed and used its sweeping powers to review and overturn rules and policies within sixty days of submission to Congress (the 60 days *from submission* technicality is enabling Congress to overturn many rules and policies that have long been in effect).⁷

Thus, the process of public commenting provides a vital opportunity for agencies and Congress to obtain important and relevant information from diverse audiences that will help them to understand whether and how a regulation fulfills its legislative purpose.

However, new technology has also created challenges to successful public participation in rulemaking.⁸ The shift from a predominantly paper-based to a digital process has made commenting easier but it has also inadvertently opened the floodgates to voluminous, duplicative and even "fake" comments – what I call notice-and-spam – thereby lessening the value of public participation.

As I predicted in an article in the *Emory Law Review* in 2004, shortly after the launch of regulations.gov: "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 long standing 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

⁵ Melinda N. Ritchie, "Back-Channel Representation: A Study of the Strategic Communication of Senators with the US Department of Labor," *The Journal of Politics* 80, no. 1 (2018): 240-253. See also Rachel Augustine Potter, "Member Comments: The Other (Less Visible) Way Congress Oversees Rulemaking," *The Brookings Institution*, November 21, 2019, <https://www.brookings.edu/research/member-comments-the-other-less-visible-way-congress-oversees-rulemaking/> and Nicole Kalaf-Hughes, Jason A. MacDonald, and Russell W. Mills, "Agency policy preferences, congressional letter-marking and the allocation of distributive policy benefits," *Journal of Public Policy* 36, no. 4 (2016): 547-571.

⁶ "Waters Opens Investigation," *U.S. House Committee on Financial Services*, January 15, 2020, <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406070#1>.

⁷ Dylan Scott, "The New Republican Plan to Deregulate America, Explained," *Vox*, April 25, 2018, <https://www.vox.com/policy-and-politics/2018/4/25/17275566/congressional-review-act-what-regulations-has-trump-cut>.

⁸ For comprehensive information about E-Rulemaking, see University of Pennsylvania Law School's E-Rulemaking.org program: <https://www.law.upenn.edu/institutes/ppr/enrulemaking/papers-reports.php>.

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.”⁹

Although much current attention is focused on the problem of fake comments and astroturfing, where an interest group hides its identity and manufactures the appearance that comments come from the “ordinary public,” the more salient and urgent concern for regulators and overseers, is not who signed the comment – if anyone – but the failure to invite and then to use high quality and diverse participation to inform the rulemaking process.

There is a remedy. In the almost two decades since participation moved online, data science tools and methods have evolved to deal with the problems of voluminous, duplicative and fake comments. Yet neither agencies nor the regulations.gov administrator are using them in a substantial way. The more agencies are deluged by voluminous, duplicative and fake “astroturf” comments, the more this race to the bottom reinforces a disturbing disregard for the potential value of public participation. We are failing to recognize the value of public commenting to enhance the quality of rules and, therefore, we have chosen not to solve the real problem at issue, which is not astroturfing, but taking the value of public commenting seriously. Failure to address the real challenge will only set us back further from the growing number of advanced nations that use new technology to tap the collective experience and expertise of their citizens.

I argue that the Committee should direct the agencies it oversees to use – and itself use – easily available tools to:

1) Mine and summarize relevant comments for information. As we shall explore, machine learning and natural language processing software, namely those subfields of artificial intelligence used for making sense of large quantities of text, have created unprecedented ways to manage information—to sort the informational wheat from the extraneous content chaff. These technologies could enable agencies to process and analyze public comments rapidly and effectively.

2) Adopt complementary mechanisms for public commenting in addition to notice and comment. The technologies of collective intelligence that enable people to

⁹ Beth Simone Noveck, “The electronic revolution in rulemaking,” *Emory LJ* 53 (2004): 433, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/emlj53§ion=20.

communicate and collaborate via the Internet, have led to new ways of soliciting information that are a substantial improvement on the traditional, open-ended submission process of notice-and-comment. Around the world, regulatory agencies and the legislative committees that oversee them are turning to “crowdlaw,” namely the use of the Internet to create a meaningful and deliberative two-way conversation with the public, yielding more relevant, timely and diverse information. I explain how we could—how we must—adopt these practices in the United States and reimagine how agencies engage with citizens and stakeholders.

For additional information on the platforms and processes described herein, please see “CrowdLaw for Congress: Strategies for 21st Century Lawmaking,” a report and short video training materials I authored, available at congress.crowd.law.



The GovLab's CrowdLaw for Congress website with cases and examples of how parliaments around the world are using technology to engage with citizens and stakeholders. Available online at congress.crowd.law

Non-Endorsement: *The technologies referenced in this document are discussed as examples of platforms supporting public participation practices in lawmaking in legislatures around the world. Their mention does not constitute an endorsement of the companies behind these technologies. I derive no financial benefit from these firms.*

Summary of Recommendations

In order to address the challenge of voluminous, duplicative and fake comments:

1. Agencies should use machine learning to *summarize voluminous comments*.
2. Agencies should use deduplication software to *remove identical comments*.
3. Agencies should use filtering software to *sift out the real and the relevant*.
4. Lawmakers and agencies *should use complementary crowdlaw platforms and processes* used by other governments and organizations to enable better citizen and stakeholder engagement.
5. Like Brazil and New Jersey, agencies and committees should use *Wiki Surveys* to reduce volume and duplication.
6. Agencies and committees should use *Collaborative Drafting and Annotation* as Germany did to engage more experts in review of rules.
7. Committees should set up UK-style *Evidence Checks* to crowdsource review of comments and evidence.
8. Committees should democratize oversight and pilot the use of *Citizen Juries* as they do in Belgium.

Why Improving Public Commenting is Urgent: Declining Trust in the Effectiveness and Legitimacy of Government

The need to improve how we make rules has never been more pressing. For democracy to thrive, it has to work. Yet there is widespread public perception that the government's capacity to tackle the problems of our age is declining. Cynicism is up and rates of trust are down.¹⁰ In particular, trust in Congress is at an all-time low. In a 2019 Gallup poll just 4 percent of Americans trusted Congress a great deal.¹¹ The executive branch does not

¹⁰ Morris Fiorina, "Parties, Participation, and Representation in America: Old Theories Face New Realities," *Annual Meeting of the American Political Science Association*, August 2000, <https://web.stanford.edu/~mfiorina/Fiorina%20Web%20Files/Fiorina%20SOD.pdf>.

¹¹ Megan Brennan, "Americans' Trust in Government to Handle Problems at New Low," *Gallup* 31 (2019), <https://news.gallup.com/poll/246371/americans-trust-government-handle-problems-new-low.aspx>.

fare much better. Across the board, only 17 percent of Americans today say they can trust the government in Washington to do what is right “just about always” (3 percent) or most of the time” (14 percent).¹² Globally, the 2020 Edelman Trust Barometer finds that 66 percent of people do not trust their country's leaders to address the country's challenges.¹³

In part, the decline in trust stems from a crisis of effectiveness. Voters typically see their government as a “chronically clumsy, ineffectual, bloated giant.”¹⁴ Both Republicans and Democrats hold this view.¹⁵ In *Why Government Fails So Often*, Yale Law professor Peter Schuck concludes that voters rate the government so poorly because it performs poorly. Similarly, political scientist Paul Light asserts that federal failures have become de rigueur. He writes: “the question is no longer if the government will fail every few months, but where. And the answer is ‘anywhere at all.’”¹⁶

There is also a related crisis of legitimacy. The public feels disenfranchised. One study concludes that “the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy.”¹⁷ This “implosion of trust” is compounded by a widening legitimacy gap – the sense that those who govern do not speak for us. Law professors Bryan Caplan and Ilya Somin (following in the tradition of Anthony Downs in his 1957 classic, *Economic Theory of Democracy*) see voting, that basic form of democratic participation, as irrational and irrelevant.¹⁸

With legislation and regulation often developed by a small group of elected or appointed officials working behind closed doors, often with the aid of lobbyists, it is no wonder that rates of trust are at historic lows.

¹² “Public Trust in Government: 1958-2019,” *Pew Research Center*, April 11, 2019, <https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/>.

¹³ “Edelman Trust Barometer 2020 Global Report,” *Edelman*, January 19, 2020, https://www.edelman.com/sites/g/files/aatuss191/files/2020-01/2020%20Edelman%20Trust%20Barometer%20Global%20Report_LIVE.pdf.

¹⁴ Peter H. Schuck, *Why government fails so often: And how it can do better* (Princeton University Press, 2014): 3.

¹⁵ John Bridgeland and Peter Orszag, “Can government play moneyball? How a new era of fiscal scarcity could make Washington work better?” *The Atlantic*, July/August, 2013, <https://www.theatlantic.com/magazine/archive/2013/07/can-government-play-moneyball/309389/>.

¹⁶ Paul C. Light, “A cascade of failures: Why government fails, and how to stop it.” *Center for Effective Public Management*. Washington, DC: Brookings Institution (2014), <https://www.brookings.edu/research/a-cascade-of-failures-why-government-fails-and-how-to-stop-it/>.

¹⁷ Martin Gilens and Benjamin I. Page, “Testing theories of American politics: Elites, interest groups, and average citizens,” *Perspectives on politics* 12, no. 3 (2014): 564-581.

¹⁸ Anthony Downs, *An Economic Theory of Democracy* (University of Chicago Press, 1957): 260-276; See also Guido Pincione and Fernando R. Tesón, *Rational choice and democratic deliberation: A theory of discourse failure* (Cambridge University Press, 2006).

That is one reason why the rulemaking process is so important. It provides an opportunity to implement Congress' broad-scale policy prescriptions and to involve the American public in doing so. It creates an opportunity to reverse the lack of engagement and improve rates of trust, as well as to strengthen later compliance by giving everyone equal chance to be part of the process. To overcome the twin crises of legitimacy and of effectiveness, it is increasingly urgent to create meaningful ways for people to participate.

The Purpose of Public Participation in Rulemaking

Section 553 of the 1946 Administrative Procedure Act enshrines the public's right to participate by codifying a longstanding practice of soliciting participation in rulemaking. Agencies must ensure that the right is real, not just theoretical, by giving the public ample opportunity to review and comment. Therefore, they must give notice of the rule and, under the 1993 Executive Order 12,866 (reiterated in 2011 in Exec. Order 13,563), keep the draft open for comment for no less than sixty days, after which agencies must respond to significant comments.¹⁹ The D.C. Circuit has held that "there must be an exchange of views, information, and criticism between interested persons and the agency," allowing for a deliberative and two-way conversation between the public and the agency.²⁰

Thousands of rules are enacted every year.²¹ They touch every aspect of our lives. The purpose of participation is to advance both the legitimacy and the quality of these rules. Participation allows agencies to obtain information that will enable them both to improve rules and to anticipate their likely impact. This input—bringing to bear the collective intelligence of a wider audience of stakeholders, interest groups, businesses, nonprofits, academics and interested individuals—infuses the process with information that comes from participants' professional and lived experience. Committees also need this information in order to provide effective oversight of the executive, one of their core legislative responsibilities. Research shows that committees do not access enough information from diverse enough sources.²² This impedes their capacity to conduct

¹⁹ *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015). Also Exec. Order 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

²⁰ *Home Box Off. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977).

²¹ Maeve P Carey, "Counting regulations: An overview of rulemaking, types of federal regulations, and pages in the federal register," *Congressional Research Service* (Updated September 3, 2019), <https://fas.org/sgp/crs/misc/R43056.pdf>.

²² Jonathan Lewallen et al., "Congressional Dysfunction: An Information Processing Perspective", *Regulation and Governance*, 10, no. 2 (2016): 179-190.

oversight. Access to more information from a greater diversity of perspectives will bolster committee oversight of the executive.

Participation is also designed to ensure legitimacy. People who get the chance to participate in a deliberative rulemaking process, especially one in which the agency responds to and addresses their concerns, will be more willing to comply with the rule. Participation also provides a public check on the rulemaking process, helping to ensure public oversight and scrutiny. It can also help to facilitate congressional oversight and judicial review by allowing for comments that, as Penn law professor Cary Coglianese writes: “assess whether agency decisions are in fact being made on the grounds asserted for them and not on other, potentially improper, grounds.”²³

The Challenges of Online Participation: High Quantity, Low Quality

While it represents an improvement on the paper-based processes of yesteryear, online participation in notice-and-comment rulemaking falls far short of the goal of effectively informing the regulatory process. The limitations can be grouped into three categories: 1) voluminous comments, 2) duplicative comments, and 3) fake comments. I examine each in turn.

Voluminous Comments

Although many of the 3-4,000 rulemakings agencies publish receive only a handful of comments, some receive voluminous responses, thanks to the ease of digital commenting. In 2017, when the Federal Communications Commission sought to repeal an earlier Obama-era rule requiring Internet Service Providers to observe Net Neutrality by transmitting content at the same speeds and not discriminating in favor of one content provider, the agency received 22 million comments in response.²⁴ According to the General Services Administration, which administers [regulations.gov](https://www.regulations.gov), the Social Security Administration’s proposed rule on disability reviews attracted 91,720 comments between November 2019 and January 2020. A Justice Department proposal to expand the collection of DNA samples from people put under arrest and from immigrant detainees garnered over 24,000 comments over a three week period in October 2019.²⁵ The Fish

²³ See Cary Coglianese, Heather Kilmartin, and Evan Mendelson, “Transparency and public participation in the federal rulemaking process: Recommendations for the new administration,” *Geo. Wash. L. Rev.* 77 (2008): 924, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292911.

²⁴ Restoring Internet Freedom (82 Fed. Reg. 25,568 (June 2, 2017) and (83 Fed. Reg. 7,852 (Feb. 22, 2018)).

²⁵ “Site data,” *Regulations.gov*, United States Government, <https://www.regulations.gov/siteData>.

and Wildlife Services received more than 640,000 e-mail comments on whether to list the polar bear as a threatened species in 2007.²⁶ When the National Parks Service proposed restricting snowmobile access, it received 360,000 comments. It is good, in principle, that the public comments on rules, but large volumes of both electronic and mailed-in comments make it hard for agencies to read and understand the material (and can present other problems that I examine in the next section).

Without the right tools and methods, the volume of comments makes it impossible for agencies to process comments, and renders public participation all but useless, frustrating the needs of regulators, overseers and the public.

Duplicative Comments

Moreover, comments are often both voluminous and duplicative. Interest groups have learned the tactic of getting people to submit identical or nearly identical comments -- so-called postcard comments -- by mail or electronically. One research study looked at 1,000 e-mails sent via the grassroots activism site MoveOn.org to the Environmental Protection Agency (EPA) in connection with its 2004 mercury rulemaking. The study concluded that "only a tiny portion of these public comments constitute potentially relevant new information for the EPA to consider. The vast majority of MoveOn comments are either exact duplicates of a two sentence form letter, or they are variants of a small number of broad claims about the inadequacy of the proposed rule."²⁷ The Pew Research Center found that only 6 percent of online comments in the 2017 Net Neutrality rulemaking used unique text. In fact, Pew found that the top five comments were each repeated over 800,000 times.²⁸

Interest groups of every political stripe encourage this kind of clicktivism, in which people click a button to submit duplicative postcard comments. Political science

²⁶ The U.S. Fishing and Wildlife Service, "News Release: Polar Bear Range States Meet to Exchange Information." <https://www.fws.gov/news/ShowNews.cfm?newsId=64E14600-FE16-C275-509DA6F8C494B903>.

²⁷ Stuart W Shulman, "The case against mass emails: Perverse incentives and low quality public participation in US federal rulemaking," *Policy & Internet* 1, no. 1 (2009): 23-53, https://onlinelibrary.wiley.com/doi/abs/10.2202/1944-2866.1010?casa_token=kL6DVaO-CyQAAAAA:syPJG_lztTwFmGqweF9fWfs9fnXZU8ZpZAbMA62KJUzkuxPymuodcPHOivbUkrDhKJ1F8Kx6xTO7LY.

²⁸ Jack Karsten and Darrell West, "Net Neutrality Debate Exposes Weaknesses of Public Comment System," *The Brookings Institution TechTank*, January 18 2018, <https://www.brookings.edu/blog/techtank/2018/01/18/net-neutrality-debate-exposes-weaknesses-of-public-comment-system/>.

professor Eitan Hirsch calls this process “political hobbyism;”²⁹ Digital technology is making it easier for some groups to engage in notice-and-spam clicktivism, to sign electronic petitions, to forward political messages on Facebook or to shout into the wind on Twitter.

In the main, these groups are not seeking to enhance the level of knowledge in the rulemaking. They do not place much stock in the ability of their members and would-be members to contribute substantively to the discussion. Even though the public commenting process is meant to air new ideas and identify novel issues, interest groups use it simply as an opportunity to recruit new members and solicit personal information for subsequent donation solicitations. Interest groups use the forum to signal popular approval or disapproval. These campaigns are intended to sway the outcome, and agencies should never base their decisions on the number of campaigners asserting for or against, but on the substance of the comments.³⁰

With large numbers of duplicative comments, and without the right tools, agencies are not obtaining all ideas worth hearing because they cannot extract information of value. Moreover, the identical comments, even if genuine, do not add meaningfully to the discussion or even convey the sense that the individual feels strongly about the point of view. This further undermines respect for and belief in the value of public commenting.

Without the ability to visualize and understand the comments as a whole -- to see how many are identical and what the unique content is across the dataset of comments -- it also becomes too easy for regulators and others to cherry-pick those comments that support their point of view and claim that it reflects the public’s submissions.

Fake Comments

Finally, there is the problem of astroturfing and fake comments. A 2017 Wall Street Journal investigation found that 41 percent of comments they investigated on several federal agency websites were from “fake people.” Comments had been signed by people

²⁹ Eitan D. Hersh, “The Problem With Participatory Democracy Is the Participants,” *The New York Times*, June 29, 2017, <https://www.nytimes.com/2017/06/29/opinion/sunday/the-problem-with-participatory-democracy-is-the-participants.html>.

³⁰ Stuart W. Shulman, “The case against mass e-mails: Perverse incentives and low quality public participation in US federal rulemaking,” *Policy & Internet* 1, no. 1 (2009): 23-53, https://onlinelibrary.wiley.com/doi/abs/10.2202/1944-2866.1010?casa_token=kL6DVaO-CyQAAAAA:syPJG_LziTwFmGqweF9fWfs9fnXZU8ZpZAbMA62KJUzkuxPymuodcPHOivbUkrDhKJ1F8Kx6xTO7LY.

who either did not exist or had died, or whose names were used without their knowledge.³¹ Nearly eight million of the FCC Net Neutrality comments came from email addresses associated with fakemailgenerator.com.³² The ability to comment online has made it easy to submit fabricated comments that skew the informational inputs and further emasculate the public commenting process.³³

Software is making it easier to auto-generate, duplicate and submit such comments. While some agencies have required fields for “name” and “address” in their rulemakings, any string of characters typed in the box is sufficient.³⁴ Although anonymous commenting is legal, interested parties are still choosing to falsify names, perhaps in an effort to lend more weight to comments and knowing that agencies lack the tools and the ability to investigate and prosecute perpetrators of identity fraud.

For example, the Department of Housing and Urban Development (HUD) reported to the Senate Subcommittee that:

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.³⁵

³¹ James V. Grimaldi and Paul Overberg, “Millions of People Post Comments on Federal Regulations. Many Are Fake.” *Wall Street Journal*, Updated December 12, 2017, <https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188>.

³² 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).

³³ Jack Karsten and Darrell M. West, “Net Neutrality Debate Exposes Weaknesses of Public Comment System,” *The Brookings Institution*, January 18, 2018, <https://www.brookings.edu/blog/techtank/2018/01/18/net-neutrality-debate-exposes-weaknesses-of-public-comment-system/>.

³⁴ United States Senate Permanent Subcommittee on Investigations. “Abuses of the Federal Notice-and-Comment Rulemaking Process.” *U.S. Senate Committee on Homeland Security & Governmental Affairs* (October 24, 2019): 16. [https://www.hsgac.senate.gov/imo/media/doc/2019-10-24 PSI Staff Report - Abuses of the Federal Notice-and-Comment Rulemaking Process.pdf?mod=article_inline](https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf?mod=article_inline).

³⁵ United States Senate Permanent Subcommittee on Investigations. “Abuses of the Federal Notice-and-Comment Rulemaking Process.” *U.S. Senate Committee on Homeland Security & Governmental Affairs* (October 24, 2019): p. 17 citing 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).

As the Chairwoman of this Committee, the Honorable Representative Maxine Waters, has written: such fraudulent comments “undermine legitimate debate on proposed rules by creating the false appearance that a position has widespread, grassroots support. Such misrepresentations have been increasing in frequency and complexity in recent years.”³⁶

Tackling the Problems: Use Data Analytical Tools to Make Sense of Comments

Companies, governments and researchers are keen to make sense of the increasing volume of information people post online. The good news is that the tools and methods already exist to be able to address the problem of voluminous, duplicative and fake comments, while preserving the right to comment anonymously.

Society is awash in information. IBM is fond of saying that 90 percent of the world’s data has been created in the last two years alone. There are countless projects—both academic and commercial—to help us make sense of such overload. Whether there are too many comments, too many of the same comments, or fake comments, agencies need to extract meaning to understand the substance of what is submitted. The good news is that “there’s an app for that,” as the saying goes. The Center for Democracy and Technology writes: “Automated content filtering is not new. Many tools have been developed over the years to identify and filter content, including keyword filters, spam detection tools, and hash matching algorithms.”³⁷

Thankfully, with the proliferation of big data, technologists have evolved the means to make sense of large quantities of information, much of it far more complex than the text-based comments submitted to regulations.gov. To address the challenges discussed above, agencies need three kinds of tools.

First, they need help to make sense of large quantities of relevant comments. A large volume of messages can be hard to parse in a short time frame, especially when they are thoughtful, helpful and on topic. I examine each of these tools in turn.

Second, they need to be able to de-duplicate identical comments.

³⁶ “Waters Opens Investigation,” *U.S. House Committee on Financial Services*, January 15, 2020, <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406070#1>.

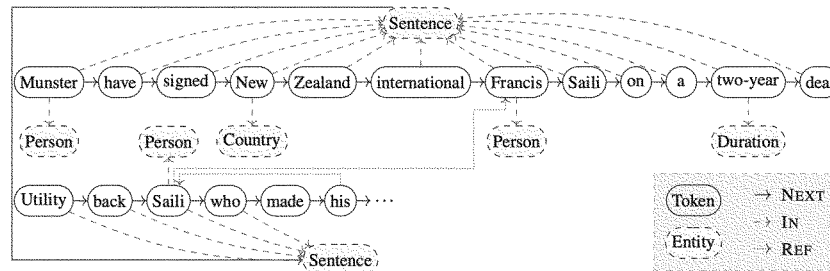
³⁷ Natasha Duarte, Emma Llanso, and Anna Loup, “Mixed Messages? The Limits of Automated Social Media Content Analysis,” In *FAT*, p. 106. 2018, <https://cdt.org/wp-content/uploads/2017/11/2017-11-13-Mixed-Messages-Paper.pdf>.

Third, they need to separate the real from the fake and, as we shall discuss, separate out relevant from irrelevant comments.

Solution 1: Use Machine Learning to Summarize Voluminous Comments

While still a challenging task, researchers have developed tools for extracting meaning and summarizing text. The processes often combine automation with human, collective intelligence to make quick work of large data stores. Journalists took advantage of such tools, for example, when they needed to rapidly sift through the 13.4 million documents that comprised the Paradise Papers.³⁸ In short, researchers have cracked problems far more challenging than making sense of rulemaking data. So far rulemakers, legislators and agencies have paid little attention to them.

That should change, especially since both **Google** and **Microsoft** announced in 2019 that they had built systems that could summarize articles spanning news, science, stories, instructions, emails, patents, and even now legislative bills.^{39 40}



A graphic explaining how Microsoft's AI breaks down a sentence and interprets its various parts in order to develop a summary. Source: see Patrick Fernandes et al, "Structured Neural Summarization," <https://arxiv.org/pdf/1811.01824.pdf>

³⁸ Fabiola Torres López, "How They Did It: Methods and Tools Used to Investigate the Paradise Papers," Global Investigative Journalism Network (Dec. 4, 2017).

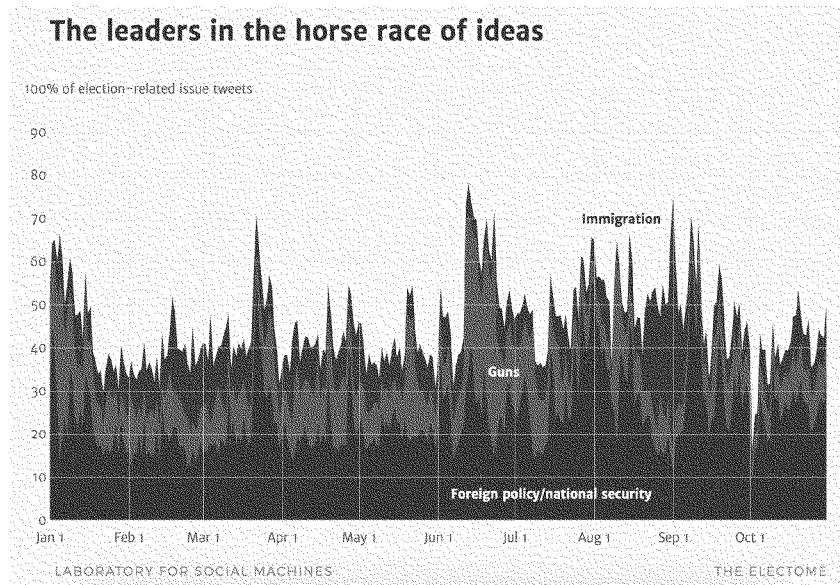
³⁹ Patrick Fernandes, Miltiadis Allamanis, Marc Brockschmidt, "Structured Neural Summarization", International Conference on Learning Representations (ICLR 2019), February 2019, <https://arxiv.org/pdf/1811.01824.pdf>

⁴⁰ Google AI Blog, "Text Summarization using TensorFlow", August 2016, <https://ai.googleblog.com/2016/08/text-summarization-with-tensorflow.html>.

Indian news aggregation app **InShorts** recently debuted its AI-based news summarization feature. The app creates 60-word summaries of full-length news articles using natural language processing techniques.⁴¹

Similar techniques have become commonplace for images. Both Android and iOS operating systems use machine learning to “summarize photos” -- that is to identify objects present in a photograph. This enables people to search for photos that contain dogs or cars, for example.

Professor Deb Roy directs the “Social Machines” Lab at MIT, which does research on large-scale Twitter data sets. Its **Electome** project extracts meaning from the entire corpus of Twitter data—billions of tweets—in order to summarize the core political messages of the day and help drive election coverage.⁴²



An example of a data visualization created by the MIT Electome project: This graphic shows foreign policy and national security issues were the dominant topics on Twitter between January and November 2016.

⁴¹ Economic Times Tech, “Inshorts debuts AI-based news summarization on its app”, June 2018, <https://tech.economictimes.indiatimes.com/news/startups/inshorts-debuts-ai-based-news-summarization-on-its-app/64531038>.

⁴² The Electome, <http://www.electome.org/>.

Public institutions are also using data analytical techniques to make sense of social media data for public good. To help UNICEF and other actors craft more effective pro-immunization messaging programs, researchers set out to monitor social media networks, including blogging platforms, forums, Facebook, Twitter, Tumblr, and YouTube. They sought to analyze prevalent conversation themes according to volume, types of engagement, and demographic; to identify influencers across languages and platforms; and to develop specific recommendations for improving messaging strategies across languages, platforms and conversation themes. The research methodology involved scraping text conversations from social media platforms in English, Russian, Polish and Romanian, in order to be able to identify key patterns.⁴³

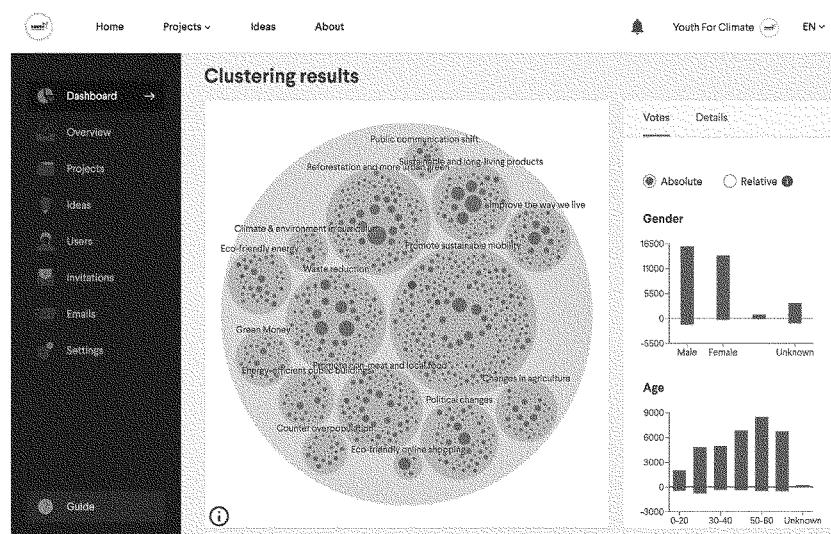
In 2019, in order to make inputs more usable for civil servants, **CitizenLab**, a Belgian software company that designs software for citizen engagement in use in twenty countries, incorporated natural language processing (NLP) and machine learning to categorize and cluster the text submitted by citizens. As Wietse van Ransbeeck, the CEO, writes: “Analyzing the high volumes of citizen input collected on these platforms is extremely time-consuming and requires skills that administrations often do not have, which prevents governments from uncovering valuable learnings. Setting up a digital participation platform is therefore not enough: it is also necessary to make data analysis more accessible so that civil servants can tap into collective intelligence and make better-informed decisions.”

CitizenLab’s algorithms identify the main topics and group similar ideas together using an approach known as topic modeling. It works by grouping content that shares similar words, both in meaning and in form, i.e. the words “trees” and “forest” are similar in meaning, therefore two ideas with these words are more likely to be grouped together. With regard to word form, for example, “bicycle” and “cyclist” are also considered similar.

Such clustering, according to van Ransbeeck, happens in real-time and takes between 5-15 seconds. This makes it easier for those running the consultation to see what the comments are about and understand priorities. If organizers require people to login then the comments can also be sorted by demographic groups and location, making it possible to cluster topics, for example, by location as well. For example, an engagement on youth

⁴³ Stefaan G. Verhulst and Andrew Young, “The Potential of Social Media Intelligence to Improve People’s Lives,” *The GovLab*, Online: <http://www.thegovlab.org/static/files/publications/social-media-data> (2017).

climate action in 2019 elicited 1700 contributions, which CitizenLab grouped into 15 concrete proposals. This helps decision makers to make sense of the content gathered through citizen participation and better understand the priorities and ideas of the public.



A screenshot of summarized and clustered public comments from a CitizenLab project on climate change policy

In addition, **Remesh** is an American engagement platform that also uses artificial intelligence to enable clustering of topics but for a real-time conversation, rather than asynchronous submissions. Remesh specializes in real-time online discussions with large numbers of participants, usually a thousand or more.

A recent **State Department project** offers a simple illustration for how agencies could take a more effective approach to making sense of rulemaking comments using a combination of artificial intelligence (AI) from machines and collective intelligence (CI) from humans. In 2016, the State Department sought to improve its passport application and renewal process in anticipation of an increase in the number of passport application and renewal forms. After consulting with the General Services Administration (GSA) and USA.gov, it ran an online public engagement process to ask people what improvements they wanted. It received almost 1,000 comments. In order to make rapid sense of those submissions, it engaged **Insights.us**, an Israeli American third-party software company

that helped the agency use two methods to whittle down answers to their most essential parts.

First, commenters were asked to highlight the 200 most important characters containing the key points of their answers. For users who declined to do so, the platform encouraged other users to highlight what they felt to be the other users' core ideas. Then the company applied a text-mining algorithm that scanned the highlighted text for responses containing similar keywords in order to create summaries, or what the company calls "highlights." The public was invited to proof and make suggestions for how to improve those highlights, adding accountability but in a way that is efficient.

The combination of human and machine intelligence made it faster and easier to summarize content than using an algorithm alone. Finally, the Insights.US team grouped the AI and CI summaries into nine insights. Inevitably, most individuals wanted a "much easier and more convenient" online process. Others wanted the Department to use simpler language on forms and web pages, make physical passport application facilities easier to access, and provide on-demand user support through an online web chat or other system. Indeed, research has also identified increased accessibility as a key way to improve participatory rulemaking.⁴⁴ After the Department of State reviewed these insights, it made them available on the tell-us.usa.gov site. Although the cost of this engagement is not public, Insights.us says services for cities and government agencies generally cost between USD 18,000 and USD 36,000.

Solution 2: Use Deduplication Software to Address Identical Comments

The large volume of submissions often results from duplicative "postcard" comments. Data mining technology to deduplicate public comments has existed for well over a decade. Deduplicating records in a database is a common process. **Dedupe.io** is an example of a software service which helps researchers and data scientists to identify and delete similar records in their database. Once similar entries are identified, duplicate records can be deleted if they are an exact match or consolidate similar entries.⁴⁵ Jeff Jonas, a world renowned data scientist, has spent his career developing tools like **Senzing**, an "entity resolution system" -- software that detects duplicates in large scale databases like voter registration systems. His work for the Electronic Registration Information Center has made it possible to identify 26 million people who are eligible but

⁴⁴ Cary Coglianese, "Enhancing Public Access to Online Rulemaking Information", *Michigan Journal of Environment & Administrative Law* 2 (2012): 1.

⁴⁵ "Dedupe - how it works." *Dedupe.io*, <https://dedupe.io/documentation/how-it-works.html>.

unregistered to vote, as well as 10 million registered voters who have moved, appear on more than one list or have died.⁴⁶

	A	C	D	E	F
1	cluster_id	site_name	address	zip	phone
2	00448ef8-0700-4af0-aac4-799b092eddb6	Ada S. McKinley Community Services	725 S Wells Street	60607	3852000
3	005473f8-81b5-4ee6-bc90-216576cc14d	Armstrong	2110 W. Greenleaf	60645	5342150
4	005473f8-81b5-4ee6-bc90-216576cc14d	Armstrong , G.	2110 W. Greenleaf		5342150
5	0130db28-e581-4bbf-9821-ade35c19ac0c	Chicago Public Schools Mason, Roswell B.	4216 W. 19th St	60623	5341530
6	0130db28-e581-4bbf-9821-ade35c19ac0c	Mason	4216 W. 19th St	60623	5341530
7	0130db28-e581-4bbf-9821-ade35c19ac0c	CHICAGO PUBLIC SCHOOLS MASON, ROSWELL B.	4216 W 19TH ST	60623	5341530
8	0142bae7-785c-40c1-8c8f-820c1960d0d3	Tarkington	3330 W. 71st St.		5354700
9	0160962a-02d5-4a9f-a72e-72db596190f9	HENRY BOOTH HOUSE ALLISON'S INFANT TODDLER	5522 S RACINE	60636	4363193
10	0160962a-02d5-4a9f-a72e-72db596190f9	Henry Booth House - Allison's Infant Toddler	5522 S Racine Ave		4363193
11	0160962a-02d5-4a9f-a72e-72db596190f9	Henry Booth House Allison's Infant Toddler	5522 S Racine	60636	4363193
12	0160962a-02d5-4a9f-a72e-72db596190f9	Allison's Infant and Toddler Center	5522 S. Racine		4363193
13	01da0507-f652-4d30-a450-a3802399b9c9	Ashburn School	8300 S. St. Louis	60652	5357860
14	01da0507-f652-4d30-a450-a3802399b9c9	Ashburn School	8300 S. St. Louis Ave.		5357860
15	01e0fd0c-a559-4e2a-a587-829e2c6d8a55	ERIE NEIGHBORHOOD HOUSE FCCH-TANIA PEREZ	4502 N CHRISTIANA AVE	60625	5041813
16	024a0af2-03f4-4c71-88a7-d734e902531	Bass	1140 W. 66th St.		5353275
17	024a0af2-03f4-4c71-88a7-d734e902531	Bass	1140 W. 66th St.	60621	5353275
18	0285ac65-6b06-4819-a247-223fd16caf54	Catholic Charities-St Mark	1041 N. Campbell	60622	7726606
19	0285ac65-6b06-4819-a247-223fd16caf54	Catholic Charities Chicago - St. Mark	1041 N Campbell Avenue	60622	7726606
20	02ceb7fb-4237-4090-82a2-55ba1a2cc5bb	Easter Seals Gilchrist Marchman	1001 West Roosevelt Rd.	60608	4927402
21	02ceb7fb-4237-4090-82a2-55ba1a2cc5bb	Easter Seals Society of Metropolitan Chicago - Gilchrist-Marchman	1001 W Roosevelt Rd		9395115
22	02ceb7fb-4237-4090-82a2-55ba1a2cc5bb	Easter Seals Society of Metropolitan Chicago - Gilchrist-Marchman	1001 W Roosevelt Rd		9395115

Results downloaded from Dedupe: After analyzing the database, the tool adds a "cluster_id" to each entry and assigns a single cluster id to entries which are similar or are duplicates.

While Dedupe and Senzing are designed to remove duplicates of names and addresses from databases, American technology firm **Texifer** was designed specifically to work on the problem of regulatory rulemaking comments. The company was a spinout from the research of Dr. Stuart Shulman, who has written many seminal articles about administrative rulemaking. In 2007, he created a text mining tool called DiscoverText through research funded by the National Science Foundation.

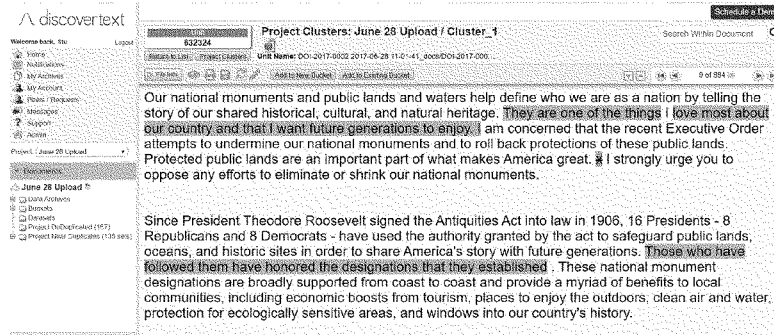
DiscoverText helps agencies and rulemaking researchers to quickly deduplicate comments.⁴⁷ For example, Shulman deduplicated the public comment dataset from a 2013 school nutrition rulemaking in order to be able to quickly reveal the substance of the comments and analyze them.⁴⁸ Shulman deduplicated the polar bear rulemaking in 2007 (660,000 comments) and the national monuments rulemaking in 2017 (3.3 million comments). According to the DiscoverText website, the company has worked with the Department of Homeland Security, Department of the Treasury, Federal Communications

⁴⁶ Lohr, Steve Lohr, "Another Use for AI: Finding Millions of Unregistered Voters," *The New York Times*, November 5 2018, <https://www.nytimes.com/2018/11/05/technology/unregistered-voter-rolls.html>.

⁴⁷ Stuart Shulman, "Scholarly Citations of the Coding Analysis Toolkit," *DiscoverText*, March 31, 2018, <https://discovertext.com/2018/03/31/scholarly-citations-of-the-coding-analysis-toolkit/>.

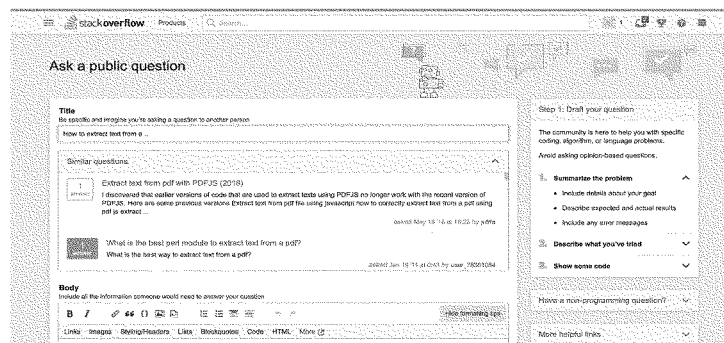
⁴⁸ Lauren M. Dinour and Antoinette Pole, "Potato chips, cookies, and candy oh my! Public commentary on proposed rules regulating competitive foods," *Health Education & Behavior* 44, no. 6 (2017): 867-875, <https://journals.sagepub.com/doi/abs/10.1177/1090198117699509>.

Commission, National Labor Relations Board, Naval Postgraduate School, National Oceanic and Atmospheric Administration, Office of the Comptroller of the Currency, U.S. Department of Agriculture, U.S. Fish & Wildlife Service, U.S. Small Business Administration and U.S. Department of the Interior.



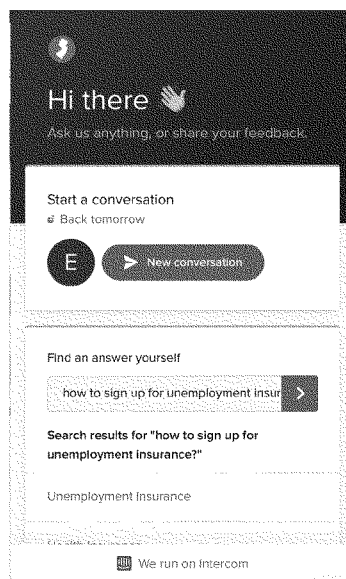
Interface of Discovertext with unique text in a paragraph highlighted

Another way to avoid some of the problems of duplicates is to process a user's submission and alert her if a similar entry already exists since the goal of rulemaking is not to hear every person but to hear every idea. This process happens now with **chatbots** or question-and-answer platforms like Stack Overflow, a popular site for hobbyists and technologists, where people ask and get answers to questions like "how often to water my begonias."



Screenshot of the question form on Stack Overflow (A Q&A platform for computer engineers): When a user attempts to ask a question, the tool automatically proposes similar questions which have previously been asked and answered.

Many websites, including government sites, use chatbots to respond to customer service queries. After typing in a question, the software shows the user similar questions that have already been posted (and answered). Smartphones and email clients like Google use a similar technique for the “auto-complete” feature that analyzes a user’s input in real time. For example, the State of **New Jersey’s Career Network** website (<https://njcareers.org/>), which provides automated coaching for job seekers, has such a chatbot. Once a question is asked, the software remembers it along with the answer so it can easily provide such information next time.



Screenshot of the chatbot on njcareer.org which provides users with the links to relevant answers based on the question it is asked.

Solution 3: Use Filtering Software to Sift Out the Real and the Relevant

A third challenge -- related to deduplication -- is to separate topical from irrelevant comments, whether they are posted maliciously or not. In other words, some comments are fake and posted by bots and others may be posted by humans but are irrelevant. These twin challenges have different solutions

Many people have already called for the use of captcha technology designed to filter humans from bots. **Captcha** is an example of a “Turing Test” - a technique developed by Alan Turing to tell humans and robots apart - and stands for “Completely Automated Public Turing Test to tell Computers and Humans Apart.” With captcha, users are presented an image of a set of visually distorted letters and numbers and asked to enter the same characters into a textbox. When captcha was invented nearly two decades ago, it was believed that machines would not be able to complete this task since only humans would be able to interpret what the distorted characters were. With advances in computing power this is no longer true and techniques to defeat captcha have been created but captcha has also been reinvented to protect against these attacks. In its latest form, called **reCaptcha** (a free service, owned by Google), “bot activity” is identified using artificial intelligence.⁴⁹ “NoCaptcha ReCaptcha” simplified the user experience of Captcha by simply requiring users to click a box which says “I am not a Robot.”⁵⁰ By analyzing several parameters on a website including mouse movements and button clicks, the service can differentiate between humans and robots. In 2018, Google announced “**reCaptcha v. 3**” which eliminated the need for any human interaction with Captcha at all. By using risk analysis algorithms that assign a “risk score” to every person browsing a website using the tool, the software alerts administrators if fraudulent activity is detected.⁵¹

But, in addition to sorting out the real from the fake, there is still a need to make it easier for federal agencies to sort the relevant from the irrelevant as part of the process of making sense of large quantities of content. Again, content-based filtering techniques that combine human intelligence and machine learning can help to sort irrelevant or off-topic comments. Such techniques are used, for example, with spam detection. Software analyzes content to determine whether it meets certain “rules.” The simplest of these methods measures the occurrence of certain words and phrases – telltale signs of spam. More complex techniques involve identifying common patterns in submissions. Many blogging platforms such as Wordpress use such techniques to filter abusive/spam/advertorial comments in the comments section.

Creating the data to train an algorithm for the relevant subject matter domain has become faster and cheaper using crowdsourced human labor. As the Center for Technology and

⁴⁹ Matt Burgess, “Captcha is dying. This is how it’s being reinvented,” *Wired Magazine* (Oct 2017), <https://www.wired.co.uk/article/captcha-automation-broken-history-fix>.

⁵⁰ Vinay Shet, “Are you a robot? Introducing “No CAPTCHA reCAPTCHA,” Google Security Blog (December 3, 2014), <https://security.googleblog.com/2014/12/are-you-robot-introducing-no-captcha.html>.

⁵¹ “reCAPTCHA: Easy on Humans, Hard on Bots” <https://www.google.com/recaptcha/intro/v3.html>.

Democracy explains, training algorithms that teach a computer to classify content are sometimes developed “using crowdsourcing services such as CrowdFlower or Amazon Mechanical Turk. Researchers or developers typically provide definitions for the targeted content (e.g. hate speech, spam, “toxic” comments) or other instructions for annotating the text. While there are significant ethical challenges with these particular crowdwork platforms, which are notorious for underpayment of workers, the point to take away is that the combination of machine algorithm and manually coded training data to teach that algorithm is a potential avenue for sorting comments and extracting meaning from them to make them easier for regulators to read.⁵²

Informing Rulemaking and Oversight with CrowdLaw

This testimony has examined how agencies can improve the outputs of the e-rulemaking process in order to enhance the quality of information received during the public comment period, pointing out the widespread availability of data analytical tools for making sense of comments. These solutions demonstrate that, with the right data mining tools, astroturfing need not be an impediment to effective and meaningful participation.

However, the need to improve the quality and diversity of participation remains urgent and unresolved. People are hungry for meaningful opportunities to participate. Half of respondents surveyed by Pew said they had participated in a civic activity in the past year.⁵³ But more want to do so and about three-quarters of those surveyed by the Public Agenda in 2019 said they would participate under two circumstances that are currently not present in notice-and-comment rulemaking: namely, if they knew that participation was relevant and if they could contribute their skills and experiences.⁵⁴

Not only do people want to get involved in the life of their democracy, their involvement will benefit our institutions by bringing more diverse voices into the process. There is a need, as we have seen with the Community Reinvestment Act rulemaking, to create an opportunity for more people with lived experience of the statute to participate. As noted earlier, last week’s hearing underscored how bank closures disproportionately affect low

⁵² Natasha Duarte, Emma Llanos, and Anna Loup, “Mixed Messages? The Limits of Automated Social Media Content Analysis,” In *FAT*, p. 106, 2018, <https://cdt.org/wp-content/uploads/2017/11/2017-11-13-Mixed-Messages-Paper.pdf>.

⁵³ Aaron Smith, “Part 1: Online and offline civic engagement in America.” *Pew Research Center*, April 25, 2013, <https://www.pewresearch.org/internet/2013/04/25/part-1-online-and-offline-civic-engagement-in-america/>.

⁵⁴ “Strengthening Democracy: What do Americans Think?” *Public Agenda and the Kettering Foundation*, 2019, https://www.publicagenda.org/wp-content/uploads/2019/08/Strengthening_Democracy_WhatDoAmericansThinkFINAL.pdf.

income communities. Lawmakers have urged the OCC to establish a notice and comment period that allows for a larger and more diverse group of stakeholders to comment on the proposal.

Yet rulemaking -- as civic participation generally -- does not attract diverse perspectives. Cornell law professor Cynthia Fiorina explains that regulated entities tend to be more represented in rulemakings than regulatory beneficiaries. Studies by a variety of academics find that business groups dominate the commenting process.⁵⁵ While there is still limited empirical research on electronic rulemaking, it appears that individuals all too rarely submit substantive comments -- in the same way that freedom of information requests come far less often from investigative reporters or civic groups than from businesses.⁵⁶ Surveys undertaken by Pew in both 2008 and 2012 found that civic engagement is overwhelmingly the province of the wealthy, white and educated.⁵⁷

The notice-and-commenting process is not attracting the balanced and deliberative discussion that it was intended to attract. The design of the current notice-and-comment process exacerbates armchair activism and amplifies some voices at the expense of others with relevant expertise and experience to share. Structural challenges compound the issue: the public is given the opportunity to participate only very late in the process; people are provided with limited information other than the draft rule or notice of proposed rulemaking; and agency officials are prohibited from responding to public comments during the process in order to foster more deliberation and elicit more information.⁵⁸

⁵⁵ Jason Webb Yackee and Susan Webb Yackee, "A bias towards business? Assessing interest group influence on the US bureaucracy," *The Journal of Politics* 68, no. 1 (2006): 128-139.

⁵⁶ David E Pozen, "Freedom of information beyond the Freedom of Information Act," *U. Pa. L. Rev.* 165 (2016): 1097, https://scholarship.law.columbia.edu/faculty_scholarship/2022.

⁵⁷ Aaron Smith, "Part 1: Online and offline civic engagement in America." *Pew Research Center*, April 25, 2013, <https://www.pewresearch.org/internet/2013/04/25/part-1-online-and-offline-civic-engagement-in-america/> ("a key finding of our 2008 research was that Americans with high levels of income and educational attainment are much more likely than the less educated and less well-off to take part in groups or events organized around advancing political or social issues. That tendency is as true today as it was four years ago, as this type of political involvement remains heavily associated with both household income and educational attainment.").

⁵⁸ Cary Coglianese, Heather Kilmartin, and Evan Mendelson, "Transparency and public participation in the federal rulemaking process: Recommendations for the new administration," *Geo. Wash. L. Rev.* 77 (2008): 924, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292911.

Solution 4: Use crowdlaw platforms to increase diversity and quality of commenting

Thus, in addition to improving the commenting process ex post using machine learning tools, lawmakers should use alternative and complementary platforms and processes -- ones used by other governments and organizations -- in order to eliminate the challenge of voluminous, duplicative and fake comments from the outset. I examine these below.

Crowdlaw describes the use of the Internet to enable citizens to volunteer, or be selected to participate, in law and policymaking. In many different jurisdictions around the world, people are collectively taking part in every stage of lawmaking. They identify problems or solutions, they draft proposals, and they debate, vote on, implement or evaluate policies, regulations and laws. Innovative technologies, including collective intelligence, artificial intelligence and machine learning, are enabling these new forms of democratic experimentation. Parliaments and city councils have sought to reverse the decline in democratic trust by adopting more of these online participatory practices. To give just one example, Taiwan has enacted 26 statutes informed by online and offline deliberation by 250,000 people through a process known as vTaiwan.⁵⁹

Innovative crowdlaw approaches should be undertaken by American regulatory agencies and the committees that oversee them to improve the quality of public comments. The innovative practices described below are explained in detail on congress.crowd.law, a website designed to educate public officials about crowdlaw processes and platforms.

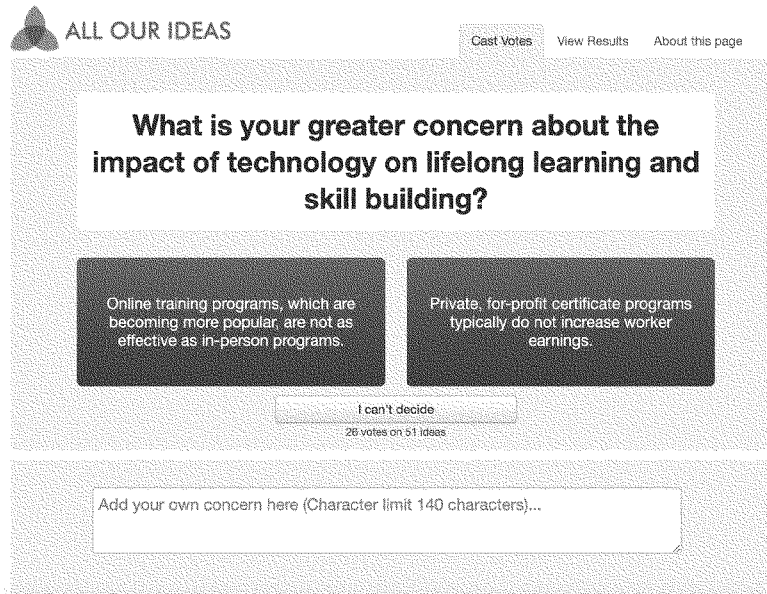
⁵⁹ Audrey Tang, "A Strong Democracy is a Digital Democracy," *The New York Times*, October 15, 2019, <https://www.nytimes.com/2019/10/15/opinion/taiwan-digital-democracy.html>.

Solution 5: Like Brazil and New Jersey, Use Wiki Surveys to Reduce Volume and Duplication



Landing page for the New Jersey Future of Work Task Force public consultation using All Our Ideas

Later this month, the State of New Jersey’s Future of Work Task Force will start multiple online public engagement exercises using a wiki survey tool called **All Our Ideas** in order to engage workers in defining the challenges associated with the impact of technology on the future of worker rights, health and learning. All Our Ideas is a free, open source tool developed by Princeton professor Matt Salganik, who explains that All Our Ideas combines “the scale, speed, and quantification of a survey while still allowing new information to ‘bubble up’ from respondents.” A wiki survey presents respondents with a question and then a random series of two answer choices. People select the response they prefer (or “I can’t decide” as a third answer) or they may submit their own response. As people are repeatedly selecting between two randomly generated options, it is a faster and easier mechanism for responding to a series of questions. People can answer as many or as few questions as they choose and, with enough people participating, the resulting list is a rank ordered list of the answer choices. Because people respond to questions and can add their own responses, it is known as a **Wiki Survey**.



ALL OUR IDEAS

Cast Votes View Results About this page

What is your greater concern about the impact of technology on lifelong learning and skill building?

Online training programs, which are becoming more popular, are not as effective as in-person programs.

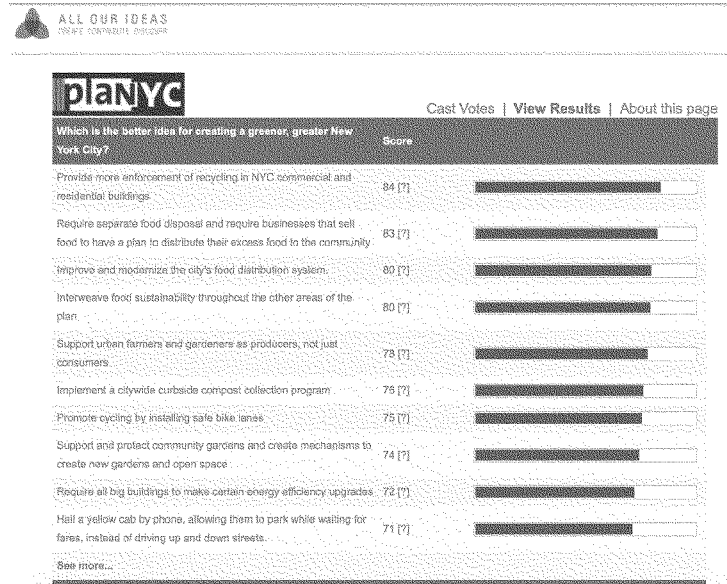
Private, for-profit certificate programs typically do not increase worker earnings.

I can't decide
26 votes on 51 ideas

Add your own concern here (Character limit 140 characters)...

The user interface for voting in the AllOurIdeas tool. Users can pick between the two options or add their own in the text box.

The All Our Ideas system automatically tabulates and visualizes the results and can also select “View Results” to see how other participants are responding.



The All Our Ideas tool results page in New York City (2010): The results are updated in real time to show a rank ordered list. All option choices are assigned an equal score (50) when voting begins. This score changes based on the users' votes.

Although participants select between two options (or add an idea), New Jersey is not seeking a referendum on the future of work policy. People are not voting in the conventional sense. Rather, the Task Force is using the tool to create a more manageable and structured commenting process.

The Task Force has pre-populated the wiki survey tool with dozens of issues that are already known to it, enabling people to select one of them, thereby reducing proliferation of duplicative comments. In addition, people can also submit new ideas, which, if different, are then added to the roster of options; this function enables the public to contribute new information to the policymaking process. For example, when the NYC Mayor's office used All Our Ideas to collect feedback on the City's sustainability plan in 2007, eight of the top ten ideas selected for the plan were respondent contributions. For

instance, the top-rated idea, “Keep NYC’s drinking water clean by banning fracking in NYC’s watershed,” was submitted by a participant.⁶⁰

Similarly, in 2011 in the State of Rio Grande Do Sul in Brazil, then-Governor Tarso Genro used All Our Ideas to create the “Governor Asks” program, by some measures the largest citizen consultation in the country’s history. In its first iteration, the Governor’s Office collected more than 1,300 new proposals and 122,000 votes on public health care policy within a period of 30 days. In 2012, Rio Grande do Sul collected more than 2,000 submissions and then used the tool to help identify 10 priorities in promoting traffic safety. In order to encourage participation, the government partnered with civil society organizations and sent two “voting vans” equipped with tablets to collect votes across the state. This broadened access to those without access to the internet at home. This innovative technique helped ensure that a broad and diverse group of people, representing the opinions of ordinary citizens across the country, was able to participate.

The wiki survey method of showing people two ideas and having them choose between them or submit a new idea has several practical benefits. It makes it harder to manipulate or game results as one can with open-ended commenting of the kind found on regulations.gov. Respondents cannot manipulate which answer choices they will see. Second, because respondents must select one of two discrete answer choices from each pair (or add their own), this reduces the impulse to add new ideas unless there is something new to be said. New submissions can also be reviewed prior to posting to reduce duplication. Also, the need to pick one of two submissions does help with prioritization of ideas. While rulemaking is not a popularity contest, this prioritization can help ensure that the agency sees those ideas that are most novel. In any event, all submissions are still shown and readily available. This feature is particularly valuable in policy contexts in which finite resources make it helpful for agency officials to have some assistance extracting the most unique comments.

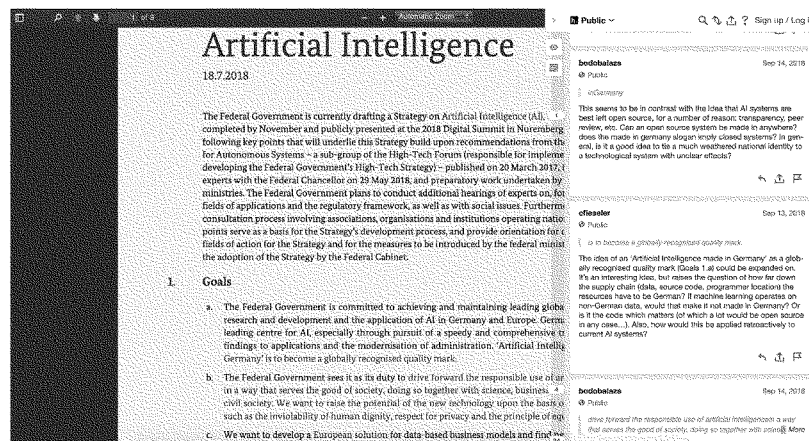
Solution 6: Obtain Better Exercise: Use Collaborative Drafting and Annotation as Germany Did to Engage More Experts in the Review of Rules

Other countries are turning to online collaborative drafting processes and platforms to develop policies, rules and laws with the public, especially with experts. Instead of a hearing with a handful of experts, **online collaborative annotation** could make it possible to hear from a broader and deeper range of experts. To enhance the level of

⁶⁰ Matthew J. Salganik and Karen E.C. Levy. “Wiki Surveys: Open and Quantifiable Social Data Collection.” *PLoS ONE* 10, no. 5 (2015): 12. <https://doi.org/10.1371/journal.pone.0123483>.

expertise in rulemaking, an agency or a committee could use collaborative annotation to invite experts to annotate and comment on a draft rule. They could, as the German federal government did in 2018, invite a select subset of experts to discuss the draft as a complement to the notice-and-comment e-rulemaking process.

In 2018, the German government used an annotation platform to “expert source” feedback on its draft artificial intelligence policy.⁶¹ By putting the draft on **Hypothes.is**, a free and open source annotation tool, the German Chancellor’s Office, working in collaboration with Harvard University’s Berkman Center for Internet and Society and the New York University Governance Lab, was able to solicit the input of global legal, technology and policy experts. Using an annotation platform also made it possible for people to see one another’s feedback and create a robust dialogue, instead of a series of disconnected comments.



The Hypothes.is tool overlaid on the webpage of the draft artificial intelligence policy (2018)

Hypothes.is can be used on any webpage. It offers the ability to highlight, mark up or respond to other people's comments, and it offers both public and private annotations on the same page. Comments can be tagged for ease of filtering. Adding hypothes.is to a webpage does not change how the site looks or works; when the tool is active, it “adds a layer” on top of the website to enable annotation without affecting the underlying text. Users can turn on and off this layer as they want.

⁶¹ Beth Simone Noveck, Rose Harvey and Anirudh Dinesh, “The Open Policymaking Playbook,” *The GovLab*, April, 2019, <https://www.thegovlab.org/static/files/publications/openpolicy-making-april29.pdf>.

While collaborative annotation and drafting demand a higher level of commitment and greater knowledge of the subject matter than clicktivist commenting, when designed right, public participation in drafting offers key advantages. It provides an opportunity to obtain meaningful expert review of draft rules. It raises issues policymakers don't know about and ensures that drafts more effectively reflect the concerns of the people impacted by them. It is much faster and easier to organize online expert review using an annotation platform, making it efficient to organize, while providing the means to get balanced and thoughtful reactions to draft rules. An oversight committee could organize such an online annotation process alongside notice-and-comment rulemaking.

Solution 7: Set up a UK-Style Evidence Checks Process to Crowdsourcing Review of Comments and Evidence

The UK Parliament uses online **Evidence Checks** to invite members of the public to comment on the rigor of evidence on which a policy is based. This process allows a large and diverse group of people with relevant experience and expertise to identify gaps in evidence that require further review and aids in oversight.⁶² If Congress would like to ensure diverse citizen input into the rulemaking process, the Committee should innovate the process of citizen engagement and **pilot the use of Evidence Checks**.

Department for Education
'Evidence check' memorandum
Universal infant free school meals (UIFSM)


Policy?

- From September 2014, all children in reception, year 1 and year 2 attending state-funded schools in England are eligible for free school meals. This includes pupils attending academies, free schools, maintained special schools, pupil referral units, and day pupils in non-maintained special schools. The headline effect of this policy will be to extend free school meal entitlement to an additional 1.55 million children.
- The policy is designed to:
 - improve educational attainment and children's social skills and behaviour;
 - ensure that children have access to at least one healthy meal each day, and support the development of long term healthy eating habits;
 - help families with the cost of living, and remove disincentives to work.

Evidence

Attainment, social skills and behaviour

- The Department for Education and Department for Health ran pilots of universal free school meals in two local authorities – Newham and Durham – between 2009 and 2011. The pilot evaluation¹ showed that there were benefits for all children – those who would have been entitled previously to a free school meal under the existing entitlement criteria as well as those that became newly-entitled during the pilots. The pilots found:
 - Improved performance in the classroom.** The universal FSM pilot had a significant positive impact on attainment for primary school pupils, with pupils in the pilot areas making between four and eight weeks' more progress in English and mathematics than similar pupils in comparison areas. Improvements in attainment were strongest amongst pupils from less affluent families and amongst those with lower prior attainment.
 - Increased take-up of meals amongst children from low-income families, who were already entitled to, but not taking free meals, under the existing rules – at least partly because universal entitlement removes the perceived stigma attached to receiving free school meals.**
 - Higher take-up of school lunches amongst other children – which is important.** A study by academics from the University of Leeds showed that only 1% of packed lunches brought to school by children met the School Food Standards (Evans et al. 2010), whereas estimates from a 2012 School Food Trust survey (Nelson et al. 2012) suggest that 99% of primary meals catered for by local authorities are compliant with food-based standards.



Education Committee web forum: Universal Infant Free School Meals

The Education Committee invites views on the strength of the evidence in relation to the current policy on the effect of nutrition on students and how implementable Universal Infant Free School Meals is.

Thank you for all comments submitted to the 'Evidence Check' forum. The forum is now closed. Comments received will help the Committee evaluate the evidence received from the Department for Education.

The Committee will use the comments to select topics for one-off oral evidence sessions in early 2015.

Evidence

Please read the Department's evidence on Universal Infant Free School Meals:

» Department for Education 'Evidence check' memorandum – Universal Infant Free School Meals (UIFSM) (16 June 2014) »
» Back to the 'Evidence check' web forum homepage

19 Responses to Universal Infant Free School Meals

Claire Crawford, Lorraine Dearden and Ellen Groves says:
October 15, 2014 at 10:49 AM
Comments on School Starting Age

Claire Crawford, Lorraine Dearden and Ellen Groves, Institute for Fiscal Studies

We thank the evidence presented in the FSM document in...

⁶² "Evidence Checks UK," CrowdLaw for Congress, *The GovLab* (Feb 2020), <https://congress.crowd.law/files/evidence-checks-uk-briefing-note.pdf>.

An example of the UK Evidence Checks forum: The Committee posts a public PDF with the policy proposal and the evidence on which it is based (left). The forum allows participants to scrutinize the evidence and add their own comments (right).

In the UK House of Commons, where the role of committees is similar to that in the United States, there is a Select Committee conducting oversight for each government department, examining spending, policies and administration. In an Evidence Check, government departments and agencies supply information to the Committee about an issue. Committee staff publish that information at parliament.uk and share the task of scrutinizing it with a wider pool of experts, stakeholders, and members of the public. Typically, the Committee uploads the government statement as a publicly viewable PDF and frames the request with specific questions and problems that they would like participants to address. The process comprises three steps:

First, the Committee asks a government department to supply information about a policy, and the evidence on which the policy is based. Second, the Committee publishes the departmental submission and adds a page to their website to collect comments over a period of about a month, inviting academics, stakeholders, practitioners and members of the public affected by the policy to comment on the departmental advice. They might comment on the strength of the evidence provided by the department, highlighting contrasting evidence, selection biases and gaps. The web forum is public, but committee staff may choose to review comments before and after users post them to ensure that they are not defamatory, abusive, or otherwise inappropriate.

Finally, the Committee assesses comments and uses them to guide further investigation of the policy and/or integrates the commentary into its final report, which is supplied to the relevant government Minister for response.

Within this broad approach, Commons Select Committees have implemented evidence checks in varying ways. In 2014-15 the Education Select Committee used the process to help develop its work program. Initially, the Committee requested a two-page statement on each of nine topics from the Department of Education, inviting public comment via web forums on each topic, as well as general comments on the Department's approach to the use of evidence. Comments on the web forums then helped the Committee to decide what areas to focus on and what areas to hold oral evidence sessions for.

In 2016, the Science and Technology Select Committee published seven government statements on policy areas, including driverless cars, smart cities, digital government, smart meters and flexible working arrangements. It sought comments that aligned with a

framework that the Institute for Government developed in partnership with the Alliance for Useful Evidence and Sense About Science. The framework covered diagnosis of the issue, evidence-based action by government, implementation method, value for money, and testing and evaluation.

Targeted outreach, including social media, guest blogs on civil society organization websites, and leveraging the networks of organizations with expertise in the related policy topic, is crucial for obtaining high quality participation on an array of policy topics.

Evidence Checks help committees to more efficiently and effectively hold government to account by leveraging the collective intelligence of a broader expert audience. In 2016, an Evidence Check conducted by the Women and Equalities Committee into sexual harassment in schools (dubbed a “Fact Check”) generated contributions from students with lived experience of harassment and led to a revised (upwards) estimate of the incidence of harassment. Information from contributors was incorporated into the subsequent Ministerial Briefing on the issue.

Solution 8: Democratize Oversight: Pilot the Use of Citizen Juries as in Belgium

If Congress would genuinely like to ensure diverse citizen input into the rulemaking process, the Committee should innovate the process of citizen engagement and **pilot the use of a citizen jury** to democratize and enhance oversight. Citizen juries have long been in use for civic deliberation in the United States but, as of December 2019, the legislature of the Brussels Region of Belgium formally introduced the use of citizen juries into the work of its legislative committees.⁶³

The Regional legislature established that every committee shall include a citizen jury, comprising a random sample of 45 residents aged 16 and above, to participate in advisory committees alongside elected legislators. Citizen juries are attached to a specific standing committee, where they deliberate with selected parliamentarians on a given topic and formulate recommendations after four days of discussion and committee hearings of experts.

⁶³ For more on citizen juries, see Beth Simone Noveck, “The electronic revolution in rulemaking,” *Emory LJ* 53 (2004): 499ff, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/emlj53§ion=20.

Inspired by ancient Greek democracy where citizens chosen by lot served in a wide range of governing roles, and by one-off sortition (aka selection by lot) experiments in Australia, Ireland, Spain and in the United States, the Brussels region is seeking to institutionalize the benefits of citizen engagement in formal lawmaking processes by adopting the use of citizen juries.

Under this arrangement, Regional Parliament standing committees each comprise 15 parliamentarians and 45 randomly chosen citizens. The two groups work together to draft recommendations on any given issue. The citizen participants are chosen as follows:

- 1) a first round, in which people are chosen by lot from among the population
- 2) a second draw among those who have expressed interest in participating. A random sampling method is used to ensure diversity of gender, age, geography, level of education and, important for Belgium, language spoken. Citizens serve for one year.

Political science Professor Min Reuchamps writes: “in this new deliberative process, the power of the citizens is significant. Nevertheless, the institutional and legal framework in Belgium does not allow non-elected citizens to officially vote in parliament. Accordingly, the recommendations adopted by both the randomly selected citizens and the parliamentarians will be voted upon separately.”⁶⁴ In other words, the agenda and the final vote remain firmly in the hands of elected legislators. But citizens offer information, ideas and reactions as part of the deliberative process. Moreover, the fact that the jury comprises a random sample of citizens ensures a diverse spectrum of different citizen perspectives.

The House Financial Services Committee should consider a pilot project to incorporate the participation of a deliberative citizen jury if it wants to ensure both more diversity and legitimacy in its work.

I hope that these recommendations have been of value and I am happy to answer any questions now or in the future.

Thank you.

⁶⁴ Min Reuchamp, “Belgium’s experiment in permanent forms of deliberative democracy,” ConstitutionNet (January 17, 2019), available at <http://constitutionnet.org/news/belgiums-experiment-permanent-forms-deliberative-democracy>.

