



## Request for Proposals—June 8, 2012

### Social Media in Rulemaking

The Administrative Conference is seeking a consultant to undertake a research project that will consider legal and policy issues raised by agency use of social media to support rulemaking activities. Proposals are due by 6:00 p.m. Eastern time on July 6, 2012.

#### Background

Social media, including Facebook, Twitter, blogs, and other similar technologies, present new opportunities for agencies to engage the public in rulemaking activities. Such social media tools are uniquely valuable because they facilitate two-way communication. Rather than just pushing information out, social media allows agencies to provide the public with a way to communicate views and information to the agency.

In the context of rulemaking, however, agency use of social media raises difficult policy and legal issues. Agencies must determine whether and how to use social media to support rulemaking initiatives, including during the preliminary stages of a rule's development, while the rule is out for comment, and once the rule has been promulgated. Determining how the Administrative Procedure Act (APA) and other legal requirements apply to social media requires sound judgment and expertise. With little judicial precedent to guide the way, agencies face substantial uncertainty in navigating these issues. This uncertainty discourages agency innovation.

#### Project

The Conference seeks to study various policy and legal issues agencies face when using social media in rulemaking. The goal of the project is to identify relevant issues, define applicable legal and policy constraints on agency action, resolve legal uncertainty to the greatest extent possible, and encourage agencies to find innovative ways to use social media to facilitate broader, more meaningful public participation in rulemaking activities. A detailed scope of work follows, but the Conference encourages prospective consultants to comment on the scope of work in their project proposals, and identify/include any additional research subjects related to this topic that the Conference may wish to consider.

#### **Scope of Work**

The study should include consideration of the following issues and questions:

1. *Why Use Social Media?* Assessing the value to agencies and the public from the use of social media in rulemaking.
2. *Managing Social Media.* The public often expects prompt responses and regular posts on social media. In light of this, how do agencies manage their use of social media and how can they improve such management?



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3. *Using Blogs in Rulemaking.* If an agency sponsors a blog during a rulemaking, can it lawfully reference the discussion? Is an agency required to respond to blog posts? What policies should agencies maintain to effectively communicate to the public how it will use a blog, if at all, during the rulemaking?
  - a. *Blog Moderation Policies.* Should an agency moderate its blog? Can a third party moderate the blog and, if so, does the identity of the moderator raise unique concerns? What does the law say about courts ascribing knowledge acquired by one part of an agency (e.g., an employee or contractor moderator) to other parts (e.g., rulewriters)? What should the agency do to ensure sufficient public understanding of the agency's moderation policy?
  - b. *Active Agency Engagement in Blogs.* What legal issues arise if an agency rulewriter engages actively in a blog by, for example, correcting errors, explaining the proposed rule, or explaining a related rule? Will such statements be treated as final agency action or reconsideration of related rules? If so, what can an agency do to prevent such treatment?
4. *Webcasts and Other Electronic Public Outreach.* When an agency conducts public outreach through a webcast or teleconference, how can it preserve statements made by the public? If the agency wants these statements to be treated as comments under the APA, how can it preserve and organize them as such? What policies should an agency establish if it does not want the public statements to be treated as comments? How would webcasts differ, if at all, from public meetings or hearings held during the comment period?
5. *Recordkeeping Issues.* Are agencies required to preserve blog posts, Facebook comments, etc., and, if so, how should agencies preserve them? What administrative record issues are raised when an agency uses social media before proposing a rule? What policies, if any, can an agency follow to shape such legal obligations? Do blog posts become part of the administrative record? What, if anything, can an agency do to prevent blog posts from being treated as comments under the APA or becoming part of the administrative record? What other recordkeeping issues are associated with agency use of social media?
6. *Use of Social Media by Senior Agency Officials.* What legal issues are associated with use of Twitter, Facebook updates, or blog posts by senior agency officials? Would a court treat such uses of social media as final agency action? If so, is there anything an agency can do to prevent that outcome?
7. *Choosing Technology.* Some agencies run into strict rules regarding government use of non-government, off-the-shelf technology; other agencies do not. What legal and policy



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issues are associated with agencies agreeing to the terms of service necessary to use off-the-shelf tools for using social media? How should agencies address these issues?

8. *Paperwork Reduction Act (PRA) and Privacy Issues.* What PRA, privacy, or other legal issues arises with social media? How should agencies address those issues?

### How to Submit a Proposal

Proposals are invited from qualified persons who would like to serve as a consultant on this project. All responses will be considered by the Conference staff and the Chairman.

A consultant's study should result in a report that is delivered first for review by the Conference staff and Chairman and then forwarded to a committee of the Conference membership. The report should provide proposed recommendations. The consultant works with Conference staff and the committee to refine and further shape recommendations and may work with Conference staff to revise the report. Recommendations approved by the committee are then forwarded to the Council of the Conference and ultimately to the full Conference membership meeting in plenary session. If approved at the plenary session, a recommendation becomes an official recommendation of the Administrative Conference. (For a general understanding of how the Conference is organized and operates, see 5 U.S.C. §§ 591-596, and <http://www.acus.gov/research/the-administrative-conference-project-process/>)

The Conference typically provides a consulting fee for a study plus a budget for expenses. The Conference also typically encourages its consultants to write up the results of their studies for publication. Thus, working as a Conference consultant provides some compensation, a publication opportunity, and the opportunity to work with Conference members from federal agencies, academia, the private sector, and public interest organizations to help shape and improve administrative law, procedure, and practice.

Those submitting proposals should understand that, in addition to the work involved in researching and writing the consultant's report, the consultant will need to work with Conference staff and committees as the Conference develops a recommendation based on the report. The consulting fee is not designed to match a consultant's normal consulting rates. It is a significant public service to serve as a consultant to the Conference.

To submit a proposal to serve as the Conference's consultant on this project, you must:

- Send an e-mail to Emily S. Bremer, Attorney Advisor at [ebremer@acus.gov](mailto:ebremer@acus.gov). *Proposals must be submitted by e-mail.*
- Include the phrase "ACUS Project Proposal" in the subject line of your e-mail.

In the body of your e-mail or in an attachment, please:

- State the name of the project for which you are submitting a proposal (Social Media in Rulemaking).



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- Explain why you would be a well qualified to work on the project. Include your CV or other summary of relevant experience.
- Explain how you would research the proposed project and how you would develop recommendations based on the research. There is no required format and 2-3 pages should probably be sufficient for this section.
- State how much funding you would need for expenses, keeping in mind that a typical Conference research contract will include a consulting fee of \$12,000 plus travel expenses of \$1,000, and research assistance expenses of \$1,000. There is some flexibility in the expense budget based on factors relating to the proposal (*e.g.*, the consultant's location relative to Washington, DC, and the need for research assistance and empirical or interviewing work), so your proposal should suggest any special needs in this regard. The amount of the expenses is not a critical factor in the award of the contract; the quality of the proposal and of the consultant's ability to carry out the study will be the most important factors.
- Propose a schedule for the project. The Conference's research projects typically call for submission of an outline, a draft report, and a final report. The draft report should be substantially complete and ready for consideration by the committee. Proposals for this project should target the submission of the draft report so that the recommendation can be targeted for completion at a plenary session of the Conference held in June 2013. A fall 2012 submission date for the draft report is preferred, but high quality research leading to a well-written report will be the prime consideration.

Submit your proposal by 6:00 p.m. Eastern time on July 6, 2012. Only proposals submitted by the stated deadline are guaranteed to receive consideration. Proposals may also be submitted or amended at any time until the award of the contract, and the Conference may consider any proposals or amended proposals received at any time before the award of the contract.

Proposals will be evaluated based on:

- The qualifications of the researcher(s)
- The quality of the proposal
- The timeline of the proposal
- The likelihood that the research will lead to an Administrative Conference recommendation that will improve government
- The cost of the proposal (although the other factors are more important)

Failure to follow the above instructions may result in your proposal not being considered. Including the phrase "ACUS Project Proposal" in the subject line of your e-mail is important so that your proposal can be easily identified.