



Administrative Conference Recommendation 2013-5

Social Media in Rulemaking

Adopted December 5, 2013

In the last decade, the notice-and-comment rulemaking process has changed from a paper process to an electronic one. Many anticipated that this transition to “e-Rulemaking”¹ would precipitate a “revolution,” making rulemaking not just more efficient, but also more broadly participatory, democratic, and dialogic. But these grand hopes have not yet been realized. Although notice-and-comment rulemaking is now conducted electronically, the process remains otherwise recognizable and has undergone no fundamental transformation.

At the same time, the Internet has continued to evolve, moving from static, text-based websites to dynamic multi-media platforms that facilitate more participatory, dialogic activities and support large amounts of user-generated content. These “social media” broadly include any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public. Examples of social media tools currently in widespread use include Facebook, Twitter, Ideascale, blogs, and various crowdsourcing² platforms. But technology evolves quickly, continuously, and unpredictably. It is a near certainty that the tools so familiar to us today will evolve or fade into obsolescence, while new tools emerge.³

¹ The Conference has previously defined “e-Rulemaking” as “the use of digital technologies in the development and implementation of regulations before or during the informal process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA).” Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789, 48,789 (Aug. 9, 2011) (internal quotation marks and footnote omitted).

² “Crowdsourcing” is an umbrella term that includes various techniques for distributed problem-solving or production, drawing on the cumulative knowledge or labor of a large number of people. Wikipedia, the development of the Linux operating system, Amazon.com’s “Mechanical Turk” platform, and public and private challenges that award a prize to the best solution to a particular problem are all examples of crowdsourcing.

³ One type of emerging technology includes structured argumentation tools. These tools may take the form of, for example, interactive feedback forms that ask direct and progressively more focused questions in sequence or in response to input, thereby generating more targeted and substantively useful input from users.



The accessible, dynamic, and dialogic character of social media makes it a promising set of tools to fulfill the promise of e-Rulemaking. Thus, for example, the e-Rulemaking Program Management Office, which operates the federal government’s primary online rulemaking portal, Regulations.gov, has urged agencies to “[e]xplore the use of the latest technologies, to the extent feasible and permitted by law, to engage the public in improving federal decision-making and help illustrate the impact of emerging Internet technologies on the federal regulatory process.”⁴ The Conference has similarly, albeit more modestly, recommended that “[a]gencies should consider, in appropriate rulemakings, using social media tools to raise the visibility of rulemakings.”⁵

Federal agencies have embraced social media to serve a variety of non-rulemaking purposes,⁶ but few have experimented with such tools in the rulemaking context. One explanation for this reluctance is uncertainty about how the Administrative Procedure Act (APA) and other requirements of administrative law apply to the use of social media, particularly during the process governed by the APA’s informal rulemaking requirements, beginning when the Notice of Proposed Rulemaking (NPRM) has been issued, through the

⁴ E-RULEMAKING PROGRAM MANAGEMENT OFFICE, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES 8 (2010), available at http://exchange.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf.

⁵ Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2257, 2265 (Jan. 17, 2012). The Conference has consistently supported full and effective public participation in rulemaking, as well as the use of new technologies to enhance such participation. In Recommendation 95-3, *Review of Existing Agency Regulations*, the Conference encouraged agencies to “provide adequate opportunity for public involvement in both the priority-setting and review processes,” including by “requesting comments through electronic bulletin boards or other means of electronic communication.” 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995).

⁶ For example, agencies have enthusiastically embraced social media, including Facebook and Twitter, as an effective tool for pushing information out to the public, from general information about an agency and its mission to more specific notifications of services, benefits, or employment opportunities that are available from an agency. Agencies have also used social media in more interactive ways, such as when nearly three dozen agencies used Ideascale to engage the public in the process of developing the agencies’ Open Government Plans, or to collect metadata, such as when the Consumer Financial Protection Bureau used “heat maps” generated from click-based online user reviews of prototype disclosure forms to illustrate which sections of the forms elicited the strongest reactions.



comment period, and until the agency issues a final rule.⁷ In particular, agencies are uncertain whether public contributions to a blog or Facebook discussion are “comments” for purposes of the APA, thus triggering the agencies’ obligations to review and respond to the contributions and include them in the rulemaking record. Other concerns include how the Paperwork Reduction Act applies to agency inquiries through social media,⁸ whether the First Amendment might limit an agency from moderating a social media discussion, and how individual agencies’ “ex parte” communications policies might apply to the use of social media.

Apart from legal concerns are doubts as to whether, when, and how social media will benefit rulemaking. These doubts arise with respect to two distinct issues that often overlap. First, can social media be used to generate more useful public input in rulemaking? Second, is increased lay participation in rulemaking likely to be valuable? Experience suggests that both the quality of comments and the level of participation in social media discussions are often much lower than one might hope. A third-party facilitator may be able to help an agency address these issues by encouraging public participation, helping participants understand the rulemaking process and the agency’s proposal, asking follow-up questions to produce more substantive input, and actively facilitating engagement among participants. Regardless of whether a third-party facilitator is used, however, creating the conditions necessary to foster a meaningful, productive dialogue among participants requires commitment, time, and thoughtful design. Since this kind of innovation can be costly, agencies are understandably reluctant to expend scarce resources in pursuit of uncertain benefits. Agencies also face a variety of practical questions. One such question is whether to require participants to identify themselves in agency-sponsored social media discussions. Another concern is that the use of

⁷ The Conference recently addressed legal issues related to e-rulemaking in Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, see *supra* note 1, but did not delve into the unique concerns that arise when agencies use social media to support rulemaking activities.

⁸ The Office of Management and Budget has issued helpful guidance on these issues. See Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to the Heads of Executive Departments and Independent Regulatory Agencies regarding Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act (Apr. 7, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.



ranking or voting tools may mislead some to believe that rulemaking is a plebiscite or allow some participants to improperly manipulate the discussion.

Social media can be valuable during the notice-and-comment phase of rulemaking, but on a selected basis. For example, if an agency needs to reach an elusive audience or determine public preferences or reactions in order to develop an effective regulation, social media may enable the collection of information and data that are rarely reflected in traditional rulemaking comments. Success requires an agency to thoughtfully identify the purpose(s) of using social media, carefully select the appropriate social media tool(s), and integrate those tools into the traditional notice-and-comment process. In addition, agencies must clearly communicate to the public how the social media discussion will be used in the rulemaking. Although the APA allows agencies the flexibility to be innovative, attention should be given to how the APA or other legal requirements will apply in the circumstances of a particular rulemaking.

Agencies may find, however, that it is both easier and more often valuable to use social media in connection with rulemaking activities, but outside the notice-and-comment process. For example, social media can be effective for public outreach, helping to increase public awareness of agency activities, including opportunities to contribute to policy setting, rule development, or the evaluation of existing regulatory regimes. The use of social media may also be particularly appropriate during the pre-rulemaking or policy-development phase. Here, the APA and other legal restrictions do not apply, and agencies are often seeking dispersed knowledge or answers to more open-ended questions that lend themselves to productive discussion through social media. For the same reasons, social media may be an effective way for agencies to seek input on retrospective review of existing regulations. It also may be helpful in connection with a negotiated rulemaking,⁹ where these tools may make it easier for the diverse interests to collaborate during and between meetings on a solution to the problem being addressed.

⁹ See, e.g., Recommendation 85-5, *Procedures for Negotiating Proposed Regulations* (Dec. 13, 1985).



This recommendation provides guidance to agencies on whether, how, and when social media might be used both lawfully and effectively to support rulemaking activities. It seeks to identify broad principles susceptible of application to any social media tool that is now available or may be developed in the future. It is intended to encourage innovation and facilitate the experimentation necessary to develop the most effective techniques for leveraging the strengths of social media to achieve the promises of e-Rulemaking.

RECOMMENDATION

1. Agencies should explore in the rulemaking process the use of social media—online platforms that can provide broad opportunities for public consultation, discussion, and engagement.

Public Outreach

2. Agencies should use social media to inform and educate the public about agency activities, their rulemaking process in general, and specific rulemakings. Agencies should take an expansive approach to alerting potential participants to upcoming rulemakings by posting to the agency website and sending notifications through multiple social media channels. Social media may provide an effective means to reach interested persons who have traditionally been underrepresented in the rulemaking process (including holders of affected interests that are highly diffused).

3. Agencies should recognize that raising awareness among missing stakeholders (those directly affected by the proposed rule who are historically unlikely to participate in the traditional comment process) and other potential new participants in the rulemaking process will require new outreach strategies beyond simply giving notice in the *Federal Register*, Regulations.gov, and the agency website. Social media may be particularly effective for successful outreach, and agencies using it for this purpose in connection with rulemaking should consider:



- (a) Developing one or more communications plans specifically tailored to the rule and to all types of missing stakeholders or other potential new participants the agency is trying to engage. These plans should be evenhanded and designed to encourage all types of stakeholders to participate.
- (b) In outreach messages, clearly explaining the mechanisms through which members of the public can participate in the rulemaking, what the role of public comments is, and how the agency will take comments into account.
- (c) Encouraging public response by being clear and specific about how the proposed rule would affect the targeted participants and what input will be most useful to the agency.
- (d) Asking all interested organizations to spread the participation message to members or followers. Agencies should be prepared to explain why individual participation can be beneficial, and to encourage organizations to solicit substantive, individualized comments from their members.
- (e) Using multilingual social media outlets where appropriate.

4. The General Services Administration, the e-Rulemaking Program Management Office, and other federal agencies, either individually or (preferably) collaboratively, should use social media to create and distribute more robust educational programs about rulemaking. These efforts could include: producing videos about the rulemaking process and how to effectively participate through commenting and posting on an agency website or video-sharing website; hosting webinars in which agency personnel discuss how to draft useful and helpful comments; maintaining an online database of exemplary rulemaking comments; or conducting an online class or webinar or providing explanatory materials in which officials review a draft comment and suggest ways to improve it.



5. Agencies should explore ways to publicize, and allow members of the public to receive, regular, automated updates on developments in, at a minimum, significant rulemakings.

6. Agencies should consider using social media prior to the publication of an NPRM or proposed policy where the goal is to understand the current state of affairs, collect dispersed knowledge, or identify problems. To enhance the amount and value of public input, an agency seeking to engage the public for these purposes should, to the maximum extent possible, make clear the sort of information it is seeking and how the agency intends to use public input received in this way. The agency should also directly engage with participants by acknowledging submissions, asking follow-up questions, and providing substantive responses.

7. Agencies should consider using social media in support of retrospective review of existing regulations, particularly to learn what actual experience has been under the relevant regulation(s).

Using Social Media in Notice-and-Comment Rulemaking

8. Although the use of social media may not be appropriate and productive in all rulemakings, agencies may use social media to supplement or improve the traditional commenting process. Before using social media in connection with a particular rulemaking, agencies should identify the specific goals they expect to achieve through the use of social media and carefully consider the potential costs and benefits.

9. Agencies should use the social media tools that best fit their particular purposes and goals and should carefully consider how to effectively integrate those tools into the traditional rulemaking process.

Effective Approaches for Using Social Media in Rulemaking

10. For each rulemaking, agencies should consider maintaining a blog or other appropriate social media site dedicated to that rulemaking for purposes of providing



information, updates, and clarifications regarding the scope and progress of the rulemaking. Agencies may also wish to explore using such a site to generate a dialogue.

11. When an agency sponsors a social media discussion in connection with a notice-and-comment rulemaking, it should determine and prominently indicate to the public how the discussion will be treated under the APA (for administrative record purposes). The agency may decide, for example:

(a) To include all comments submitted via an agency-administered social media discussion in the rulemaking record. Agencies should consider using an application programming interface (API) or other appropriate technological tool to efficiently transfer content from social media to the rulemaking record.

(b) That no part of the social media discussion will be included in the rulemaking docket, that the agency will not consider the discussion in developing the rule, and that the agency will not respond to the discussion. An agency that selects this option should communicate the restriction clearly to the public through conspicuous disclaimers on the social media site itself, provide instructions on how to submit an official comment to the rulemaking docket, and provide a convenient mechanism for doing so. It is especially important in these circumstances that the agency clearly explain the purpose of a social media discussion the agency does not intend to consider in the rulemaking.

12. When soliciting input through a social media platform, agencies should provide a version of the NPRM that is “friendly” and clear to lay users. This involves, for example, breaking preambles into smaller components by subject, summarizing those components in plain language, layering more complete versions of the preamble below the summaries, and providing hyperlinked definitions of key terms. In doing this, the agency should either:

(a) Publish both versions of the NPRM in the *Federal Register*; or

(b) Cross-reference the user-friendly version of the NPRM in the published NPRM and cross-reference the published NPRM in the user-friendly version of the NPRM.



13. Agencies should consider, in appropriate rulemakings, retaining facilitator services to manage rulemaking discussions conducted through social media. Appropriate rulemakings may include those in which:

- (a) Targeted users are inexperienced commenters who may need help to prepare an effective comment (e.g., providing comments that give reasons rather than just reactions); or
- (b) The issues will predictably produce sharply divided or highly emotional reactions.

14. Agencies should realize that not all rulemakings will be enhanced by a crowdsourcing approach. However, when the issue to be addressed is the public or user response itself (e.g., when the agency seeks to determine the best format for a consumer notice), direct submission to the public at large may lead to useful information. In addition, agencies should consider encouraging, and being receptive to, comments from lay stakeholders with “situated knowledge” arising out of their real world experience.

15. Agencies should consider experimenting with collaborative drafting platforms, both internally and, potentially, externally, for purposes of producing regulatory documents.

16. If an agency chooses to use voting or ranking tools, the agency should explain to the public how it intends to use the input generated through those tools (e.g., to help it decide which of several potential forms is easiest to use).

17. Agencies should use social media to notify and educate the public about the final agency action produced through a rulemaking.

18. In appropriate circumstances, agencies should also use social media to provide compliance information. For example, an agency might use social media to inform and educate the public about paperwork requirements associated with a rule or the availability of regulatory guidance.



19. Agencies should collaborate to identify best practices for addressing issues that arise in connection with the use of social media in rulemaking.

Direct Final Rulemaking

20. Agencies should consider using social media before or in connection with direct final rulemaking to quickly identify whether there are significant or meaningful objections that are not initially apparent.

Key Legal Considerations

21. Agencies have maximum flexibility under the APA to use social media before an NPRM is issued or after a final rule has been promulgated.

22. Agencies should consider how the First Amendment applies to facilitating or hosting social media discussions, such as by making it clear through a posted comment policy that all discussions and comments on any given agency social media site will be moderated in a uniform, viewpoint-neutral manner. Through this posted policy, agencies may decide to define or restrict the topics of discussion, impose reasonable limitations to preserve decorum, decency, and prevent spam or, alternatively, terminate a social media discussion altogether.

23. Agencies that have “ex parte” contact policies for information obtained in connection with rulemaking should review those policies to ensure they address communications made through social media.