



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committee on Rulemaking
From: Emily S. Bremer (Staff Counsel)
Date: October 24, 2013
Re: Social Media in Rulemaking: Draft Recommendation

[Comments of Carol Ann Sicilano 11/4/13](#)

The following draft recommendation is based on Professor Michael E. Herz's report "Using Social Media in Rulemaking: Possibilities and Barriers." This draft is intended to facilitate the Committee's discussion at its next public meeting, and not to preempt the Committee's discussion and consideration of the suggested recommendations. In keeping with the Conference's past practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

Draft Preamble

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

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 large numbers 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.



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technology evolves quickly, continuously, and unpredictably. It is a near certainty that the tools so familiar to us today will grow or fade into obsolescence, while new tools emerge.

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, www.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."³ 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."⁴

Federal agencies have embraced social media to serve a variety of non-rulemaking purposes, 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 comment period, and until the agency issues a final rule.⁵ 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, but are not limited to, how the Paperwork Reduction Act applies to agency inquiries through social media,⁶ whether the First Amendment might limit an agency from moderating a social media discussion, and how individual agencies'

³ 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.

⁴ [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).

⁵ 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.

⁶ Although the Office of Management and Budget has issued helpful guidance on these issues, it has not eliminated the agencies' concerns. See Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to



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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. Experience suggests that both the level of participation and the quality of comments in social media discussions are often much lower than one might hope. 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 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.

Social media can also be valuable during the notice-and-comment phase of rulemaking, but on a selected basis. For example, social media are likely a poor fit for rulemakings that call for statutory interpretation, technical knowledge, or scientific expertise. On the other hand, 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.

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

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.



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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.

Draft Recommendation

Public Outreach

1. As part of the rulemaking process, agencies should explore the use of social media and other-online platforms that can enable provide broad opportunities for public consultation, discussion, and engagement.
2. Agencies should use social media to inform and educate the public about agency activities, the rulemaking process in general, and specific rulemakings. Agencies should take an expansive approach toward alerting potential participants to upcoming rulemakings, posting to the agency website and sending notifications through multiple social media channels. Social media may provide a more effective means to reach interested persons that have traditionally been underrepresented in the rulemaking process.
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 conventional 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 web site. Thus, agencies should consider:
 - a. Developing a communications plan specifically tailored to the rule and to the types of missing stakeholders or other potential new participants the agency is trying to engage.
 - 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. ~~To motivate action~~ Encouraging public response by, being clear and specific about how the proposed rule would affect the targeted participants.
 - d. Asking organizations to pass-~~on~~spread the participation message to members or followers, while: (i) discouraging mass comments; and (ii) recognizing that these organizations may need to be persuaded that ~~such~~-individual participation will benefit organizational interests.



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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 in which officials review a draft comment and suggest ways to improve it.

Regulatory Agenda

5. Agency notifications regarding rulemakings should be tied to the Unified Regulatory Agenda, so that any addition or change to any item in the Unified Regulatory Agenda will trigger a notification via social media.

Pre-Rulemaking and Policy Development

6. Agencies should consider using social media during pre-rulemaking or policy development proceedings where the goal is to understand the current state of affairs, collect dispersed knowledge, or identify problems. To enhance the ~~number 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 clarify the role of public comment, and~~ 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. Social media ~~should~~ may be used to supplement or improve, but not replace, the conventional commenting process.
9. The use of social media may not be appropriate and productive in all rulemakings. Before using social media in connection with a particular rulemaking, agencies should consider identify with specificity what they expect to achieve through the use of social media and carefully consider the potential costs and benefits.
10. An agency should use the social media tools that best fit its particular purposes and goals and

Comment [E1]: CAS: I recommend avoiding the phrase "public comment" in context because of its historical link to conventional N&C rulemaking.

Comment [E2]: CAS: "may" sounds like a legal judgment. If we intend to interpret the APA, we should say so directly. (And in any case, perhaps ACUS might someday conclude that APA N&C processes can indeed be met through social media approaches.)

Comment [E3]: CAS: This recommendation seems internal to the Agency. Therefore, it's premature to talk about "identifying with specificity" something for the public.



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should carefully consider how to effectively integrate those tools into the rulemaking process it would otherwise use.

11. When deciding whether to use social media in a particular rulemaking, agencies should keep in mind the following principles:

- a. Rulemakings that primarily involve questions of statutory interpretation, technical knowledge, or scientific expertise may be poorly suited to the kinds of responses usually produced by social media.
- b. On the other hand, social media may be valuable when an agency seeks to ascertain the perceptions or reactions of regulated parties or the public to the proposed rule.

Comment [E4]: CAS: this sounds a bit “off” to me. Do we need (a) at all? I like the idea of (b), which would describe when ACUS thinks social media would be particularly useful.

12. For each rulemaking, agencies should consider maintaining a blog dedicated to that rulemaking for purposes of providing information, updates, and clarifications regarding the scope and progress of the rulemaking. The blog should include a widget or, alternatively, a link to the Regulations.gov docket for submission of official comments to the rulemaking docket. The blog should clearly state that it is intended to provide information to the public. In general, the blog should not, ~~however,~~ be used as a tool for extended discussion of substantive questions at issue in the rulemaking.

Effective Approaches for Using Social Media in Rulemaking

13. Because the creation, maintenance, monitoring and eventual retirement of government social media sites necessitates the expenditure of significant government resources, agencies should set out standardized procedures outlining the process by which new social media sites may be instituted. Such procedures should aspire to goals of:

- a. Limiting redundancy, so that multiple offices within an agency are not inadvertently hosting the same or similar sites that essentially achieve the same purpose;
- b. Limiting record-keeping burdens by assessing, at the outset, the actual need for new social media sites that may generate copious amounts of federal records requiring preservation, review or production under the Federal Records Act or Freedom of Information Act; and
- c. Maintaining social media sites so that agency contributions to the sites are consistent with the overall agency mission and agency policies.

Comment [E5]: CAS: This suggestion concerns internal agency management of social media platforms. It better belong somewhere else. But at EPA we believe these standardized procedures and disciplines are very important (“best practices”): In the absence of these goals and the institutional controls in place to implement them, an agency is likely to have multiple, redundant versions of its social media sites. It might also have sites that (inadvertently) do not represent valid or otherwise approved agency policies. Also, with every newly launched site, agencies face the added burden of its various recordkeeping and processing obligations.

14. When soliciting input through a social media platform, agencies should provide a version of the Notice of Proposed Rulemaking that is “friendly” and clear to lay users. This involves, for example, breaking preambles into smaller components by subject, summarizing

Comment [mjk6]: Should this be spelled out?



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those components in plain language, layering more complete versions of the preamble below the summaries, and providing hyperlinked definitions of key terms.

154. 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 formulate an effective comment (e.g., a comment that gives reasons rather than just reactions); or
- b. The issues will predictably produce sharply divided or highly emotional reactions.

165. ~~The “Metadata” and “analytics” information that measures citizen-user preferences and online behavior provided collected through citizen use of agency social media sites may prove useful as a supplement to direct citizen input. Such information can be obtained with the aid of specially designed, mainstream “analytics” software or, in certain instances, by simply monitoring citizen-user response behavior and trends in regard to agency postings. be indirect or amount to metadata. Agencies should consider whether the information they need can also be learned not from what is directly communicated by the public, but from what is indirectly revealed by how members of the public interact with the agency online.~~

Comment [E7]: CAS: EPA uses “Google Analytics” software, for example, to monitor web traffic on agency sites and assess how much time people spend on the site, among other types of user behavior. EPA uses Analytics for overall trends and NOT to track individuals.

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

187. Agencies should consider experimenting with collaborative drafting platforms internally ~~within the agency~~ for purposes of producing regulatory documents. Public collaborative drafting sites are unlikely, however, to be effective for the production of regulatory or preamble text or for the production of comments.

Comment [E8]: CAS: what is ACUS’s aim in sharing this view in a recommendation? Perhaps in the preamble (if at all)?

198. Agencies generally should not employ tools through which users can vote on or rank comments submitted in response to an NPRM, in order to avoid suggesting to inexperienced commenters that rulemaking is a plebiscite.

Direct Final Rulemaking

2019. Agencies should consider using social media in connection with direct final rulemaking to quickly identify whether there are significant or meaningful objections that are not initially



apparent.

Legal Considerations

~~210. The APA does not restrain agency use of social media before an NPRM is issued or after a final rule has been promulgated.~~

Comment [E9]: CAS: This “before” and “after” assurance implies that the APA does indeed pose a barrier to “during” situations (i.e., that the APA forecloses the use of Social Media “during” a rulemaking). I think ACUS should hesitate before making such a declaration. I suggest striking the entire sentence.

221. When an agency sponsors a social media discussion in connection with a notice-and-comment rulemaking, it has two options for determining how the discussion will be treated under the APA (for administrative record purposes):

a. The agency may decide 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. The agency may decide that no part of the social media discussion will be included in the rulemaking docket, that the Agency will not consider the discussion be considered in developing the rule, and that the Agency will not respond to the discussion. ~~or be~~

~~—responded to in the final rule.~~ 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 link to ~~that the~~ rulemaking docket on www.regulations.gov or other agency rulemaking portal. It is especially important in these circumstances that the agency clearly explain the purpose of its use of social media discussion if it does not intend to consider it in the rulemaking.

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~~23. When considering the use of a third party application or web site to host the agency’s social media site, agency counsel should first be consulted to ensure that the agency’s prospective agreement to any terms of service would not violate federal law (e.g., the Anti-deficiency Act).~~

Comment [E10]: CAS: Here is another institutional or “internal facing” suggestion (like #13 above). If we want to share these types of “best practices” for the benefit of other agencies, perhaps we should create an entirely separate section?

~~24. In maintaining a social media site, an agency must fulfill its records preservation and production obligations under the Federal Records Act and the Freedom of Information Act. Agency discovery obligations to preserve documents at issue in potential or pending litigation must also be heeded.~~

Comment [E11]: CAS: EPA attorneys routinely review new third party social media applications when EPA develops new social media sites.

~~25. Agencies should determine whether new social media sites implicate the Privacy Act and, if so, whether the site must feature a new or existing Systems of Records Notice under the Act.~~



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26. Agencies ensure compliance with the Children’s Online Privacy Protection Act (COPPA) when posting web sites that are directed to children under the age of 13 years old and collect, use or disclose personal information concerning children.

272. To provide clarity regarding the application of the Paperwork Reduction Act (PRA) to agency use of social media, the Office of Information and Regulatory Affairs (OIRA) should amend its definition of information regulation, 5 C.F.R. § 1320.3(h), and, particularly, the information exclusions so that they explicitly apply to social media. ~~“general solicitations” definition to eliminate or expand the reference to “the Federal Register or other publications.”~~⁷

Comment [E12]: CAS: Instead of modifying only the general solicitations exception in OMB’s regulations, the information exceptions should all be modified to explicitly address social media and thereby codify OMB’s 2010 memo.

287. When creating and posting material on agency social media sites, an agency should adhere to the Standards of Ethical Conduct for Employees of the Executive Branch, and, in so doing, take care not to improperly endorse third parties or commercial entities.

29. An agency should ensure that it first has permission prior to posting material obtained from non-government sources.

Comment [E13]: CAS: I’m thinking of copyrighted works or potentially confidential business information.

3028. In constructing its web sites, an agency must fulfill its obligations under Section 508 of the Rehabilitation Act (29 U.S.C. § 794d), as amended by the Workforce Investment Act of 1998 (P.L. 105-220), which requires federal agencies to develop, procure, maintain and use electronic and information technology (EIT) that is accessible to people with disabilities – regardless of whether or not they work for the federal government.

3123. Agencies should consider First Amendment principles when facilitating or hosting social media discussions and make it clear through a posted “comment policy” that the agency will moderate all discussions and comments on any given agency social media site in a uniform manner. Through this posted policy, a agencies may decide to define or restrict the topics of discussion, impose reasonable limitations to preserve decorum, decency, and clear channels of communication between participants, or, alternatively, mutual respect, or decide to terminate a social media discussion altogether. Agencies may not, however, deny access to participants based on viewpoint or other expressive elements protected by the First Amendment.

Comment [E14]: CAS: For example, to reduce “spam.”

Comment [E15]: CAS: This is a vague restriction by First Amendment standards and might be difficult for agencies to defend (if we assume that these social media sites are considered “limited public forums”).

3224. Agencies should develop appropriate ex parte contact policies that explicitly address the use of social media in informal rulemaking.

Comment [E16]: CAS: I understand why we want to say this. I’m still unsure whether ACUS should provide legal advice.

⁷ See 5 C.F.R. § 1320.3(h)(4).