<u>**Government Ethics and the Use of Social Media***</u>
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SESSION DESCRIPTION: This two part presentation will (1) introduce attendees to the terminology and background of social media software, (2) discuss how Government ethics principles are implicated in official and personal use of social media tools, (3) provide insight into best practices, recommendations, and lessons learned from other ethics officials; and (4) provide resources for practitioner's reference. The first part will address initial ethics (and other legal) considerations when the Agency implements Social Media tools. The second part will address ethics considerations when employees use Social Media in both their official and personal capacity.

I. <u>OVERVIEW- ETHICS CONSIDERATIONS WHEN IMPLEMENTING SOCIAL MEDIA</u>: (Social Media 101—The Basics)

A. **What** is "Social Media:" Anything online other than static content where the provider posts and the viewer absorbs (also referred to as "Web 2.0").

B. **Why** is the Government interested in the use of Social Media?

1. Can serve the Government's mission for outreach and public affairs.
2. Public can participate in a conversation about relevant issues.
3. Government efficiency – cost effective
4. Great way for Government to be collaborative, transparent, and participatory

C. **Examples** of Social Media Tools/Services (See *Appendix A* for more detailed examples & definitions)

- <u>Blogs</u> – Short for "web log" is a type of website, usually maintained by a single individual/entity with regular entries of commentary, descriptions of events, or other material such as graphics or video. Entries are commonly displayed in reverse-chronological order, and usually with a particular topic or area of concentration.

- <u>Wikis</u> - is a website that allows the easy creation and editing of any number of interlinked web pages via a web browser. Wikis are typically powered by wiki software and are often used to create collaborative websites, to power community websites, for personal note taking, in corporate intranets, and in knowledge management systems. E.g., Wikipedia.

* DISCLAIMER: Reference to any commercial products or services in this presentation is not an endorsement or Government sanction of those non-Federal entities, its services or products.

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D. **Ethics Considerations** in Implementation of Social Media

1. Selecting a tool. **Impartiality**. How do you select an effective social media tool? And ensure a fair competition—where acquisition rules are not triggered? 5 C.F.R.§2635.702 & 48 C.F.R. §3.101-1.
2. Terms of Service. **Misuse of government resources**. Beware of terms that mandate license to use Government seals/logos or otherwise imply endorsement.
3. Setting up a site. Avoid even the appearance of **preferential treatment** or government **sanction**. Use a disclaimer.
4. Publicizing Implementation. **Endorsement** issues.

E. **Other Legal Considerations** when implementing Social Media

1. Authority. What is the agency mission requirement to employ social media? What are the stated parameters of such an engagement—who is the champion, what is the purpose and intent? Should efforts be measurable to determine effectiveness?

2. Terms of Service Agreement
   a. GSA or independently negotiated
   b. Indemnification issue
   c. Choice of law – sovereignty

3. Considerations for inclusion on .gov or .mil websites:
   a. Consider Agency Branding to assist in the identification of official and unofficial efforts.
   b. Include a goodbye page when linking to a non-Federal website. Such as a page with a disclaimer and notice that the user is leaving the Federal Site and how to return to Federal content.
   c. Create a dedicated agency social media page. Where the agency notifies users of the policies and practices, as well as lists all the Agency's social media presences with a disclaimer statement and a perhaps also a statement indicating the agency willingness to consider use of other social media (to avoid concerns of preferential treatment).
   d. Provide as many share tools as possible. If you are going to provide options for users to share the information from your websites, include a full list of sharing options to avoid any implied endorsement and show impartiality, e.g., RSS, email, Facebook, Twitter.
   e. Only include links that are determined as necessary to accomplish the agency social media mission, and avoid items that are commercial in nature.

II. ETHICS IMPLICATIONS FOR USE OF SOCIAL MEDIA

A. GENERAL PRINCIPLE: The Standards of Ethical Conduct impact on use of social media, in official or personal capacities, does not have special treatment.

B. OFFICIAL USE:

1. **Conflicting financial interests** – employees are prohibited by criminal statute from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him has a financial interest, if the particular matter will have a direct and predictable effect on that interest. (18 U.S.C. § 208; 5 C.F.R. §2635.401-403)

2. **Impartiality in performing official duties** - Employees must avoid the appearance of loss of impartiality in the performance of their official duties. (5 C.F.R. §§ 2635.501-502)

3. **Misuse of Government property & time** – Employees have a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes. Likewise, employees shall use official time in an honest effort to perform official duties. (5 C.F.R. §§ 2635.704–705)

   TIP: Does your agency have other policy restrictions (e.g., limited use, operational security)?

4. **Misuse of position** (5 C.F.R. § 2635.702)

   a. Inducement or coercion of benefits (5 C.F.R. § 2635.702(a)).
   b. Appearance of a governmental sanction (5 C.F.R. § 2635.702(b))
   c. Endorsements (5 C.F.R. § 2635.702(c)) (see discussion under pitfalls)
   d. Performance of official duties affecting a private interest (5 C.F.R. §2635.702(d))

5. **Use of nonpublic information** – employees shall not allow the improper use of nonpublic information to further their own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure. (5 C.F.R. §2635.703)

   a. Prohibition (5 C.F.R. §2635.703(a))
   b. Definition of nonpublic information (5 C.F.R. §2635.703(b))

6. **Fundraising in an official capacity** – An employee may participate in fundraising in an official capacity if, in accordance with statute, Executive Order, regulation or otherwise as determined by the agency, he is authorized to engage in fundraising activity as part of his official duties. (5 C.F.R. §§2635. 808(b))

7. **Gifts to Agency** - Check whether your Agency has Gift Acceptance Authority for unsolicited offers of products, services, the product if the "gift" was unsolicited.

C. PERSONAL USE: Outside Activities (5 C.F.R. §§ 2635.801-809)

1. **Prohibition against assisting in the prosecution of claims against the Government or acting as an agent or attorney before the Governmen**t (18 U.S.C. §§ 203 and 205)

2. **Outside employment or activity cannot conflict with employee's official duties** (5 C.F.R. §2635.802)

   ▪ Writing a private blog or video sharing which conflicts with an employee's official position can create a problem, but must be also weighed against an employee's 1st Amendment right.[1]
   ▪ Consider availability of remedial action. Generally, there are few employment law avenues to reach beyond official action, and discipline an employee for activities in their personal capacity.

3. **Prior approval to engage in outside employment or activities** (5 C.F.R. § 2635.803) Check for any supplemental regulations requiring prior approval. E.g., EPA 5 C.F.R. § 6401.103; DoD 5 C.F.R. § 3601.107.

4. **Compensation for teaching, speaking, or writing** – With certain exceptions, employees generally shall not receive compensation from any source other than Government for teaching, speaking, or writing that relates to the employees' official duties. (5 C.F.R. §§2635.807(a))

5. **Reference to official position** – Employees may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking, or writing, provided that his title or position is given no more prominence than other significant biographical details. (5 C.F.R. §§2635.807(b)(1)) Applies to outside employment and outside activities (5 C.F.R. §§2635.807(b)) *See also OGE Advisory Opinion 10 x 1 at http://www.usoge.gov/ethics_guidance/opinons/advop_files/2010/10x1.pdf*

6. **Fundraising in a personal capacity** – Employees may engage in fundraising in their personal capacities provided that they do not personally solicit funds or other support from a subordinate or from any person known to be a prohibited source. (5 C.F.R. §§2635.808(c))

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[1] Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563 (1968).

III. <u>OTHER PITFALLS/LESSONS LEARNED</u>:

    A. Tips for Using Web 2.0/Social Media Tools

        1. PURPOSE: Ask yourself, why use social media? How does it relate to the agency's mission? There must be an identified mission need to expend appropriations towards this effort.

        2. SELECTION: How do you select a tool? Must be impartial when selecting a social media tool – Approach all equivalent, similar parties.

            ▪ Where appropriated funds are not expended there are no Federal Acquisition Regulation requirements.

            <u>E.g.</u>, If you want to post photographs, you should approach all available providers, not just Flickr or Picasa.

            Best Practice(BP): Consider including on your website a comment area to allow responders to identify other third party sites or new forms of communications tools.

    B. Practical Tips

        1. Terms of Service Agreements

            a. GSA has negotiated Government-wide terms of service with several social media providers and is making those services/products available for agency use at www.apps.gov/cloud/advantage/main/start_page.do

            b. Alternatively, agencies must negotiate the terms of service in accordance with government-wide rules and agency-specific restrictions.

            c. Lessons Learned:

                i. Most social media agreements are product licenses to permit public use free of charge, where income is derived from selling advertising space/resources.

                ii. Negotiations for terms which change the product could result in a Contract or a Gift.

                iii. A Contract would implicate the Federal Acquisition Regulation (FAR 48 C.F.R) and would require competition or sole source authority as per the FAR.

                iv. Agencies with gift acceptance authority may be permitted to accept unsolicited gifts from terms of service agreements/negotiations.

d. Use of Agency Name/Seal – Terms of service agreements usually include a clause which permits use of the agency's name/seal for commercial purposes, which may raise improper endorsement issues.

  i. Factual statements are permissible. Limit agency use of the agency's name/seal to factual statement—that it is a service user
  ii. Lessons Learned: Preferably, include an express provision stating that the company may not represent or imply that the Government endorses the product.

2. Setting Up a Site

a. Include link to official government site. Might be preferable to re-direct users to your official government site for dissemination of official information to clearly delineate where official/authorized information can be received as opposed to social media interaction.

b. Include a disclaimer or explanation on the social media site, like:

    We are providing the following links to FEMA's presence on other third party sites for your reference. FEMA does not endorse any non-government websites, companies or applications.

c. Implement a comprehensive Comment Policy -
  i. Moderate/monitor comments
  ii. Include a clear statement of policy regarding what comments will be removed.

d. Branding – Consider implementing agency branding to assist with validation of information, and protect the agency seal. This is the best way to create uniformity/recognition for the agency.

e. Avoid Links to Third Party Site, Graphics or Trademarks – it raises concerns of improper endorsements. If they must be included, consider adding a bumper or similar style disclaimer, like:

    "You are now exiting the Federal Emergency Management Agency (FEMA) web site…and entering the site: www.youtube.com/fema. We have provided a link to this site because it has information that may be of interest to our viewers. FEMA does not necessarily endorse the views expressed or the facts presented on this site. FEMA does not endorse *any commercial products* that may be advertised or on this site. The FEMA *Privacy Policy* does not apply on this site. Please check the site for its Privacy Notice. To easily return, make sure you have added www.fema.gov as a Bookmark or Favorite."

     f. On official website, beware of raising concerns about impartiality in listing of social media tools/share software. Consider listing alphabetically.

C. **Other Legal Considerations:**

    a. **The Anti-Lobbying Act** (18 U.S.C. 1913)

- Prohibits the use of appropriated funds for indirect lobbying when federal employees are on duty
- Cannot make explicit statements asking the public to contact members of Congress in support of or in opposition to a legislative proposal

    2. **The Hatch Act** (5 USC §§ 7321-7326)

Official Restrictions
- Regulates the political activities of all federal employees in the Executive Branch of the Federal Government
- Political Activity is activity directed toward the success or failure of a political party, a candidate for partisan political office, or a partisan political group."

Personal Restrictions
- May not solicit, accept or receive political contributions in general.
- May not permit the use of one's name or title as a sponsor or host of a political fundraiser.

    3. Records Management – How long do the social media interactions need to be retained?
    4. Privacy Act, FOIA, and Freedom of Speech
    5. Contractual Issues
    6. FACA - Beware of interaction that triggers the Federal Advisory Committee Act. E.g., an agency seeking a consensus from a website to formulate a policy position.
    7. Compliance with Section 508 of the Rehabilitation Act
    8. Compliance with EO 13166 on Limited English Proficiency

F. Other Tips & Issues To Consider

    1. Consider whether you have the resources to maintain, monitor, and administer the social media tools under consideration
    2. Identify the areas where you need a point of contact.
    3. Establish a working group to develop Web 2.0 Strategy/Policy Creation/Interagency cooperation includes all relevant agency POCs, such as:

- Ethics & other legal
- Public Affairs
- Information Technology
- IT Security
- Records Management
- Management
- Program Offices

4. Make sure the POCs use the technology before signing off on any web 2.0 technology
5. Set up a personal account and play with the applications.
6. Identify the issues and develop solutions
7. Be creative in your solutions – think outside of the box.
8. Develop employee training

G. Best Practices & Final Lessons Learned:

1. ***Learn more*** because it's happening, whether you "link in" or not.

2. Avoid blurring distinctions between official and personal use

3. Treat it the same as all other government equipment and communications – the Federal rules apply!

4. The law does not address this type of technology; agencies should act in the "spirit" of the law.

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APPENDIX A

DEFINITIONS/EXAMPLES OF SOCIAL MEDIA

1. Cloud Computing - Use and access of multiple server-based computational resources via a digital network (e.g., internet). Cloud users access the server resources using a computer, netbook, pad computer, smart phone, or other device. In cloud computing, applications are provided and managed by the cloud server and data is stored remotely. Users do not download and install applications on their own device or computer; all processing and storage is maintained by the cloud server. The data on the Cloud can move between servers based on the amount of data traffic. The user never really knows where the data is hosted; it could be in California one day and India the next.

2. Crowd Sourcing – Where data is mashed together on a map to allow users to visually see the location of different sources of information.

3. Blogs – Short for "web log" is a type of website, usually maintained by a single individual/entity with regular entries of commentary, descriptions of events, or other material such as graphics or video. Entries are commonly displayed in reverse-chronological order, and usually with a particular topic or area of concentration.

4. Mashups - is a web page or application that combines data or functionality from two or more external sources to create a new service. The term mashup is primarily used to describe a *remix* of digital data.

5. Mobile Applications or Apps - Mobile Apps are small applications on your mobile device that either connect to specific content or run an application such as a game, video player, or word processing software. E.g. http://apps.usa.gov/.

6. Mobile Friendly Websites - Web sites that provide content and functionality without clutter, and should be easily viewable in a mobile device (i.e. wireless PDA, smartphone, cell phone, etc.), as long as the mobile device is capable of viewing Web sites. E.g., m.fema.gov.

7. Podcasting - is a series of digital media files (either audio or video) that are released episodically and downloaded through web syndication. The mode of delivery differentiates podcasting from other means of accessing media files over the internet, such as direct download, or streaming webcasting (webinars). A list of all the audio or video files currently associated with a given series is maintained centrally on the distributor's server as a web feed, and the listener or viewer employs special client application software that can access this web feed, check it for updates, and download any new files in the series. This process can be automated so that new files are downloaded automatically. Files are stored locally on the user's computer or other device ready for offline use, giving simple and convenient access to episodic content.

8. RSS – (short for "Really Simple Syndication") is a web feed format, which proactively pushes out updated to such social media sites—such as blog entries, news headlines, audio,

and video—in a standardized format. An RSS document includes full or summarized text. Web feeds benefit the public as a form of automatic syndication. They benefit readers who want to subscribe to timely updates from favored websites or to aggregate feeds from many sites into one place.

9. <u>Social Networking</u> – Is the act of building social networks or relations among people, e.g., who share interests and/or activities. A social network service essentially consists of a representation of each user (often a profile), his/her social links, and a variety of additional services. Most social network services are web based and provide means for users to interact over the internet, such as e-mail and instant messaging. Although online communities (LinkedIn, Facebook, MySpace etc) services are sometimes considered as a social network service in a broader sense, social network usually means an individual-centered service whereas online community services are group-centered.

10. <u>Video/Photo Sharing</u> – These online "social media" avenues permit users to keep videos/photos safe, organized and sharable in a web setting. E.g., Flickr, Shutterfly

11. <u>Webinars</u> – An interactive seminar conducted via the world-wide web. Usually a live presentation, it happens in real time as users participate through chats rooms, sharing audio and visual media file.

12. <u>Widgets</u> - A widget is a stand-alone application that can be embedded into third party sites by any user on a page where they have rights of authorship (e.g., a webpage, blog, or profile on a social media site). Widgets are fun, engaging, and useful applications that allow users to turn personal content into dynamic web apps that can be shared on just about any website. E.g., a "Weather Report Widget" could report today's weather by accessing data from the Weather Channel, it could even be sponsored by the Weather Channel. Should you want to put that widget on your own Facebook profile, you could do this by copying and pasting the embed code into your profile on Facebook.

13. <u>Wikis</u> - is a website that allows the easy creation and editing of any number of interlinked web pages via a web browser. Wikis are typically powered by wiki software and are often used to create collaborative websites, to power community websites, for personal note taking, in corporate intranets, and in knowledge management systems. E.g., Wikipedia.

APPENDIX B

OTHER GOVERNMENT REFERENCE MATERIAL

WEBCONTENT.GOV
Social Media and Web 2.0 in Government site:
http://www.usa.gov/webcontent/technology/other_tech.shtml

DEPARTMENT OF DEFENSE

Directive-Type Memorandum (DTM) 09-026 - Responsible and Effective Use of Internet-based Capabilities http://www.dtic.mil/whs/directives/corres/pdf/DTM-09-026.pdf

AIR FORCE
Social Media site: http://www.af.mil/socialmedia.asp

Publication - Air Force & Social Media http://www.af.mil/shared/media/document/AFD-091210-043.pdf

ARMY
Social Media site http://www.army.mil/media/socialmedia/

NAVY
Social Media site: http://www.chinfo.navy.mil/socialmedia.html

Navy Command Social Media Handbook, Fall 2010:
https://www.chinfo.navy.mil/socialmedia/Navy_Command_Social_Media_Handbook-Fall2010_print.pdf

DEPRTMENT OF STATE
Social Media site: http://www.state.gov/media/

DEPARTMENT OF HOMELAND SECURITY
Social Media site: http://www.dhs.gov/xabout/gc_1238684422624.shtm

FEMA
Social Media site: http://www.fema.gov/news/newsrelease.fema?id=49302

ENVIRONMENTAL PROTECTION AGECNY
Social Media site: http://www.epa.gov/epahome/socialmedia.html

GENERAL SERVICES ADMINISTRATION
GSA Order - GSA Social Media Policy
http://www.gsa.gov/graphics/staffoffices/socialmediapolicy.pdf