March 11, 2020

OMB Desk Officer, Department of Homeland Security
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Via Email: dhsdeskofficer@omb.eop.gov


Dear Sir/Madam:

The American Bar Association ("ABA") submits the following comments in response to Docket No. DHS-2019-0044, the Notice of proposed rulemaking on Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms, 85 Fed. Reg. 7573 (Feb. 10, 2020) (the "Proposed Rule").

The ABA is the largest voluntary association of lawyers and legal professionals in the world. The ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, and works to build public understanding around the world of the importance of the rule of law. The ABA’s Section of Civil Rights and Social Justice raises and addresses civil rights and civil liberties issues, including those arising in the national security context, and seeks to ensure that protection of individual rights remains a focus of legal and policy decisions.

The ABA has long supported the establishment of laws, policies, and practices that ensure the free flow of information and ideas, especially with respect to individuals invited to the United States to speak or otherwise participate in the exchange of ideas. The Proposed Rule threatens this free exchange of ideas across borders and within the United States to the extent it deters non-U.S. citizens from applying to visit, study, and work in the United States and chills the online expression and association of those who do apply.

The Proposed Rule would require applicants for a wide variety of different travel and immigration benefits to disclose all social media identifiers they have used on twenty
specified platforms during the five years preceding their application. The Proposed Rule would apply to, among others, individuals already residing in the United States with lawful immigration status, such as Legal Permanent Residents seeking to become naturalized U.S. citizens (Form N-400), remove conditions on their residence (Form I-751), or travel (Form I-131); students seeking to adjust their status to allow them to pursue employment in the United States (Form I-485); and refugees seeking asylum in the United States (Form I-589). The Department of Homeland Security (“DHS”) estimates that the Proposed Rule will impact more than 33 million individuals each year.

Furthermore, DHS has made clear that this requirement is mandatory, explaining that “the applicant will be unable to submit the online application if they do not provide a response to the mandatory social media field,” though “the applicant may proceed if they answer none or other.” The Proposed Rule makes no exception for pseudonymous social media identifiers, which individuals may use to maintain their anonymity while speaking out on sensitive or controversial topics online.

The ABA notes the many concerns that a number of other commentators have expressed regarding the Proposed Rule’s effect on freedom of expression and association in the United States. As the Supreme Court has observed, social media platforms are now among the “most important places . . . for the exchange of views.” Individuals from around the world rely on social media to share information and opinions, maintain contact with family and friends, pursue educational and professional opportunities, and engage in social, religious, and political activism.

Requiring individuals seeking travel or immigration benefits, including those already in our country, to register their social media identifiers with the government, however, may chill their online speech and deter many from applying for those benefits in the first place. In many cases, review of an individual’s social media activity—even if limited to their publicly available social media activity—will enable the government to develop a granular picture of their social, religious, and political views; delineate their personal, professional, political and other networks; and track their speech and associations not only in real time, but also over time. This government intrusion into individuals’ privacy may deter them from exposing as much information online as they otherwise would have. Moreover, the significant risk that
government officials will misinterpret that information—a risk exacerbated by language and cultural differences—may further deter individuals from freely expressing themselves online, for fear that they may inadvertently doom their chances of obtaining the travel or immigration benefits they seek.

These chilling effects may be even more pronounced for individuals who use pseudonymous social media identifiers to maintain anonymity online. By requiring applicants to disclose all social media identifiers used on the listed platforms, including pseudonymous identifiers, the Proposed Rule would impact their ability to engage in anonymous speech online. Online anonymity can be vital to individuals fearing reprisals by state or private actors outside the United States, including political activists, members of ethnic or religious minorities, or persons identifying as lesbian, gay, bisexual or transgender (LGBT). The Proposed Rule would effectively compel these individuals to surrender the protection afforded by online anonymity in return for the opportunity to apply for travel or immigration benefits from the United States.

DHS’s disclaimer that “[n]o assurance of confidentiality is provided” underscores the risk that applicants’ social media identifiers may be shared with foreign governments or other third parties. The Proposed Rule indicates that applicants’ social media information will be stored in a consolidated database to which numerous agencies have access for a range of purposes beyond travel and immigration vetting and national security purposes, and that the information may be subject to existing information-sharing agreements with foreign governments.

Finally, these chilling effects will ripple through the individuals’ broader communities, likely impacting millions of U.S. citizens. First, members of those communities will be deprived of speech they wish to hear from applicants who no longer feel free to speak openly online, and from individuals who choose not to apply for travel benefits to the United States under the condition that they subject their social media activity to government surveillance. Second, mindful of the inherently interactive nature of social media, members of those communities

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12 Id. at 7476–77.
may self-censor their own speech on social media for fear that it will be swept under government surveillance of their online contacts’ social media activity.

DHS asserts that the Proposed Rule is necessary to comply with Section 5 of the Executive Order (E.O.) 13780,14 which calls for the adoption of standards and procedures enabling DHS “to assess an [applicant]’s eligibility to travel to or be admitted to the United States or to receive an immigration-related benefit from DHS.”15 As other commenters have explained at greater length,16 however, social media surveillance of the kind the Proposed Rule would impose may be an unreliable means of assessing individuals’ eligibility for travel or immigration benefits or any risks they may pose to national security. Social media information is, as noted above, highly susceptible to misinterpretation.17 Language and cultural differences increase the likelihood of misinterpretation, as do tonal differences between speech on social media and speech in other contexts.18

As DHS and its components have themselves concluded, numerous pilot programs conducted by component agencies failed to demonstrate that social media surveillance is an effective vetting tool. From one such program, DHS component U.S. Citizenship and Immigration Services (“USCIS”) reported that “the information in [social media] accounts did not yield clear, articulable links to national security concerns, even for those applicants who were found to pose a potential national security threat based on other security screening results.”19 The Proposed Rule cites to no evidence suggesting that social media surveillance is, to the contrary, an effective means, in and of itself, of identifying national security threats.

To the extent DHS proposes to use manual methods to review applicants’ social media information, such review would be labor intensive and inefficient.20 The manual review of the social media activity of more than 33 million applicants each year, often across multiple different social media platforms and in different languages, would require considerable amounts of time and resources that would be better spent examining submissions and interviewing individuals whose applications raise questions or concerns for reviewing officers. DHS may instead seek to employ automated review tools, but studies have shown these tools to be even more unreliable in parsing social media information, often

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17 Patel, et al., supra note 10; see also, e.g., Sara Robinson, When a Facebook Like Lands You in Jail, Brennan Ctr. for Justice (July 6, 2018), https://perma.cc/H9PH-PSEV (reporting arrest and prosecution of teenager based on “likes” and group photos on his Facebook page).
20 See id. at 183–84 (“Having [USCIS] personnel dedicated to mass social media screening diverts them away from conducting the more targeted enhanced vetting they are well trained and equipped to do.” Id. at 184.).
incorporating and sometimes magnifying programmers’ racial, ethnic, cultural, and other biases. In any case, persons with harmful intentions trying to enter the United States are not likely to self-report social media identifiers that reveal questionable conduct or intent to the government.

The Proposed Rule may also adversely affect members of the legal profession. For example, it may deter lawyers from seeking educational and professional opportunities in the United States, and it may chill the online speech of those who decide to pursue those opportunities. The U.S. legal community as a whole may suffer from the lack of important voices, whether online or in our schools, law firms, courtrooms, and other institutions.

The ABA has repeatedly emphasized that the government must address the immigration challenges facing the United States by means that are fair and effective and that uphold our constitutional principles. The government should abandon means that violate those principles, especially those that are not demonstratively effective in achieving its immigration enforcement and national security ends, such as those included in this Proposed Rule. If DHS persists in pursuing the collection of social media information as proposed, then clearly articulated strict use limitations on the data should be imposed and data retention periods should be as short as possible to help mitigate some of the anticipated harms to privacy, free speech, and other basic civil liberties.

Thank you for considering our views. If you have any questions or need additional information, please contact Kristi Gaines in the ABA Governmental Affairs Office at 202-662-1763 or kristi.gaines@americanbar.org.

Sincerely,

Judy Perry Martinez
President