



USAID
EXECUTIVE SECRETARIAT

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September 21, 2007

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United States Agency for International Development
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Via email: jdenale@usaid.gov

RE: Response to Federal Register /Vol. 72, No. 140/Monday, July 23, 2007
Notice of Public Information Collections Being Reviewed by the U.S. Agency for
International Development

Sir:

This letter is in response to the above-referenced Federal Register Notice published by the United States Agency for International Development ("USAID"), whereby USAID is requesting comments on a new Collection of Information system ("Proposed Collection"), called the "Partner Vetting System" ("PVS"), as required by the Paperwork Reduction Act for 1995 ("The PRA"). This letter incorporates by reference the August 22, 2007 and September 18, 2007 comments of Catholic Relief Services ("CRS")¹.

Catholic Relief Services. CRS was founded in 1943 by the Catholic Bishops of the United States. Our mission is to assist the poor and disadvantaged, leveraging the teachings of the Gospel of Jesus Christ to alleviate human suffering, promote development of all people, and to foster charity and justice throughout the world. CRS programs achieve this without regard to creed, race, or nationality, and touch the lives of more than 80 million people per year, on five continents, in 99 countries around the world.

CRS assists with emergency disaster relief efforts, health care, agricultural needs, education, HIV/AIDS, small enterprise development, and the needs of the most vulnerable peoples (orphans, displaced persons, the disabled and terminally ill). We aid the poor by first providing direct assistance where needed, then encouraging people to help with their own development. Together, these approaches foster secure, productive, just communities that enable people to realize their potential. We have approximately 400 employees at headquarters in the U.S., and 4,800 worldwide. Approximately 41% of our programs were funded by USAID in FY 2006.

¹ The comments were submitted in response to Federal Register, Vol. 72, No. 139, July 20, 2007, pages 39768-39770, and Federal Register, Vol. 72, No. 139, July 20, 2007, pages 39768-39770.

USAID HAS NOT PROVIDED KEY INFORMATION TO ALLOW FOR MEANINGFUL PUBLIC COMMENT

In accordance with Paperwork Reduction Act of 1995 regulations, 5 CFR 1320.8(d), USAID must:

"provide 60-Day notice in the Federal Register, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information, to solicit comment to

(1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

While the referenced Federal Register Notice might initially appear to meet the above requirements, by omitting key documents and information from the Notice, the public is unfairly constrained in its ability to provide complete and meaningful comment. Most notably, USAID has not made available the data collection form that will be used to collect the information, nor has USAID provided the methodology and assumptions it used to determine the annual burden on respondents. CRS thus offers the following response focusing on points (1) and (2) above, conceding that any further analysis is limited by the ambiguities present in the PVS description as provided by USAID, as well as by the absence of key information.

(1) Necessity and Practical Utility

USAID has not established that the PVS' Proposed Collection is 'necessary' for the proper performance of the functions of the agency. As stated in CRS' previous comment letters, USAID has offered no authority for the establishment of the PVS, nor has it justified why it must claim extensive law enforcement exemptions from the Privacy Act, since USAID is not a law enforcement agency. Nor has USAID demonstrated why such a broad and unfocused collection of information is necessary as proposed in the PVS. The Notice simply acknowledges the "...collection of personally identifiable information..." USAID therefore has not established that the Proposed Collection is "necessary for the proper performance" of the functions of the agency.

USAID also has not established that the Proposed Collection will have "practical utility," defined in the PRA as "the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects ... in a useful and timely fashion." (See 5 CFR 1320.3(l)). In its series of Federal Register notices, USAID has not established that the Proposed Collection will have practical utility beyond the safeguards already in place within the recipient community per U.S. law. USAID also has not demonstrated that it is able to process the information it collects, or that it is able to reliably use the information collected, given noted errors in the government's watch lists.²

For several years now, with every funding award, the recipient community has certified to USAID compliance with U.S. law prohibiting the provision of resources to terrorist groups. This certification also requires that PVOs take "all reasonable steps to ensure [the PVO] does not and will not knowingly provide, material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates, or participates in terrorist acts", including the vetting of individuals and entities against US Government and United Nations lists of ineligible recipients. Certifiers are also obligated to "implement reasonable monitoring and oversight procedures to safeguard against assistance being diverted to support terrorist activity."³ The obligation to ensure that material support is not knowingly provided to terrorist groups is further flowed down in any sub-agreement signed under the prime award. These become auditable documents and funding can be unilaterally terminated by USAID if these provisions are violated. Further, U.S. entities are already obligated to comply with the USA PATRIOT Act and regulations administered by the U.S. Department of Treasury/Office of Foreign Assets Control. The PVS would impose duplicative compliance procedures and therefore, serve no "practical utility".

The effectiveness of the compliance measures already in place are evident in USAID's own records. In its most recent semi-annual report to Congress, which covers October 2006 to March 2007, USAID's inspector general indicated that, "OIG oversight activities during this period did not identify any instances where terrorist organizations received USAID funds."⁴ A survey of past reports revealed the same findings in the previous five reports, covering audits back to April 2004⁵. As such, the PVS would not add any noticeable improvement to the performance of USAID's functions, nor is there a clear case for "practical utility" in adding the significant intrusion and burden proposed under the auspices of the PVS.

² CRS's comments to the July 20, 2007 Federal Register Notice regarding Exemptions to the Privacy Act explores in depth the results of the September 2007 Department of Justice Office of Inspector General "Follow-Up Audit of the Terrorist Screening Center" (TSC) (Audit Report 07-41), wherein it was determined among other negative details that the TSC had not done enough to ensure that the information in that database was complete and accurate." (pg. i)

³ U.S. Agency for International Development, "Certifications, Assurances, and Other Statements of the Recipient (May 2006)", Revision Date 07/25/07, www.usaid.gov/policy/ads/300/303sad.pdf, Accessed 20 September 2007

⁴ U.S. Agency for International Development, "Office of Inspector General Semi-annual Report to the Congress," October 1, 2006 – March 31, 2007, www.usaid.gov/oig/public/semiann/sarc0307.pdf, Accessed 20 September 2007

⁵ U.S. Agency for International Development, "Semi-annual Reports to Congress for USAID, ADF and IAF," <http://www.usaid.gov/oig/public/semiann/semiannual1.htm>, Accessed 20 September 2007

(2) Burden

USAID DOES NOT FULLY UNDERSTAND THE BURDEN ON ITS PARTNERS

"Burden" is defined in the PRA as "the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency," (See 5 CFR 1320.3(b)). The definition goes on to encompass the development, installation and utilization of technology and systems for collecting, validating, and verifying information; for processing and maintaining information; and for disclosing and providing information; adjustments to compliance measures; training of personnel; searching data sources; and completing and reviewing the collection of information.

In its Federal Register Notice, USAID states its intent "to collect information from approximately 2000 individuals and/or officers of non-governmental organizations (NGOs) who apply for USAID contracts, grants, cooperative agreements, other funding from USAID, or who apply for registration with USAID as Private Voluntary Organizations (PVO)." Through correspondence with CRS staff, USAID has clarified that "[t]he number represents the estimated number of individuals per year during the pilot phase in West Bank and Gaza."⁶ On its face, this estimation is inaccurate and flawed for a number of reasons. First, without this additional information provided separate from the Notice, no member of the public would logically understand that this estimation refers only to one location, not to the other locations where USAID works worldwide. Nor has USAID described the methodology it used to arrive at the estimate. Therefore, the Notice is misleading and ineffective for soliciting germane public comments.

Second, if USAID had understood the full depth of the definition of "burden", it seems incomprehensible that they would have reached the quoted annual burden estimate of 15 minutes per response (2000 responses/500 hours). It seems USAID only took into account the time it would take to complete and hand over an apparently very brief collection form. USAID did not take into account that the new PVS will require modifications to internal systems to ensure ongoing compliance; that it would require ongoing communications between operational staff and directors to ensure personal information is up-to-date and ready to submit multiple times per year; that it would require ongoing communication with USAID to keep personnel lists current per award; that it would require new information security protocols to ensure this depth of personal information is not accessed and used illegally against these professionals. USAID's estimates do not reflect the total burden, cost and impact of this new PVS on the recipient community.

Finally, the quoted number of 2000 individuals is not an accurate estimation for one year of activity in one large USAID program (West Bank and Gaza). Using one of the multiple data sets provided by USAID in the PVS Federal Register notices, the PVS shall vet individuals who are directors, officers⁷ or otherwise employed by NGOs, individuals who apply for personal service contracts or for other contracts, individuals or organizations who attempt to obtain other USAID assistance or benefits, and officers or other officials of NGOs

⁶ Beverly Johnson on behalf of "the appropriate USAID staff", Electronic Mail Message, 19 September 2007

⁷ In another definition provided by USAID, principal officers may include directors, program managers, members of governing bodies, or other individuals with operational control of the organization or those individuals who administer funds

applying for registration with USAID as PVOs. According to their web site, USAID West Bank and Gaza funds upwards of 29 different large "Development Partners", not including United Nations entities. Employing a conservative estimate of 40 individuals per organization or contractor, we start with 1,160 persons vetted just for those 29 awards. This number jumps exponentially if, as is to be expected with such undefined parameters, we begin to incorporate vetting of other applicant organizations who are considered for award, of organizations applying for registration, of personal service contract applicants, and of replacement directors and staff, as well as duplicated vetting due to a lack of coordination in the information collection chain.

Given the scant and murky description of how the PVS would be implemented and the lack of clarity regarding when and how vetting would occur, CRS speculates on a burden estimate as follows: If vetting is conducted for each award, and assuming that an award covers only one country program, CRS estimates that roughly 43 CRS individuals⁸ could be required to supply information or could otherwise be impacted per application and, with roughly 65 applications for USAID funding per year, this totals approximately 2,795 individuals for one organization like CRS annually. In addition, an unidentified number of CRS staff could be vetted at the time of its annual registration with USAID, and CRS may need to notify USAID of staff turnover in the positions identified for vetting. Easily, for one organization, the individuals vetted per year reaches more than 3,000.

While not explicitly included in the definition of "burden", it is critical to acknowledge and consider the prospective collateral burdens resulting from the PVS. These would include the possible loss of Board membership, possible loss of employees, loss of partnerships with organizations due to any new requirements, time and effort spent dealing with security and other concerns of employees, loss of time spent dealing with false hits, delay in delivery of services with the resultant beneficiary impact, a procurement process that is not transparent nor based on merit, and the possibility of searching for other funding sources as needed.

USAID HAS OVERLOOKED ITS RESPONSIBILITIES UNDER EXECUTIVE ORDER 12866

The Regulatory Planning and Review process laid out in Executive Order 12866 is driven in large part by federal-level desire for a regulatory system that is effective, consistent, sensible, and understandable without imposing unacceptable or unreasonable costs on society. It aims to enhance planning and coordination, to restore the integrity and legitimacy of regulatory review and oversight, and to make the process more accessible to the public. The result of such a reformed system would be a regulatory system that places a fair burden upon those who must comply.

However, in the hasty release of the proposed PVS, USAID has glossed over EO 12866, and has failed to propose regulations tailored to meet its objectives while also imposing the least burden on society. Instead, USAID has pushed an inordinate burden upon those respondents who must comply. A handful of the clauses largely ignored by the PVS include:

⁸ This estimate consists of 22 CRS Board Members, officers, and regional and field staff, all of whom may fit within USAID's definition of covered individuals.

<p>Sect 1(b)(6) Each agency shall assess the costs and benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits justify its costs.</p>	<p>The costs in this case include not only the paperwork and systems burdens, but also the infringement on privacy; the blurred distinctions between an organization USAID funds (and with which it has a legal relationship), and the employees of that organization (with which USAID does not have a direct relationship); and the potential for personal information to be lost or misused. True benefit, above and beyond what is already done within the recipient community, has not been demonstrated.</p>
<p>Sect 1(b)(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic and other information concerning the need for, and consequences of the intended regulation.</p>	<p>There has been no data produced to suggest that additional vetting at USAID's level would better ensure that funds are not provided to entities supporting terrorists. Conversely, the consequences of the intended regulation are much clearer.</p>
<p>Sect 1(b)(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.</p>	<p>U.S. entities are already obliged to comply with the USA PATRIOT Act and with regulations administered by the Office of Foreign Assets Control. The functions needed to ensure that funding is not provided to entities supporting terrorists are best placed within the recipient community.</p>
<p>Sect 1(b)(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of different sizes, and other entities, consistent with obtaining the regulatory objectives.</p>	<p>By its very estimation of the 500 annual hours to the 2000 annual responses, USAID has demonstrated that it does not fully comprehend the burden to be placed on the recipient community. No alternatives have been discussed to minimize the burden on respondents.</p>
<p>Sect 1(b)(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.</p>	<p>The three Federal Register notices are contradictory within themselves regarding who shall be covered, when and how information shall be collected, and how information will be managed. Uncertainty abounds in an area of individual privacy, which risks considerable litigation.</p>
<p>Sect 6(a) Each agency shall provide OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions. Those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action. OIRA may waive review of any planned regulatory action.</p>	<p>According to the Unified Regulatory Agenda made available to the public at www.reginfo.gov/public/do/eAgendaMain, USAID apparently has not submitted any aspect of the PVS to OIRA for regulatory review, yet the Agency has submitted for review various regulatory actions that would have far less impact on the procurement and assistance process.</p>

<p>For each matter identified as a significant regulatory action, the issuing agency shall provide to OIRA the text, cost benefit analysis of the rule, and cost benefit analysis of alternatives, identified by the agencies or the public, and an explanation why the planned regulatory action is preferable.</p> <p>After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall make available to the public the information set forth above; identify in a complete, clear, and simple manner the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.</p>	<p>If somehow in the exchange, OIRA has waived its review rights, this equally presents a gross oversight in the regulatory process. In its 18 September 2007 comments on USAID's proposed Privacy Act exemption for the PVS (RIN 0412-AA61), CRS pointed out that the PVS would in fact constitute a "significant regulatory action" subject to OIRA review, due to the material alterations to the rights and obligations of funding recipients. As such, USAID should make available to the public its cost benefit analysis of the rule and the similar analysis of any alternatives, and divulge how the Proposed Rule may have been modified as a result of OIRA review. However, there is no indication that any of this has even been done prior to issuing the Proposed Rule.</p>
<p>Sect 6(a) Each agency shall provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation.</p>	<p>The recipient community, as the sector to be most burdened by the PVS, had no opportunity to provide input to USAID prior to the issuance of the Proposed Rule.</p>

USAID SHOULD WITHDRAW THE NOTICES AND CONSIDER ALL CONSEQUENCES OF THE PVS AFTER DIALOGUE WITH THE PVO COMMUNITY AND OTHERS

Many of the details on the implementation of the PVS have not been communicated in the Federal Register notices⁹, and thus remain unclear, hindering full and accurate public comment on the PVS and the burden to be expected with its implementation. The authority of USAID to adopt the PVS, and to burden the recipient community without practical utility has not been established. USAID also has not substantiated that the massive data collection efforts as proposed with the PVS is the only reasonable way for USAID to accomplish its stated purpose. It also has not established that the devotion of substantial resources both by the government and by hundreds of organizations and thousands of individuals will produce focused returns that justify the establishment of the PVS.

⁹ Most specifically and importantly, the following have not been provided: the data collection form; identification of when and how data will be vetted; the exact watch lists to be consulted; specifics on which federal agencies will receive the data; a description of how the data collected will be managed (e.g. record retention periods; data security measures); whether funding will be denied due to any matches; and how USAID will notify applicants.

Coordinator for Counterterrorism
United States Agency for International Development
September 21, 2007
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In sum, USAID should withdraw the Federal Register Notices and engage in a carefully-considered process that includes a transparent cost/benefit analysis and consultation with the PVO community.

Sincerely,



Kenneth Hackett
President, CRS

cc: Henrietta Fore, Acting Foreign Assistance Director (in hard copy)
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