



January 4, 2008

Mr. David Rostker
Desk Officer
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

BY ELECTRONIC MAIL TO: David_Rostker@omb.eop.gov

Dear Mr. Rostker:

This is a letter of comment in response to the Notice of Public Information Collection Requirements originally published on October 2, 2007 in the *Federal Register* (72 FR 56041-4) and recently submitted to OMB for review (FR Doc. 07-5935 Filed 12-4-07).

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.

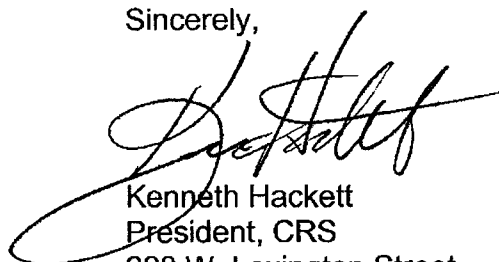
CRS submitted four letters to USAID regarding the proposed "Partner Vetting System" ("PVS"). The letters reflect CRS' position on the PVS, and therefore also on the proposed "Partner Information Form," and the same comment letters hold true for OMB 0412-NEW:

- August 22, 2007 CRS letter in response to a *Federal Register* notice published July 17, 2007 proposing the Partner Vetting System;
- September 18, 2007 CRS letter in response to a *Federal Register* notice published July 20, 2007, concerning exemptions from numerous statutory protections afforded to individuals under the Privacy Act of 1974;
- September 21, 2007 CRS letter in response to a *Federal Register* notice published July 23, 2007 concerning public information collection;
- December 3, 2007 CRS letter in response to a *Federal Register* notice published October 2, 2007 concerning the public information collection form.
(See all four letters, attached.)

CRS' position, as articulated in the incorporated letters referenced above, is that USAID should not make the PVS nor the "Partner Information Form" operational absent meaningful dialogue with the non-profit recipient community and a narrowing of the system to address privacy and operating concerns. Otherwise, the PVS risks undermining the overall purpose of foreign assistance and the necessary community-based framework for delivery of effective foreign assistance. The burden that the PVS and this collection form will place on the non-profit recipient community and its resources is excessive and will significantly undermine their ability to efficiently and effectively fulfill foreign assistance objectives.

CRS hopes that OMB will not support USAID's request for clearance under the Paperwork Reduction Act of 1995, Public Law 104-13.

Sincerely,



Kenneth Hackett
President, CRS
228 W. Lexington Street
Baltimore, MD 21201
(410) 625-2220
khackett@crs.org



228 Lexington Street
Baltimore, Maryland 21201-3443
410.625.2220 · www.crs.org

December 3, 2007

Mr. Jeff Denale
Coordinator for Counterterrorism
Office of Security
United States Agency for International Development
Ronald Reagan Building
1300 Pennsylvania Avenue NW
Washington, DC 20523

BY ELECTRONIC MAIL TO: jdenale@usaid.gov

Dear Mr. Denale:

This is a letter of comment in response to the Notice of Public Information Collection published on October 2, 2007 in the *Federal Register* (72 FR 56041-4) in connection with the proposed "Partner Vetting System".

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.

This is the fourth letter that CRS has submitted to USAID on subjects related to the proposed "Partner Vetting System." The three prior letters reflect CRS' position on the PVS, and therefore also on the proposed "Partner Information

Form,” and are incorporated herein by reference as part of CRS’s comment on *Federal Register Notice 72 FR 56041-4*:

- August 22, 2007 CRS letter in response to a *Federal Register* notice published July 17, 2007 proposing the Partner Vetting System;
- September 18, 2007 CRS letter in response to a *Federal Register* notice published July 20, 2007 proposing to exempt the system from numerous statutory protections afforded to individuals under the Privacy Act of 1974; and
- September 21, 2007 CRS letter in response to a *Federal Register* notice published July 23, 2007 concerning public information collection.
(See all three letters, attached.)

Specifically, the September 21, 2007 CRS letter referenced above reflects comments on the Paperwork Reduction Act analysis regarding necessity/practical utility and the accuracy of burden estimates. and are incorporated into this response letter.

CRS’ position, as articulated in the incorporated letters referenced above, is that USAID should not make PVS nor the “Partner Information Form” operational and should withdraw all Federal Register notices related to the PVS. USAID should engage in a carefully-considered process that includes a transparent cost/benefit analysis and consultation with the PVO community. Many of the details on the implementation of the PVS have not been communicated in any of the four Federal Register notices, and thus remain unclear, hindering full and accurate public comment on the PVS and the burden to be expected with its implementation.

As further described in CRS’ letters referenced above, the authority of USAID to adopt the PVS and to burden the recipient community without demonstrating the practical utility of the PVS has not been established, especially given the existing anti-terrorism procedures already required by USAID. USAID 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 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, especially given the privacy and partnership issues at stake. Moreover, USAID has not supported its claim that such sweeping exemptions from the Privacy Act are necessary. In sum, the PVS risks undermining the overall purpose of foreign assistance and the necessary community-based framework for delivery of effective foreign assistance.

PARTNER INFORMATION FORM DATA ELEMENTS

The following are additional comments regarding the “Partner Information Form,” as first released in 72 FR 56041-4 (October 2, 2007):

- The form does not indicate at what stage of the award or application process data would be collected – would it be collected only after an award is issued? If not, and the data would be required for each application, the burden on PVOs would be exponentially greater.

- Part I. It is unclear whether the information identified in Part I, Questions 1 and 5 is duplicative and relates to the same organization.
 - Question 6 (information on “key individuals associated with the organization”) is not sufficiently defined in the instructions and conflicts with other Federal Register notices regarding the scope of PVS coverage. The phrase “any other person with significant responsibilities for administration of the USG-financed activities or resources” is vague and leaves room for differing interpretations among PVOs and USAID. Accordingly, we assert that Items i, ii, and iv in the instructions for Question 6 would result in open-ended information collection requests that will result in wholesale unevenness in the responses of affected parties. As such, the responses will have little practical utility while imposing significant burden on respondents. Moreover, it is unclear whether the definition of ‘key individual’ includes sub-recipient personnel, which would conflict with the scope of coverage as outlined in Federal Register notice Vol. 72, No. 136 (July 17, 2007) (describing PVS as applying to only prime recipients). Finally, USAID has not explained how the PVS collection efforts would not run afoul of the privacy and data protection laws of other countries or of PVO policies guaranteeing the confidentiality of employee data.
 - 6A. The applicable government has not been defined. Government of residence of individual? Government of nationality of individual? Government of residence of employer of individual? Government of host where funds are being expended?
 - Finally, the form does not clarify whether it is the only information USAID will seek as part of the PVS process, and whether USAID employees’ discretion will be limited to seeking only information required by the form. The Federal Register notices on the PVS (see Federal Register Notice Vol 72, No. 136 (July 17, 2007) seem to indicate that the PVS “includes but is not limited to” the information on the form. (See also CRS letter of August 22, 2007, attached).
- Part II. It would be an undue burden to expect the recipient or grantee to certify due diligence for accuracy of the information provided by a broad range of individuals particularly given the unknown potential scope and undefined nature of “key individuals”.
- Public Burden Statement. “Response” is not defined on the form and therefore it is unclear whether it relates to each organization’s response or response per each individual from whom data is sought. Regardless, it appears that both the estimate regarding the number of responses and the response time is under-estimated. (Please refer to CRS letter of September 21, 2007 describing the burden estimate in more detail).
- Privacy Act Statement. The statement states that the information on ‘the form is used to conduct screenings of individuals and entities as required by applicable U.S. laws.’

We are unaware of any law that specifically requires USAID to conduct the screenings.

- Finally, USAID has not described how forms will be submitted electronically versus in paper form. USAID has not addressed how paper and electronic copies will be securely kept, especially in light of the GAO reports of poor maintenance of such vetting data in the past by USAID, and the significant personal data security breaches by government personnel. (See CRS Letter of August 22, 2007). This raises significant safety and security problems for PVO personnel, particularly in unsafe work areas.

In sum, USAID should not make PVS nor the "Partner Information Form" operational. PVS risks undermining the overall purpose of foreign assistance and the necessary community-based framework for delivery of effective foreign assistance. The burden the PVS and this collection form will place on the non-profit recipient community and its resources is excessive and will undermine their ability to efficiently and effectively fulfill their mission in a foreign operating environment.

Sincerely,



Kenneth Hackett
President, CRS
228 W. Lexington Street
Baltimore, MD 21201
(410) 625-2220
khackett@crs.org

cc: Henrietta Fore, Acting Foreign Assistance Director
Susan Dudley, Administrator OIRA (by email: sdudleyomb.eop.gov)
Art Fraas, Branch Chief, OIRA (by email: afraas@omb.eop.gov)
David Rostker, Desk Officer for USAID, OIRA (by email: drostker@omb.gov)



August 22, 2007

Chief Privacy Officer
BY POSTAL SERVICE AND ELECTRONIC MAIL TO: privacy@usaid.gov
United States Agency for International Development
1300 Pennsylvania Avenue, NW
Office 2.12-003
Washington, DC 20523-2120

Re: Notice, Privacy Act System of Records, *Federal Register*, Vol. 72, No. 136, July 17, 2007, Pages 39041-39044

Sir:

This letter is in response to the above referenced Federal Register Notice published by the United States Agency for International Development ("USAID"), announcing the establishment of a Partner Vetting System ("PVS"), a new system to collect records on non-governmental organization ("NGO") employees, governing body members, and individuals applying for USAID assistance. Given the far-reaching implications of the PVS for NGOs, their employees, and U.S. citizens, Catholic Relief Services ("CRS") urges USAID to withdraw the Federal Register Notice at this time. CRS requests an opportunity for a public dialogue with USAID regarding the proposed rule and its implications, and a rulemaking process that would allow for a meaningful comment period by the NGO community.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 offers assistance without regard to creed, race, or nationality, and CRS touches 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

¹ This Notice (and the two other related Notices on the Privacy Act Exemptions and on the Public Information Collections (Federal Register Notice Vol 72, No. 139 and Vol 72, No. 140)) allows minimal time for comment, provides very limited information about the proposed PVS, and does not offer specifics on the exact data required by the collection form nor the process for its disclosure within the USG. This has prevented a fair opportunity to comment. Therefore, we are only able to give a preliminary response at this time. We will comment more fully at such time as USAID provides the additional information and time needed to do so.

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 63% of our programs are funded through U.S. Government funds.

The PVS Seeks Unlimited Private Information

CRS is sensitive to antiterrorism concerns, but the PVS as currently described provides no limits on the authority of USAID employees to exercise vast discretion to seek unlimited private information on any NGO director or employee, wherever situated, and to make unlimited requests for information on that individual. The PVS would allow USAID to collect information on individuals who work for organizations that seek federal assistance and acquisition funding, such as "directors, program managers, members of governing bodies, or other individuals with operational control of the organization or those individuals that administer funds." Over multiple awards, this represents potentially hundreds or thousands of individuals within just one NGO, without any demonstration that any of these individuals have any plausible ties to terrorism.

The PVS also allows USAID employees to seek potentially unlimited information on any individual. The Federal Register Notice states that "information in this system, ***includes, but is not limited to:*** full name, date and place of birth, government issued identification (including social security number, passport number, or other numbers originated by the government that specifically identifies an individual, current mailing address, telephone and fax numbers, email addresses, country of origin, nationality, citizenship, gender, profession or other employment" (emphasis added).

CRS's policy ensures the confidentiality of employee records. If the PVS were adopted in its current form, it would require CRS to force directors and potentially hundreds of employees to sacrifice disclosure of their personal data, so that CRS could bid on funding to support its development and relief programs. With the PVS, USAID has apparently blurred the distinction between imposing requirements on the ***partner organization--the recipient of the funding***--and imposing requirements on individuals who happen to work for the organization, who are NOT recipients of funding, and who are not entitled to any of its benefits. Forcing employees and volunteer board members -- many of whom are domestic citizens -- to disclose their personal data so that an employer can 'do business' is antithetical to the American way. Such a broad and limitless intrusion on the privacy of so many individuals as proposed in the PVS is entirely unjustified in the Federal Register Notice.²

USAID Has Not Articulated A Need For PVS that Would Mitigate Privacy Concerns

² Moreover, the PVS could potentially force employers to violate the privacy and data protection laws of other countries, and subject employers to potential liability for privacy violations if data is mishandled. This is of special concern given that records collected by USAID will be "...stored in both paper and electronic format" in both USAID HQ and overseas office locations, and given the security lapses in the past few years with respect to volumes of private data by both the private sector and the U.S. government.

The Federal Register Notice announcing the PVS does not state that existing anti-terrorism procedures are inadequate. The Notice states that the PVS will be used to "conduct national security screening" of "individuals and NGOs to ensure that USAID funds do not inadvertently or otherwise provide support to entities or individuals associated with terrorism." In the Notice, USAID acknowledges that it already takes "several steps to ensure USAID funds are not provided to individuals or entities associated with terrorism." The efforts described in the Notice include:

(1) All solicitations, contracts, Annual Program Statements, and Requests for Applications and other documents contain language reminding USAID partners of the laws and Executive Orders prohibiting the provision of resources and support to individuals and organizations associated with terrorism;

(2) All NGO applicants for grants and cooperative agreements are required to submit certifications that they do not provide material support or resources to individuals or entities engaged in terrorist activity; the certification delineates steps for awardees such as vetting against U.S. and U.N. terrorist lists, and developing reasonable monitoring procedures to safeguard against the diversion of assistance to support terrorist activity; and

(3) USAID contracting officers and agreement officers check applicable terrorist listings to ensure that potential contractors, grantees, subcontractors, and sub-grantees are not on these terrorist listings."

Further, by way of its many USAID agreements, CRS knows that USAID grant and cooperative agreements contain an antiterrorism provision reminding recipients of the laws and Executive Orders prohibiting the provision of resources and support to individuals and organizations associated with terrorism, and a requirement that the same provision be included in all prime recipients' subaward documents.

USAID has not established that the existing antiterrorism measures are inadequate, or even that less intrusive alternatives to the PVS have been explored but are unavailable. It also has not demonstrated that NGOs, who are subject to the same antiterrorism laws cited as the basis for USAID's Partner Vetting System, cannot on their own comply with the antiterrorism laws. (In fact, many NGOs do their own extensive internal vetting against OFAC and other lists as suggested by the USAID certifications.) Nor does USAID assert that the existing USAID programmatic, audit, and reporting requirements are inadequate safeguards against financing terrorist activities. The Notice fails to articulate a compelling need that would justify the burden imposed on NGOs and the intrusion on the privacy of thousands of individuals as proposed by the PVS.

The Federal Register Notice announcing the PVS refers to the GAO report that audited the West Bank/Gaza vetting system, GAO-06-1062R issued September 29, 2006, as a basis for the establishment of the PVS. It states that the report "identified processes and procedures that could be improved and streamlined with the use of additional information technology." Not only does the GAO report relate solely to the existing vetting process in the West Bank and Gaza region (where such vetting does not apply to U.S. NGOs, unlike the proposed PVS), but also it in no way requests or suggests that USAID should establish a vetting system worldwide as proposed by the PVS.

PVS' Implementation Unclear

USAID has not at all addressed how the PVS will impact the application process or the rights of the applicant, individual NGO employees, or volunteer board members. The

Federal Notice relating to the Privacy Act exemptions does state, however, that USAID will not "confirm or deny" whether a positive or negative match has occurred in response to data supplied by an applicant or employee.³ Will USAID then deny funding to the applicant on the basis of this result? The Notice does not describe what will happen to the applicant if there is a match, or whether the applicant will have the opportunity to challenge denials of applications or to even supply information that might refute a positive hit.

Safety and Security Concerns

The Notice announcing the PVS states that "paper records are maintained by the USAID regional offices where the information cannot be collected electronically." CRS has concerns about whether sensitive employee data supplied in paper form can be adequately safeguarded in the USAID regional offices. Such offices typically have varying degrees of secure recordkeeping practices. For example, even the GAO audit report on the West Bank/Gaza noted weaknesses in security controls because vetting data was stored in unlocked filing cabinets where Mission foreign national staff and others had unrestricted access. (See page 17, GAO-06-1062R USAID West Bank and Gaza Antiterrorism Procedures.) These concerns are highlighted by the fact that in many of the countries where CRS operates, identity theft and security issues are rampant.

In addition, if CRS requires employees and others to supply to USAID personal information for anti-terrorism purposes, it risks being perceived as a law enforcement arm of the U.S. Government, which subjects staff to greater safety and security risks. By implementing this system, USAID is de facto acting as a law enforcement agency, and it is forcing its NGO "partners" to do the same.

Lack of Statutory Authority

Given the risks to invasion of privacy at play here, there should be Congressional evaluation and strong statutory support for such a system. We are unaware of any statutory support to justify the PVS as proposed. The Federal Register Notice announcing the PVS references only the Appropriations Act portions applicable to the West Bank and Gaza (the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. 109-102, § 559(b), 119 Stat. 2172, 2221 (2005)). In the appropriations legislation, Congress chose to limit the vetting requirement to the West Bank/Gaza. By going further and implementing a global vetting system, USAID is stepping into the shoes of Congress without any authority to do so.

Lack of Consultation Despite Promises

Acting USAID Administrator Henrietta H. Fore has promised increased collaboration with the NGO community. In her June 12, 2007, testimony before the Senate Foreign Relations Committee, she stated: "I am committed to increasing consultation and communication with you and our many stakeholders as we take the next steps in this reform effort. . . . I am committed to continuing our work in an increased spirit of consultation. I also intend to move forward immediately with more intensive collaboration with the broad and vibrant development community. This past week I have met with the

³ Federal Register Notice Vol. 72, No. 139 (July 20, 2007). CRS will separately comment on this Notice.

Board of the Advisory Committee for Voluntary Foreign Assistance, InterAction, The Society for International Development and many other development leaders."

The process leading to the enactment of the PVS is inconsistent with the promises and principles espoused by Ms. Fore. In fact, the NGO Community only learned about the PVS by Federal Register Notice. There was no attempt on the part of USAID to engage in collegial or collaborative discussions in advance of the Federal Register notice. In addition, because the Notice states that comments are due by August 27, 2007, the same date as the PVS effective date, when will USAID consider the comments supplied before adopting a final rule?

In closing, CRS would like to reiterate its request of USAID to withdraw the Federal Register notice and engage in a public dialogue and a subsequent meaningful comment period of at least 60-90 days for any revised proposed rule. Many details regarding the implementation of any Partner Vetting System are not clear. Given these new sweeping and surprising requirements, consultation with the NGO community is essential. USAID should examine the chilling effect that the PVS may have on the NGO community, and the possibility that NGOs will have to decide whether it is 'worth it' to bid on USAID assistance. If USAID does not examine the ramifications of this new Partner Vetting System through open dialogue with the NGO community, it risks having the PVS undermine the overall purpose of foreign assistance.

Sincerely,

CRS


Kenneth Hackett
President

cc: Henrietta Fore, Acting Foreign Assistance Director



September 21, 2007

Jeffrey Denale
Coordinator for Counterterrorism
Office of Security
United States Agency for International Development
Office 2.06-005, RRB
1300 Pennsylvania Avenue, N.W.,
Washington, DC 20523

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.

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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>

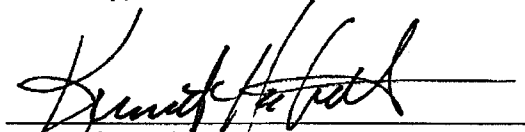
USAID SHOULD WITHDRAW THE NOTICES AND CONSIDER ALL CONSEQUENCES OF THE PVS AFTER DIALOGUE WITH THE PVO COMMUNITY AND OTHERS

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.

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)
Philip Heneghan, Chief Privacy Officer, USAID (by email: privacy@usaid.gov)
Beverly Johnson, Office of Administrative Services, USAID (by email: bjohnson@usaid.gov)
Susan Dudley, Administrator OIRA (by email: sdudley@omb.eop.gov)
Art Fraas, Branch Chief, OIRA (by email: afraas@omb.eop.gov)
David Rostker, Desk Officer for USAID, OIRA (by email: drostker@omb.eop.gov)



September 18, 2007

US Agency for International Development
1300 Pennsylvania Avenue, NW
Room 2.12-003
Washington, DC 20523-2120
Attention: Philip M. Heneghan, Chief Privacy Officer

RE: Response to Federal Register /Vol. 72, No.139/Friday, July 20, 2007
Agency: U.S. Agency for International Development
Title of Action: Proposed Rule; Privacy Act of 1974, Implementation of Exemptions
RIN: 0412-AA61

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 announcing a proposed rule to exempt portions of the "Partner Vetting System" ("PVS") from the Privacy Act of 1974, 5 USC § 552a ("Privacy Act") (the "Proposed Rule"). This letter incorporates by reference the August 22, 2007 comments of Catholic Relief Services ("CRS"), in which CRS maintained that USAID does not have legal authority to adopt the PVS.¹ CRS hereby reiterates that position and also submits the following comments to the Proposed Rule in the event that USAID is able to proffer proper legal authority to adopt the PVS.

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 63% of our programs are funded through U.S. government funds.

¹ The comments were submitted in response to Federal Register, Vol. 72, No. 136, July 17, 2007, pages 39041-39044.

USAID Is Undermining the Purpose of the Privacy Act by Claiming Wholesale Exemptions from the Privacy Act

In the Proposed Rule, USAID is exempting the PVS from key provisions of the Privacy Act, effectively nullifying the purpose of the Privacy Act. The U.S. Department of Justice's Overview of the Privacy Act of 1974 outlines the purpose and objectives of the Privacy Act as follows:

"[T]he purpose of the Privacy Act is to balance the government's need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from federal agencies' collection, maintenance, use, and disclosure of personal information about them. The historical context of the Act is important to an understanding of its remedial purposes: In 1974, Congress was concerned with curbing the illegal surveillance and investigation of individuals by federal agencies that had been exposed during the Watergate scandal; it was also concerned with potential abuses presented by the government's increasing use of computers to store and retrieve personal data by means of a universal identifier -- such as an individual's social security number. The Act focuses on four basic policy objectives:

- (1) To restrict disclosure of personally identifiable records maintained by agencies [including restricting disclosure by one agency to another].
- (2) To grant individuals increased rights of access to agency records maintained on themselves.
- (3) To grant individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely, or complete.
- (4) To establish a code of "fair information practices" which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records."²

The Privacy Act exemptions sought by USAID in the Proposed Rule would nullify all of the above objectives. It would permit USAID to disclose records about individuals to other agencies or persons unbeknownst to those individuals; it would deny individuals the right to access such records; it would deny individuals the right to amend such records; and as such it certainly would not provide a code of "fair information practices." In fact, USAID seeks to exempt the PVS from key provisions of the Privacy Act, with the effect of significantly 'watering down' the Privacy Act protections established by Congress. USAID is seeking to claim itself exempt from at least 16 requirements of the Privacy Act as follows:

² U.S. Department of Justice, "Overview of the Privacy Act of 1974, 2004 Edition," <http://www.usdoj.gov/oip/1974polobj.htm>, accessed 18 September 2007.

552a(c)(3)	Eliminating requirement that individual be provided an accounting of disclosures of his/her records to other persons or agencies
(c)(4)	Eliminating requirement to inform others about correction or notation of dispute involving individual record
(d)	Eliminating individual access to records, right to amend records, and right to appeal determinations not to amend records
(e)(1)	Eliminating requirement that agency maintain only information as "is relevant and necessary" to accomplish a purpose of the agency required to be accomplished by statute or by Executive order...."
(e)(2)	Eliminating agency requirement to collect information directly from subject individual when information may result in adverse determination about an individual's rights, benefits and privileges under federal programs
(e)(3)	Eliminating agency requirement to inform individual on the collecting form about the authority authorizing the solicitation; whether it is mandatory or voluntary; the principal purpose for which the information will be used; the routine uses of the information; and the effect on him of not providing the information ³
(e)(4)(G), (H), and (I)	Eliminating requirement to publish in Federal Register agency procedures whereby an individual can be notified at his request if agency system of records has a record on him , how he can gain access to such record and contest its contents , and the categories of sources of records in the system
(e)(5)	Eliminating requirement that agency "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination."
(e)(8)	Eliminating requirement that agency make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record
552a(f)	Eliminating requirement that agency promulgate rules establishing procedures to notify individual of records, define requirements before agency will disclose records to individual, to amend records pertaining to the individual with appeal rights, and fees for record copies
552a(g)	Eliminating right to civil remedies and right to judicial review where agency fails to amend records or abide by Privacy Act; monetary penalties for certain intentional or willful agency actions
552a(h)	Eliminating rights of legal guardians
(k)(1)	Specific Exemption – discussed below
(k)(2)	Specific Exemption – discussed below

USAID has exempted the PVS from many key provisions of the Privacy Act -- namely, the right of an individual to know if USAID has information on them, the right to view the records, the right to amend the records, and the right to judicial review of the

³ In addition, USAID is exempting the PVS from section (e)(8), which requires an agency to advise individuals as to whether providing information under the PVS is mandatory or voluntary, and the authority for the agency's request. Because one of the categories of information in the PVS is social security numbers, this contradicts Section 7 of 552a(b), which requires government agencies requesting disclosures of social security numbers to inform individuals about whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

agency's practices. USAID has not demonstrated, however, that these exemptions are required to accomplish its objectives to "ensure that USAID funds and USAID-funded activities are not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security." For example, USAID has not demonstrated why it must apparently maintain information above and beyond what "is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by Executive order."⁴ It also has not demonstrated why it cannot give individuals access to records and the right to amend incorrect records, or why it must eliminate an individual's right to judicial review of the agency's practices. By eliminating the ability for an individual to access and review information about himself, how can USAID ensure the accuracy and reliability of the data collected?

This is particularly important given the high incidence of inaccurate USG watch list records. A September 2007 Department of Justice Office of Inspector General "Follow-Up Audit of the Terrorist Screening Center" (TSC) (Audit Report 07-41) noted concerns over the accuracy of watch list records, the same records that presumably would be checked as part of the PVS. The DOJ OIG report concluded that the "TSC needs to further improve its efforts for ensuring the accuracy of the watchlist records." (pg. iii) The report noted that a testing of specific watchlist records revealed that records "contained significant errors - 38 percent of the records tested contained data that was inaccurate, incomplete, inconsistent, or not current" (pg xxii). It further noted that TSC "continues to lack important safeguards for ensuring data integrity, including a comprehensive protocol outlining the agency's quality assurance procedures...." (pg. iii). The report opined that "inaccurate, incomplete, and obsolete watchlist information increases the chances of innocent persons being stopped or detained during an encounter because of being misidentified as a watchlist identity" (pg. iii). By eliminating access and amendment rights, USAID cannot ensure that the PVS would be a reliable mechanism for screening individuals, such that it can use those vetting results to deny PVOs' funding with any degree of certainty.

Moreover, USAID has not substantiated why it has eliminated individuals' redress rights to correct misinformation held by the agency. According to the DOJ OIG report, in 2005, TSC created a dedicated unit for redress matters and it helped spearhead the creation of a multi-agency Memorandum of Understanding focusing on watch list redress and developing standard operating procedures (pg. xviii). The DOJ OIG report highlights the usefulness of a redress procedure, noting that the redress activities "identified a high rate of error in watchlist records" (pg xix). The report noted that "[t]hrough its comprehensive redress review process, the TSC concluded that 45 percent of the watchlist records related to redress complaints required modification or deletion from the watchlist" (pg. xix). USAID has not indicated how this inter-agency redress procedure would mesh with USAID's elimination of those rights under the Privacy Act. In addition, USAID has not provided any rationale as to why TSC and other agencies can provide a right of redress, but USAID cannot.

⁴ U.S. Department of Justice, "Overview of the Privacy Act of 1974, 2004 Edition," <http://www.usdoj.gov/oip/1974agenreq.htm#e1>, accessed 18 September 2007

USAID Has No Authority to Claim the Exemptions from The Privacy Act

Congress did permit certain agencies to exempt their systems of records from certain Privacy Act provisions. The plain language of the Privacy Act, however, suggests that USAID would not qualify as one of those agencies. Congress provided in Section 552a(j) of the Act that the head of any agency may promulgate rules to exempt itself from any part of the Privacy Act (except for certain specific subsections) if the system of records is--(1) maintained by the Central Intelligence Agency; or (2) **"maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws..."** (emphasis added). USAID by its own admission in the Federal Register states that "the primary functions of USAID are not of a law enforcement nature." (See Federal Register Notice at 39769.) The US DOJ Guide on the Privacy Act states that subsection (j)(2)'s threshold requirement is that the system of records must be maintained by an agency which performs as its principal function any activity pertaining to the enforcement of criminal laws, and that "[t]his requirement is usually met by such obvious law enforcement components as FBI, DEA and ATF."⁵ Therefore, USAID has not cited any authority in the Privacy Act or elsewhere to claim the general exemptions from the Privacy Act as provided in the Proposed Rule.

Specific Exemptions. USAID also is misplaced in relying on the specific exemptions under 5 USC § 552a(k)(1) and (k)(2) as a basis for its claimed Privacy Act exemptions.

5 USC § 552a(k)(1). Section 552a(k)(1) provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy *and* (B) are in fact properly classified pursuant to such Executive order" (*emphasis added*). Executive Order 12958 provides that when properly classified, national security information is exempt from mandatory disclosure under the Privacy Act exemptions. However the information to be collected and maintained in the PVS would not be properly classified under EO 12958, as it does not fall under any of the categories listed in the Executive Order, and USAID's reliance on this exemption is misplaced.⁶

5 USC § 552a(k)(2). This section provides specific exemption for "investigatory material compiled for law enforcement purposes," except that if a person is denied a right, privilege or benefit under federal law, only confidential source information may be withheld by the agency. Under this exemption, materials must be compiled for an investigative "law enforcement" purpose, such as a civil or criminal investigation by a non-principal function

⁵U.S. Department of Justice, "Overview of the Privacy Act of 1974, 2004 Edition," <http://www.usdoj.gov/oip/1974tenexemp.htm>, accessed 18 September 2007.

⁶ The information to be collected and maintained in the PVS would not be properly classified under EO 12958 as it does not concern: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including special activities), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or (h) weapons of mass destruction.

criminal law enforcement agency.⁷ The collection of information under the PVS is not for a civil or criminal investigation. USAID is not investigating individuals for law enforcement purposes under the PVS; rather it is proposing the screening of individuals to determine if the organizations they work for are eligible for funding. USAID's reliance on 5 USC §552a(k)(2) is misplaced.

The PVS and Privacy Act Exemptions Represent a Significant Regulatory Action Requiring OIRA Review

USAID claims that the Proposed Rule is not a 'significant regulatory action' that would require review by the Administrator of OMB's Office of Information and Regulatory Action (OIRA) under Executive Order 12866 and the Congressional Review Act. Not only is it OIRA's responsibility, and not USAID's, to determine if a proposed rule is subject to review under Section 6 of the Executive Order, but also USAID erroneously determined that the Proposed Rule is not a 'significant regulatory action' requiring OIRA review. Under Executive Order 12866, a 'significant regulation action' is defined as any regulatory action that is likely to result in a rule that may: ... materially alter *the rights and obligations of the recipients [of grants]*" (*emphasis added*). (See EO 12866, Section 3(f)(3).) The PVS and the proposed exemptions from the Privacy Act clearly would materially alter the rights and obligations of funding recipients. If PVOs are required to submit vetting data to apply for funding, then PVO rights and obligations would be 'materially altered' by virtue of this new requirement, especially due to the type of information requested, the volume of data required, as well as the sensitivity surrounding the disclosure of employee and board member personal data. Additionally, rights would be altered by a grant proposal evaluation process which is not transparent nor fairly based on merit alone, as well as by the security risk and mistrust created for recipients who would be perceived as extensions of USG intelligence and law enforcement services. Moreover, if employees or board members decide NOT to allow the disclosure of their personal information for vetting purposes, then PVOs are placed in the precarious position of not being able to meet the vetting requirement. In addition, the 'rights' of recipients would also be materially affected as USAID apparently will not "confirm or deny" the results of the vetting, leaving neither PVOs nor their employees with access or redress rights to correct any errors in the system that may have caused a denial of funding. If PVOs are obligated to provide vetting data, then clearly their obligations and rights are materially altered such that the PVS and the Proposed Rule exempting Privacy Act provisions are "significant regulatory actions" requiring OIRA review as a matter of law.⁸ The Inventory of Review Requests on OIRA's website

⁷ U.S. Department of Justice, "Overview of the Privacy Act of 1974, 2004 Edition," <http://www.usdoj.gov/oip/1974tenexemp.htm>, accessed 18 September 2007.

⁸ Moreover, such a significant regulatory action involving the creation of a new database of personal information should not have been undertaken without the development of a "Privacy Impact Assessment," as mandated by OMB guidance M-03-22 (September 26, 2003) and as is commonly practiced across US government agencies and private-sector institutions as well. We are not aware that a PIA process has been undertaken by USAID or that a PIA has been published in concert with the proposed System of Records notice and notice of exemptions. This is potentially a serious oversight in USAID's rule-making process. A PIA is essential to the Agency's understanding of the impact on the institutions and persons affected by this data collection, would be helpful in framing the policy imperative, and would increase the likelihood of success in discovering terrorist financing, versus the burden on data subjects and institutions and the chilling effect on the work of the PVOs included. A PIA should have been completed before the proposal of a regulatory action of this significance.

(accessed 18 September 2007) does not reveal any request to review USAID partner vetting system information collection.

Moreover, OIRA is charged with reviewing whether a Proposed Rule is deemed a "major rule" under the Congressional Review Act, 5 USC §§ 801 *et seq.* (CRA), thereby subject to Congressional review. See, 5 USC §804(2). The Proposed Rule should have been submitted to OIRA for determination of whether or not it is subject to Congressional review as a "major rule" pursuant to 5 USC §§ 804(3). The Proposed Rule falls within the definition of "rule" at 5 USC § 804(3)(C) as it substantially affects the rights and obligations of non-USAID parties by proposing exemptions under the Privacy Act that result in the suspension of an individual's privacy protections and serious potential harm to the work of the PVOs.

USAID Should Withdraw the Notices and Consider all Consequences of the PVS and the Claimed Privacy Act Exemptions 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 Proposed Rule's impact on recipient rights and obligations. The authority of USAID to adopt the PVS and to claim such sweeping exemptions from the Privacy Act has not been established. USAID has effectively tried to 'legislate' itself out of the Privacy Act protections that Congress deemed important in protecting individuals against the harms that ensue when the government assembles vast amounts of information about individuals without ensuring that protections are in place. USAID's efforts and role in the fight against terrorism also are misplaced here. Congress has decided in the Privacy Act to exempt certain agencies from certain Privacy Act requirements for specific law enforcement purposes. USAID is not one of those agencies. Finally, USAID has not substantiated that by 'casting a wide net' with the proposed PVS, and by claiming wholesale exemptions from the Privacy Act, USAID has found the only reasonable way for it to accomplish its stated purpose.

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

In sum, USAID should withdraw the Federal Register Notices announcing the PVS and the Proposed Rule, and engage in a carefully-considered process that includes consultation with OIRA and the PVO community.

Sincerely,

CRS



Kenneth Hackett
President, CRS
228 W. Lexington Street
Baltimore, MD 21201
(410) 625-2220
khackett@crs.org

cc: Henrietta Fore, Acting Foreign Assistance Director
Susan Dudley, Administrator OIRA (by email: sdudleyomb.eop.gov)
Art Fraas, Branch Chief, OIRA (by email: afraas@omb.eop.gov)
David Rostker, Desk Officer for USAID, OIRA (by email: drostker@omb.gov)