ACDI VOCA

Expanding Opportunities Worldwide

27 August 2007

Mr. Philip M. Heneghan
Chief Privacy Officer
United States Agency for International Development
1300 Pennsylvania Avenue NW
Office 2.12-003
Washington, DC 20523-2120

BY ELECTONIC MAIL TO: privacy@usaid.gov

Re: Notice, Privacy Act System of Records, *Federal Register*, Vol. 72, No. 136, July 17, 2007, Pages 39041-39044; Proposed Rule 22 CFR 215 Privacy Act of 1974 Implementation of Exemptions, Vol. 72, No. 139 July 20. 2007, Pages 39768 – 39770; and Notice of Public Information Collections being reviewed by USAID, Vol. 72, No 140, July 23, 2007

Dear Mr. Heneghan:

This letter is in response to the above referenced notices proposing and implementing the establishment of a "Partner Vetting System" (PVS) for the collection and maintenance of information on individuals and organizations who attempt to obtain USAID assistance or acquisition awards or other benefits. Having reviewed these documents ACDI/VOCA strongly suggests that USAID withdraw this proposal in order to provide for adequate public review of the merits and need for the proposed vetting system, as well as for necessary corrections and clarifications of the system as proposed and for reasonable due process as required by federal law and regulation. It is further requested that before proceeding further USAID consult with OMB officials, specifically the Office of Federal Procurement Policy, as well as the offices of Information and Regulatory Affairs and Legislative Affairs, in addition to providing for full public consultation .

Background of ACDI/VOCA

ACDI/VOCA is a private, nonprofit international development organization with over 40 years of experience in providing highly specialized, hands-on technical assistance to the U.S. Agency for International Development (USAID), international donors, host governments, private enterprises, financial institutions, organizations, communities and business service providers. ACDI/VOCA, founded in 1963, has designed and implemented developmental projects in more than 145 countries worldwide. ACDI/VOCA currently manages 90 programs in 45 countries throughout Latin America, Africa, Central Europe, the Middle East and Asia. ACDI/VOCA carries out its mission to promote economic opportunities for cooperatives, businesses and communities through the innovative application of sound business practices in four core areas: enterprise development, financial services, food and agricultural systems and community development. In 2006, 70 percent of ACDI/VOCA's $90 million annual revenue was from USAID.

Federal Rulemaking Process

There appears to be a conflict between the referenced notice and the letter and spirit of the federal rulemaking process. The rulemaking process typically begins with enabling legislation, which in this instance is notably lacking. Other than the very specific and extraordinary statutory application provided for West Bank/Gaza under E.O. 13224, USAID has provided no statutory basis, Congressional direction or authorization for the creation of the proposed PVS system. Moreover, there appears little basis on which to claim that E.O. 13224 itself has in any way authorized such a system. Had this been the case, Congress would have had no need to impose the requirements of E.O. 13224 as applicable exclusively to West Bank/Gaza (Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. 109-102, § 559(b), 119 Stat. 2172, 2221 (2005)). By such action it is clear that Congress neither deemed E.O. 13224 to have the expansive authority USAID now claims for it, nor believed the exceptional measures prescribed in the order were necessary outside of West Bank/Gaza.

Furthermore, the issuance of this notice does not fully satisfy the requirements for informal rulemaking under the Administrative Procedure Act (APA), nor has consultation as required by the Privacy Act been accomplished. In accordance with the APA, for example, while some regulations may only require publication and an opportunity for comments to become effective, others may require publication and one or more formal public hearings. The determinant regarding the requirement for public notice is found in the enabling legislation, which as noted above is lacking in this case. Therefore, standard practice under the APA should prevail with USAID providing for 60 - 90 days for public comment and an additional 30 days for reply comments. Accordingly we believe USAID needs to revise the notice to conform to this process and practice.

OMB Requirements and Approvals

OMB Circular A-110 (2 CFR 215), as codified by USAID at 22 CFR 226, requires that absent a Federal statute or executive order, USAID must request OMB to grant an exception for classes of grants or recipients (see specifically §226.1, §226.4 and §226.14). It is our understanding that no exception has been requested of OMB, and none granted. As is clearly stated in both A-110 and 22 CFR 226, OMB generally seeks to achieve maximum uniformity among federal agencies and grants exceptions only in unusual circumstances. Absent approval of such an exception the question therefore remains as to what processes and procedures are being contemplated for all other federal agencies, whether working overseas or domestic. It would appear that under USAID's proposed PVS system the broad issues addressed in E.O 13224 would now become generally applicable regardless of specific federal agency oversight. The lack of coordination of federal agencies on this important issue is troubling considering OMB's clear interest in maximum inter-agency uniformity.

USAID is also required to comply with the applicable report clearance requirements of 5 CFR 1320 ("Controlling Paperwork Burdens on the Public") when collecting detailed information from ten or more organizations or individuals in the general public. This requirement further imposes a clearance from OMB's Office of Information and Regulatory Affairs (OIRA). It is assumed that the *Federal Notice* of July 23, 2007 was intended for this purpose. However, for the reasons stated below regarding the lack of clarity with respect to the applicability of the proposal, we find this Notice to be non-compliant with 5 CFR 1320..

As this proposal also impacts contracts, the Office of Federal Procurement Policy (OFPP), which provides overall direction and shape to the government's procurement regulations, needs to be consulted. OFPP is staffed to review all proposed changes to the FAR and agency supplements, such as the AIDAR, for consistency with law, Administration policy and good management principles. The OFPP Administrator also serves as chair of the Federal Acquisition Regulatory Council (FAR Council), which we believe will also need to be consulted. While no mention of specific changes to the AIDAR was made, the proposal in fact does create significant additional reporting burdens. Furthermore, and far more troubling, is the stated intent in the Notice of July 20, 2007 that "USAID cannot confirm or deny whether an individual "passed" or "failed" screening". This implies that contracts and assistance awards will be denied, or possibly even terminated, without due process, resulting in a de facto debarment with no adequate recourse or appeal process. We respectfully submit that this approach is completely contrary to the safeguards against arbitrary and capricious behavior by USG officials, as well as FAR Part 33 protected actions under "Protests, Disputes and Appeals" and 22 CFR 226.90 "Disputes". A system must be in place to challenge the accuracy of the information being used to deny basic rights to individuals and organizations.

Confusing Applicability Statements

In our view the applicability of the proposal is problematic, exceedingly confusing and unnecessarily vague. The statement that it will apply to "(I)ndividuals or organizations who attempt to obtain other USAID assistance or benefits" creates uncertainty as to whether simple beneficiaries receiving trickle-down benefits, such as an inoculations or food, would be subjected to the proposed stringent requirements. The following is merely representative of other applicability issues that lack clarity in the proposal: flow-down requirements to contractors or subgrantees at various tiers; flow-down to beneficiaries, and tiers of beneficiaries (e.g. impact on community development programs); vendors from whom routine and innocuous procurements are made; potential volunteers; organizations or individuals whose goods or services are proposed as cost share or as leveraged sources for USAID programs; whether the term "other USAID assistance" implies that the proposal will also encompass the authority under §635(b) of the Foreign Assistance Act which authorizes the issuance of loans, and other transactions such as endowments, or if those transactions are excluded. Also, the proposal is silent regarding the impact on existing programs and whether active contracts and awards could be terminated without due process. Application of the subject proposal without further clarification of these significant applicability issues will likely cause unnecessary delays, implementation uncertainty and the potential of work stoppage on all USAID programs.

There are additional inconsistencies in the proposal as well. For example, while applicability of certain sections to contracts is mentioned, terrorist financing certifications appear only to be required for grants and cooperative agreements. The necessity for the redundant screening requirements required for PVO registration is not articulated, which creates the impression, warranted or not, that the non-profit community is being specifically profiled. It is also troubling that USAID has elected not to include Public International Organizations, their employees, contractors and beneficiaries within the parameters of this notice. USAID needs to address to the public the preferential treatment being accorded to those organizations vis a vis the purported security risk this system is intended to address.

In our judgment the accuracy of the burden estimate stated in the Notice of July 23, 2007 must be considered in question until the above stated issues are resolved and the intent of the depth and breath of the proposal are clarified.

Privacy Act Issues

The proposed rule found in the July 20, 2007 Notice to our mind provides little compelling justification for the sweeping exemptions to the Privacy Act USAID is asserting. Moreover, USAID's attempt to justify these exemptions simply as a change to 22 CFR 215 with no regard to the impact on 22 CFR 226 or the FAR/AIDAR is unpersuasive . The proposed exemptions need to be further reviewed and examined with a specific view toward protecting citizens' rights to access records containing information about them. To us the proposal appears on its face contrary to the spirit and intent of the Privacy Act, which was designed as an enforceable right of access to personal information maintained by government agencies. We are concerned that USAID in the legitimate pursuit of anti-terrorist concerns is inadvertently undermining this equally if not more important and Congressionally mandated right of the citizenry.

As the July 17, 2007 Notice stated en effective date of August 27, 2007, USAID must take immediate action to withdraw this proposal and begin a process of carefully reviewing all comments as well as opening up a dialogue with the impacted public.

Sincerely,

Carl H. Leonard
President and CEO
ACDI/VOCA

CC: Joanne Paskar, Chief, Information and Records Division, USAID
Jeff Denale, Coordinator for Counterterrorism, USAID
Paul Denett, Administrator, Office of Federal Procurement Policy, OMB
Susan Dudley, Administrator, Office of Information and Regulatory Affairs, OMB