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US Agency for International Development
Chief Privacy Officer
1300 Pennsylvania Avenue, NW
Room 2.12-003
Washington, DC 20523-2120

Re: RIN 0412-AA61
Docket ID: AID-2007-0007; Privacy Act of 1974; System of Records
Document ID. AID-2007-0007-0002, Privacy Act of 1974, Implementation of
Exemptions

Dear Sir or Madam:

The Cooperative for Assistance and Relief Everywhere (“CARE”) respectfully submits the following comments on the above-identified proposed regulations¹ exempting the US Agency for International Development (“USAID”) from portions of the Privacy Act. As explained more fully below, USAID lacks the statutory authority to make the proposed rules. In addition, the proposed rules subvert the purpose and intent of the Privacy Act, are not necessary for USAID to fulfill its mission, and unduly harm or potentially harm CARE and its officials. Additionally, for a greater understanding of CARE’s position on USAID’s proposed Partner Vetting System (“PVS”), this letter should be read in conjunction with our comments on the PVS submitted to USAID on August 23, 2007.

¹ Federal Register, Vol. 72, No. 139, July 20, 2007 pps. 39768-39770.

1) Lack of Authority

USAID lacks authority to promulgate the proposed rules under the procedures, or lack thereof, used by USAID and under the Privacy Act. Executive Order 12866² establishes the procedures to be followed by Agencies in promulgating regulations. Regulations that are “significant regulatory actions” are subject to greater internal scrutiny by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget, by the public, and by the media. A “significant regulatory action” is any regulatory action that is likely to result in a rule that may:

“(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.”³

The USAID proposed rules attempt to go beyond USAID's statutory authority and mission, and attempt to grant USAID privileges that are reserved by law and existing regulation to law enforcement agencies. As argued by CARE in its previous submission on this subject, the fact that Congress imposed an extraordinary statutory requirement applicable only to the West Bank and Gaza is not a justification for expanding far broader measures worldwide.⁴ Indeed, USAID has put forth no compelling evidence suggesting that the current anti-terrorism certification process required by USAID is insufficient.⁵ Thus, the proposed rules clearly raise novel legal or policy issues and should be considered a significant regulatory action. USAID's failure to designate the proposed regulations as a significant regulatory action gives the appearance that USAID is avoiding necessary oversight and scrutiny of the proposed regulation.

Executive Order 12866 also requires USAID to prepare a Regulatory Plan that includes a summary of each planned significant regulatory action.⁶ The most recent published version of USAID's Regulatory Plan fails to include any mention of the presently proposed regulations.⁷ It is also unclear whether USAID's submission to OIRA⁸, if made, included any indication that the presently proposed regulations are a significant regulatory action.

Finally, Executive Order 12866 establishes that in addition to publishing proposed rules in the Federal Register allowing public comment, an “agency is also directed to explore and, where appropriate, use consensual mechanisms for developing regulations”.⁹ Aside from some recent informal statements by USAID officials, little to no attempt has been made by USAID to

² Federal Register, Vol. 58, No. 190, October 4, 1993, pps. 51735-51744.

³ Executive Order 12866, Sec. 3(f)(4).

⁴ Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. 109-102, § 559(b), 119 Stat. 2172, 2221 (2005)).

⁵ USAID's current policy is required by USAID Acquisition and Assistance Policy Directive (AAPD) 04-14.

⁶ Executive Order 12866, Sec. 4(c).

⁷ Federal Register, Vol. 72, No. 82, April 30, 2007 pps. 23133-23135.

⁸ Executive Order 12866, Sec. 6(a)(3)(A).

⁹ Executive Order 12866, Sec. 6(a).

explore alternatives to the proposed rules, despite the outcry from the organizations that will be harmed by the proposed rules. Nor has USAID provided any reason or rationale as to why the use of consensual decision making in the present situation is inappropriate.

2) Lack of Applicable Exemptions under the Privacy Act

The Privacy Act only provides that certain specified systems of records are exempt, and USAID's proposed exemptions subvert the purpose and intent of the Privacy Act, are not necessary for USAID to fulfill its mission, and unduly harm or potentially harm CARE.

Sections (j) and (k) of the Privacy Act contain the possible exemptions from its provisions. Section (j) of the Privacy Act provides that the Head of an Agency may exempt a system of records if the records are maintained by the Central Intelligence Agency or maintained by an agency or component thereof which "performs as its principal function any activity pertaining to the enforcement of criminal laws". The USAID PVS records are not maintained by the Central Intelligence Agency. In addition, the principal function of USAID does not pertain to the enforcement of criminal laws, nor will the principal function of the component of USAID that will administer the PVS, pertain to the enforcement of criminal laws. Thus, USAID lacks the necessary authority under section (j) of the Privacy Act to promulgate the proposed regulations.

Section (k) of the Privacy Act provides that the Head of an Agency may exempt a system of records that falls within one of seven categories.¹⁰ USAID relies on the categories specified in subsections (k)(1), (k)(2) and (k)(5). The PVS falls outside of these categories, and indeed falls outside of any of the enumerated categories. Thus, there is no authority provided to USAID under Section (k) of the Privacy Act to promulgate the proposed regulations.

Section (k)(1)¹¹ provides an exemption for a system of records subject to the provisions of section 552(b)(1) of this title. The system of records referred to under section 552(b)(1) constitute records that are specifically authorized to be kept secret in the interest of national defense. While it is possible that one or more of the specific records in the PVS might need to be kept secret in the interest of national defense, the vast majority of the records will bear no relationship to national defense.

Section (k)(2)¹² provides an exemption for a system of records:

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to

¹⁰ 5 USC §552a (j)(1) – (7).

¹¹ 5 USC §552a (k)(1).

¹² 5 USC §552a (k)(2).

such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

USAID is not a law enforcement agency and will not use the PVS for law enforcement purposes. Thus, this exemption fails to apply.

Section (k)(5)¹³ provides an exemption for a system of records:

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

USAID admits that the PVS is not for the purpose of determining whether individuals are suitable or eligible for Federal civilian employment or military service. CARE is a recipient of federal grants from USAID, and does not serve as a contractor to USAID, nor is civilian employment or military service applicable in this case. Thus, none of the criteria necessary for USAID to use this exemption have been satisfied.

Further, USAID has failed to comply with the requirements of sections (j) and (k) that require USAID provide a statement as to why the system of records is to be exempted from a provision of section (j) or (k). The supplementary information published by USAID is conclusory in nature and fails to provide sufficient rationale or justification.

As such, the proposed rulemaking should be withdrawn as lacking in the necessary statutory authority.

3) The Need to Preserve the Purposes of the Privacy Act

The Privacy Act is intended to promote accountability, responsibility, legislative oversight and open government in the personal information systems and data banks of the Federal Government. It guards the privacy interests of citizens and lawful permanent residents against government intrusion, restricts the amount of personal data that federal agencies may collect, and requires transparency with agencies information practices. Congress found that “the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies,” and recognized that “the right to

¹³ 5 USC §552a (k)(5).

privacy is a personal and fundamental right protected by the Constitution of the United States.” It thus seeks to “provide certain protections for an individual against an invasion of personal privacy” by establishing a set of procedural and substantive rights. As the Office of Management and Budget noted in its Privacy Act guidelines, “the authority to maintain a system of records does not give the agency the authority to maintain any information which it deems useful.”

As stated by the US Department of Justice:

Broadly stated, the 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 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.
- (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.¹⁴

CARE believes that the requirements imposed by the Privacy Act should be an essential part of implementation of the PVS, which seeks to vet its partners and key individuals within them before rendering them eligible for receipt of public funding. The USAID proposed regulations are contrary to the purpose and intent of the Privacy Act. The Privacy Act is not intended to restrict USAID's gathering of information necessary to fulfill its mission. Rather, the Privacy Act is intended to safeguard the rights of US Citizens by allowing individuals to learn that the US Government is maintaining records on them and to provide access to those records except in certain defined instances. USAID has provided no rationale, compelling or otherwise, as to why the PVS cannot operate within the scope of the Privacy Act. Nothing in the Privacy Act will restrict USAID's ability to collect the information USAID deems necessary to ensure

¹⁴ US Department of Justice, "Overview of the Privacy Act of 1974", (2004).

that USAID funding is “not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security”.¹⁵

A closer review of the particular sections from which USAID seeks exemptions establishes that USAID can fulfill its mission without need for the exemptions. Section (c)(3) and (c)(4) of the Privacy Act require an agency to account for certain disclosures of information.¹⁶ Section (c)(3) requires an agency to make the accounting available to the individual named in the record and section (c)(4) requires an agency to notify other agencies if the individual has requested a correction of their record. There is no compelling reason, or rationale, for exempting the PVS from these provisions of the Privacy Act. USAID's ability to ensure its funding does not support entities deemed to be a risk to national security is not affected or harmed by allowing an individual to know that his or her record has been supplied to another agency. Nor is it harmed by informing other agencies that an individual has requested a correction of their record.

Section (d) of the Privacy Act requires an agency to provide individuals access to records containing information pertaining to them.¹⁷ Section (d) also provides individuals the opportunity to request amendments of their records and specifies procedures to be followed in such a request is filed.¹⁸ USAID states that it “cannot confirm or deny whether an individual ‘passed’ or ‘failed’ screening.” USAID provides no rationale for why exempting the PVS from section (d) of the Privacy Act furthers USAID's stated purpose to ensure that USAID funding is “not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security”. Rather, allowing individuals to have access to their records, and correct mistakes, will actually further the stated objective. It is expected that the proposed exemption will have a chilling effect on CARE's ability to attract and retain the types of individuals that will actually further USAID's mission.

Section (e) of the Privacy Act sets forth the requirements that must be followed by an agency that maintains a system of records.¹⁹ Section (e)(1) requires that an agency maintain only such information about an individual as is relevant and necessary to accomplish a purpose of the agency.²⁰ USAID proposal to be exempt from this section suggests that USAID desires to obtain and maintain information about individuals that has no bearing or relevance to USAID's mission or the stated purpose of the proposed regulations. USAID fails to provide any rationale or justification for exempting the PVS from section (e)(1).

Section (e)(2) requires that an agency, to the greatest extent practicable, collect information directly from a subject individual whose rights, benefits or privileges under Federal

¹⁵ Federal Register, Vol. 72, No. 139, Friday, July 20, 2007 p. 39769.

¹⁶ 5 USC §552a (c)(3) and (c)(4).

¹⁷ 5 USC §552a (d).

¹⁸ 5 USC §552a (d)(2)(3) and (4).

¹⁹ 5 USC §552a (e).

²⁰ 5 USC §552a (e)(1).

programs may be adversely affected.²¹ Complying with section (e)(2) will not harm USAID's intended purpose and USAID provides no rationale for why the PVS should be exempt from section (e)(2).

Sections (e)(3), (e)(4) and (e)(8) require an agency to follow certain procedures in collecting and disseminating information about an individual.²² Complying with these sections will not harm USAID's intended purpose and USAID provides no rationale for why the PVS should be exempt from these sections.

Section (e)(5) requires that an agency:

(5) 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;²³

By requesting to be exempt from section (e)(5) USAID suggests that the records contained in the PVS will be, at least in part, inaccurate, irrelevant, dated and incomplete. CARE suspects that USAID does not intend to maintain inaccurate, irrelevant, dated or incomplete records. As such, USAID should not exempt the PVS from section (e)(5).

Sections (f) and (g) of the Privacy Act specify the rules an agency must promulgate to comply with the Privacy Act, and civil remedies available to an individual whenever an agency violates the Privacy Act respectively.²⁴ Complying with these sections will not impair the ability of USAID to achieve its stated objectives, particularly as USAID already complies with the Privacy Act for other existing record systems.

Section (h) of the Privacy Act provides that legal guardian's can act on behalf of an individual upon whom records are kept.²⁵ USAID provides no rationale as to why the PVS needs to be exempt from section (h).

As illustrated by the foregoing discussion, it would not harm USAID's stated purpose for the PVS to be subject to the Privacy Act. It also appears that in the proposed rules USAID has simply chosen to exempt the PVS from as many portions of the Privacy Act as possible without considering whether the PVS needs to be exempt from a particular section.

²¹ 5 USC §552a (e)(2).

²² 5 USC §552a (e)(3)(4) and (8).

²³ 5 USC §552a (e)(5).

²⁴ 5 USC §552a (f) and (g).

²⁵ 5 USC §552a (h).

Sincerely,

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