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## FY 2005 Statutory Checklists

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### **I. INTRODUCTION**

The following checklists are intended to be convenient references when planning and implementing assistance programs. The checklists do not have every country prohibition or restriction. Consult the attorneys assigned to your Bureau or Mission to determine if there are additional country-specific or activity-specific prohibitions and "notwithstanding" authorities.

Please see ADS 201.3.3.4 to determine when a checklist should be prepared. In doing a checklist you make a reasonable inquiry, determine the applicability of each statutory reference, and set forth any additional comments or issues (for example, "We are not aware of any information that requires action under this section" or "We are not aware of any violations under this provision").

#### **• Country Checklist**

The Country Checklist includes the important provisions of general application from the Foreign Assistance Act of 1961, as amended (FAA) and the FY 2005 Foreign Operations, Export Financing, and Related Programs Appropriations Act, (FY 2005 Act), Division D, Pub. L. 108-447, December 8, 2004. The Country Checklist does not list every statutory or regulatory provision applicable to a particular country.

#### **• Assistance Checklist**

The Assistance Checklist has the activity-specific provisions of the FAA and the FY 2005 Act.

- **Notwithstanding Authorities**

There are various "notwithstanding" authorities that USAID might use to provide assistance when it would otherwise be prohibited. Some examples follow:

1. Disaster Assistance (FAA Sec. 491).
2. Health and Disease Prevention (FAA 104(c)(4) and Child Survival and HIV/AIDS (FY 2005 Act Sec. 522).
3. Assistance for Eastern Europe and the Baltic States (Title II of the FY 2005 Act).
4. Assistance to the Independent States (FAA Sec. 498B(j)).
5. Assistance to Iraq (PL 108-106, Emergency Supplemental Appropriations Act for the Defense and for the Reconstruction of Iraq and Afghanistan, 2004).
6. Afghanistan (only for loan defaults under section 512 of the FY 2005 Act (or any similar provision of law (i.e., Section 620q of the FAA) and Section 660 of the FAA); Lebanon; Montenegro; Pakistan; victims of war; displaced children; displaced Burmese; victims of trafficking in persons and combating trafficking; and, except for Sections 116, 502B and 620A of the FAA, tropical forestry, biodiversity conservation and energy programs aimed at reducing greenhouse gas emissions (FY 2005 Act Sec. 534).
7. Non-governmental organizations and PL 480 (FY 2005 Act Sec. 536).
8. Title II Emergency Programs (PL 480 Sec. 202(a)).
9. ESF funds for democracy activities in the People's Republic of China and Hong Kong (FY 2005 Act Sec. 526).

## II. **COUNTRY CHECKLIST**

Part A of the Country Checklist has the general provisions to be completed for a country.

Part B has the "taking into consideration" provisions. They are considered by the Administrator in the annual "Taking into Consideration" Memorandum as part of the Operational Year Budget (OYB) process for all countries, not just those in the OYB. Because they have already been taken into account as part of the budget process, you do not have to include them in doing the checklist.

### **Part A. General Provisions**

1. **NARCOTICS CERTIFICATION.** (Section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Public Law 107-228) (FRAA), September 30, 2002). As a result of Presidential Determination No. 2004-47, September 15, 2004, the narcotics certification applies only to Burma. All other "major illicit drug-producing or drug-transit" countries

(Afghanistan, The Bahamas, Bolivia, Brazil, China, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, Venezuela, and Vietnam) were determined either:

- (a) Not to have failed demonstrably, during the previous 12 months, to adhere to their obligations under international counter-narcotics agreements and to take the counter-narcotics measures set forth in 489(a)(1) of the FAA; or
- (b) To be vital to the national interests of the United States.

Note: Thailand is removed from the list.

See <http://www.whitehouse.gov/news/releases/2004/09/20040916-11.html>, for the September 19, 2004 press release. Presidential Determination No. 2004-47 was not available online as of December 2004.

**Is this restriction applicable? Please comment.**

2. **INDEBTEDNESS TO U.S. CITIZENS.** (FAA Sec. 620(c)). Absent a Presidential determination based on national security needs, assistance to a government is prohibited if the government is indebted to any U.S. citizen or person, and (a) such citizen or person has exhausted available legal remedies, (b) the debt is not denied or contested, or (c) the indebtedness arises under an unconditional guaranty of payment given by such government (or controlled entity).

**Is this restriction applicable? Please comment.**

3. **SEIZURE OF U.S. PROPERTY.** (Section 527 of the Foreign Relations Authorization Act, 1994-95, which superseded FAA Sec. 620(e)). Absent a waiver by the Department of State, assistance to a government is prohibited if that government has expropriated or seized ownership or control of property at least 50 percent beneficially owned by U.S. citizens without:
- (a) Returning the property to the owner;
  - (b) Compensating the owner for the property;
  - (c) Offering a domestic procedure providing prompt, adequate, and effective compensation for the property; or
  - (d) Submitting the dispute to international arbitration.

As of 12/8/2004 the only country identified is Nicaragua, which has received a waiver.

[Contact: State/EB/IFD/OIA, J Nathaniel Hatcher, 202-647-9453 (until 1/05);  
State/EB/IFD/OIA, James Roseli, check e-mail address book (starting 2/05)]

**Is this restriction applicable? Please comment.**

4. **SPECIFIC COUNTRIES.** (FAA Secs. 620(a) and 620(f); FY 2005 Act Sec. 507). Assistance is specifically prohibited in the statute to Cuba, Iran, Libya, North Korea, and Syria. [Note: Prohibitions on assistance to China, Tibet, and Vietnam have been waived.]

**Is this restriction applicable? Please comment.**

5. **LOAN DEFAULT.** (FAA Sec. 620(q); FY 2005 Act Sec. 512 [Brooke Amendment]; see ADS 623). Absent a Presidential waiver, assistance is prohibited to the country under section 620(q) and only to the government of the country under section 512 where:

- (a) The government of the recipient country has been in default for more than six months on interest or principal of any loan by the U.S. to such country under the FAA; or
- (b) The country has been in default for more than one calendar year on interest or principal on any U.S. foreign assistance loan.

The 620q report can be found on the USAID intranet at <http://inside.usaid.gov/M/FM>.

[Contact: M/FM/LM, Earl Floyd, 202-712-4796.]

**Is this restriction applicable? Please comment.**

6. **DIPLOMATIC RELATIONS WITH U.S.** (FAA Sec. 620(t)). Assistance is prohibited if diplomatic relations between the U.S. and the recipient country are currently severed.

**Is this restriction applicable? Please comment.**

7. **INTERNATIONAL TERRORISM.** (FY 2005 Act Sec. 527; FAA Secs. 620A, 620G). Absent a Presidential waiver on national security grounds or for humanitarian reasons, assistance is prohibited to a recipient country that the Secretary of State has determined:
- (a) Grants sanctuary from prosecution to any terrorist; or
  - (b) Otherwise supports or assists terrorist governments (as determined by FAA Sec. 620A) or international terrorism.

The following have been identified as countries whose governments have repeatedly provided support for acts of international terrorism: Cuba, Iran, Libya, North Korea, Sudan, and Syria. Iraq has received a Presidential waiver under §1503 of P.L. 108-11 (Emergency Wartime Supplemental Appropriations Act, 2003).

[Contact: State/L/LEI, Linda Jacobson, 202-647-7324.]

**Is this restriction applicable? Please comment.**

8. **EXPORT OF LETHAL MILITARY EQUIPMENT TO TERRORIST STATES.** (FY 2005 Act Sec. 542; FAA Sec. 620H). Absent a Presidential determination, assistance is prohibited to a government that provides lethal military equipment to a terrorist government (those described in 7 above).

[Contact: State/L/NP, Maegan Conklin, 202-647-3220]

**Is this restriction applicable? Please comment.**

9. **DISCRIMINATION.** (FAA Sec. 666(b)). Assistance is prohibited to a recipient country that objects, on the basis of race, religion, national origin, or sex, to the presence of any officer or employee of the U.S. who is present in such country to carry out economic development programs under the FAA.

**Is this restriction applicable? Please comment.**

10. **NUCLEAR TECHNOLOGY.** (Arms Export Control Act Secs. 101, 102).

- (a) Absent special certification by the President, assistance is prohibited if the recipient country has either delivered or received from any other country nuclear enrichment or reprocessing equipment, materials, or technology, without specified arrangements or safeguards any time after August 3, 1977.

- (b) Absent special certification by the President, assistance is prohibited if the recipient country has, on or after June 30, 1994:
- (1) Transferred a nuclear explosive device to a non-nuclear weapon state,
  - (2) Received or detonated a nuclear explosive device, or
  - (3) Exported (or attempted to export) illegally from the U.S. any material, equipment, or technology that would contribute significantly to the ability of a country to manufacture a nuclear explosive device.

[Contact: State/L/NP, Newell Highsmith, 202-647-4621]

**Are these restrictions applicable? Please comment.**

11. **MILITARY COUP OR DECREE.** (FY 2005 Act Sec. 508). Assistance is prohibited to the government of a country where the duly elected head of government of the recipient country has been deposed by military coup or decree unless the President has notified Congress that a democratically elected government has since taken office. Since FY 2002, the section does not apply to assistance to promote democratic elections or public participation in democratic processes.

**Is this restriction applicable? Please comment.**

12. **EXPLOITATION OF CHILDREN.** (FAA Sec. 116(b)). Assistance is prohibited where the Department of State has determined that the recipient government has failed to take appropriate and adequate measures, within its means, to protect children from exploitation, abuse, or forced conscription into military or paramilitary services.

**Is this restriction applicable? Please comment.**

13. **PARKING FINES AND REAL PROPERTY TAXES.** (FY 2005 Act Sec. 543). Assistance to a recipient country must be reduced by 110 percent of the amount of unpaid parking fines and property taxes owed to the District of Columbia and New York City.

OYB country levels are adjusted by amounts owed by PPC/M/RA as part of the OYB process. **No action required** by country desk.

[Contact: Check with Bureau budget office, or PPC/RA/PBI, Sheila Blackman, 202-712-5175.]

14. **DELIVERY OF HUMANITARIAN ASSISTANCE.** (FAA Sec. 620I). Absent a Presidential determination, assistance is prohibited where the recipient government has prohibited or otherwise restricted, directly or indirectly, the transport or delivery of U.S humanitarian assistance.

**Is this restriction applicable? Please comment.**

15. **ASSISTANCE TO CUBA.** (FAA Sec. 620(y), as amended by section 2810 of FY 98/99 Foreign Relations Authorization Act, Pub. L. 105-277; LIBERTAD Act Sec. 111; Pub. L. 104-114).

- (a) If a country (or any entity in the country) provided (1) nuclear fuel and related assistance and credits or (2) assistance or credits in support of the Cuban nuclear facility at Juragua, Cuba at any time after March 12, 1996, then assistance to such country must be reduced by an amount equal to the sum of any such assistance or credits.
- (b) Assistance to a recipient country must be reduced by an amount equal to the aggregate value of nuclear fuel related assistance and credits provided by that country to Cuba during the preceding fiscal year, unless Cuba:
- (1) Has ratified the Treaty on the Non-Nuclear Proliferation of Nuclear Weapons or the Treaty of Tlatelolco and Cuba is in compliance therewith;
- (2) Has negotiated and is in compliance with full-scope safeguards of the International Atomic Energy Agency not later than two years after ratification by Cuba of such treaty; and
- (3) Incorporates and is in compliance with internationally accepted nuclear safety standards.

**Are these restrictions applicable? Please comment.**

16. **HUMAN RIGHTS VIOLATIONS.** (FAA Secs. 116 and 502B). If the Department of State has determined that the recipient government has engaged in a consistent pattern of gross violations of internationally recognized human rights, then:

- (a) Economic Support Fund funds may be used only if the assistance will directly benefit the needy; and
- (b) Development Assistance funds may be used only if the President has found that the country has made such significant improvement in its human rights record that furnishing such assistance is in the U.S. national interest.

As of 2/08/2004, no countries have been identified.

[Contact: State/L/HRR, Gilda Brancato, 202-647-4065]

**Is this restriction applicable? Please comment.**

17. **TRAFFICKING IN PERSONS (TIP)**. (22 USC 7107). Is the country (Burma, Cuba, Equatorial Guinea, North Korea, Sudan, Venezuela) listed on Tier III of the annual TIP report, still subject to sanctions under the Presidential Determination? The Presidential Determination describes: (a) which countries were reevaluated as being Tier II and therefore not subject to sanctions; (b) which countries that remained on Tier III were subject to sanctions; and (c) which countries remaining on Tier III were the subject of full or partial waivers. This year's Presidential Determination is available at <http://www.state.gov/g/tip/rls/prsrl/36127.htm>.

Note: Bangladesh, Ecuador, Guyana, and Sierra Leone are on the Special Watch List.

[Contact: your RLA or AGC; EGAT/WID, Katherine Blakeslee, 202-712-0570.]

**Please comment.**

18. **ACTIVITY INFORMATION SHEET DATA**. (See ADS 203.3.9). Has the USAID Country Officer informed PPC/SPP of any ongoing activity, that he/she is already aware of, which is not included in the "Activities Not Managed In-Country" (ANMIC) database? The Country Officer does NOT have an obligation to inquire about activities that he/she does not already know about or to complete activity information sheets. The ANMIC is available at <http://cdie.usaid.gov/npc/>.

[ANMIC Database Contact: PPC/SPP, Parrie Henderson, 202-712-5672]

**Please comment.**

19. **ESF ASSISTANCE FOR PARTIES TO THE INTERNATIONAL CRIMINAL COURT**. (FY 2005 Act Sec. 574 [Nethercutt Amendment]). Economic Support Fund (ESF) assistance is prohibited to provide "assistance to the government of a country" that:
- (a) Is a party to the International Criminal Court (ICC); and
  - (b) Has not entered into an agreement with the U.S. pursuant to Article 98 of the Rome Statute (Article 98 agreement). An Article 98 agreement prevents the ICC

from proceeding against U.S. personnel present in that country, and must be “in force” in order to avoid the prohibition.

The President may waive this restriction in the following cases if he determines and reports to the appropriate congressional committees that it is important to the national security interest of the U.S.: (a) NATO members; (b) Major non-NATO allies (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, New Zealand)<sup>1</sup>; or (c) Taiwan. This prohibition only applies to ESF funds and does not apply to Millennium Challenge Act (MCA) assistance to MCA-eligible countries. Therefore, a country that is ineligible to receive ESF assistance under this provision can still be eligible for MCA assistance.

[Contact: your RLA or AGC; PPC/RA/PBI]

Please comment.

## **Part B. “Taking Into Consideration” Provisions**

Because they have already been taken into account as part of the budget process, you do not have to include them in doing the checklist.

1. **MOB ACTION.** (FAA Sec. 620 (j)). Assistance may be terminated if the recipient country permitted (or failed to take adequate measures to prevent) damage or destruction of U.S. property by mob action.
2. **SEIZURE OF U.S. FISHING VESSELS.** (FAA Sec. 620(o); Fishermen's Protective Act of 1967, as amended, Sec. 5 (22 U.S.C. 1975(b))). Assistance may be denied or offset if the recipient country has seized, or imposed any penalty or sanction against, any U.S. fishing vessel fishing in international waters.
3. **OVERSEAS PRIVATE INVESTMENT CORPORATION (OPIC) INVESTMENT GUARANTY.** (FAA Sec. 620(l)). Assistance may be denied if the recipient country has failed to enter into an investment guaranty agreement with OPIC.
4. **UNITED NATIONS (U.N.) OBLIGATIONS.** (FAA Sec. 620(u)). The payment status of the recipient country's U.N. obligations is to be taken into account when considering assistance levels.
5. **ALGIERS MEETING.** (Section 720 of the International Security and Development Cooperation Act of 1981 (ISDCA of 1981)). The fact that a country attended and otherwise failed to disassociate itself from the communiqué issued at the Meeting of Ministers of Foreign Affairs and Heads of Delegations of the Non-Aligned Countries to the 36th General Assembly of the U.N. on September 25 and 28, 1981, is to be taken into account when considering assistance levels to such country.

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<sup>1</sup>Note: These countries were listed in the statute; the Philippines and Thailand are also major non-NATO allies.

### III. ASSISTANCE CHECKLIST

This checklist is to help managers and teams ensure that activities are consistent with applicable law. Since different provisions apply at different stages of the process, this Checklist is divided into the following parts: (A) Planning, (B) Congressional Notifications, and (C) Obligating Documents.

In addition to completing this Checklist, managers and teams should check with the Desk Officer to make sure that the Country Checklist has been completed and nothing has occurred since completion of the Country Checklist which would affect USAID's ability to provide assistance.

For the most part, no distinction between Development Assistance and Economic Support Fund funds is made in this Assistance Checklist because the FAA provides that, to the maximum extent feasible, ESF assistance should be provided consistent with the policy directions, purposes, and programs of Development Assistance.

#### Part A. Planning (in alphabetical order)

1. **ACTIVITY INFORMATION SHEET.** (See ADS 203.3.9) Does this activity require an Activity Information Sheet (AIS)? If so, has it been prepared or, if there is already an AIS for the activity, has it been reviewed and updated?

See Additional Help document, database for accessing Blank AIS Template (<http://www.usaid.gov/policy/ads/200/200sbi.doc>), available at <http://cdie.usaid.gov/npc/> (accessible only within the USAID firewall); or send an e-mail request to [npctemplate@dec.cdie.org](mailto:npctemplate@dec.cdie.org).

Please comment.

2. **AGRICULTURAL ACTIVITIES (BUMPERS AMENDMENT).** (FY 2005 Act Sec. 513(b), as interpreted by the conference report for the original enactment). No funds may be used for agricultural development activities (specifically, any testing or breeding feasibility study, variety improvement or introduction, consultancy, publication, conference, or training) that would compete with a similar commodity grown or produced in the United States unless the activity:

(a) Is designed to increase food security in developing countries and where such activities will not have a significant impact in the export of agricultural commodities of the United States; or

(b) Is a research activity intended primarily to benefit American producers.

Is this restriction applicable? Please comment.

3. **COMMUNIST ASSISTANCE.** (FAA Sec. 620(h)). Arrangements should be made to ensure that United States foreign aid is not used in a manner which, contrary to the best interests of the United States, promotes or assists the foreign aid projects or activities of any country that is a Communist country for purposes of FAA section 620(f).

Please comment.

4. **ADVERSE ECONOMIC IMPACT UPON THE UNITED STATES.**

- (a) **IMPACT ON U.S. JOBS: RELOCATION; EXPORT ZONES; VIOLATION OF WORKERS' RIGHTS.** (FY 2005 Act Sec. 533; see [ADS 225](#)). Assistance may not be provided:

- (1) To a business located in the U.S. for the purpose of inducing that business to relocate outside the U.S. in a manner that would likely reduce the number of U.S. employees of that business;
- (2) For an activity that contributes to the violation of internationally recognized workers rights of workers in the recipient country. This is applied commensurate with the level of development of the recipient country and is not to preclude assistance for the informal sector including micro and small-scale enterprise and smallholder agriculture.

Please comment.

- (b) **PRODUCTION OF SURPLUS COMMODITIES.** (FY 2005 Act Sec. 513(a)). Assistance may not be provided to establish or expand production of any commodity for export if the commodity is likely to be in surplus on world markets and substantial injury will be caused to U.S. producers of the same, similar, or competing commodities.

Is this restriction applicable? Please comment.

5. **ENVIRONMENT.**

- (a) **ENVIRONMENTAL REVIEW.** (FAA Sec. 117; 22 CFR 216 (USAID Regulation 16), see [ADS 204](#)). 22 CFR 216 requires an Initial Environmental Examination, unless the proposed assistance falls within certain exceptions and other actions.

Please comment.

(b) **DEBT-FOR-NATURE EXCHANGE.** (FAA Sec. 463). Assistance that will finance a debt-for-nature exchange must:

- (1) Support protection of the world's oceans and atmosphere, animal and plant species, or parks and reserves; or
- (2) Promote natural resource management, local conservation programs, conservation training programs, public commitment to conservation, land and ecosystem management, or regenerative approaches in farming, forestry, fishing, and watershed management.

**Is this applicable? Please comment.**

(c) **TROPICAL FOREST DEGRADATION.** (FAA Sec. 118). Funds may not be used for:

- (1) The procurement or use of logging equipment, unless an environmental assessment indicates that all timber harvesting operations involved will be conducted in an environmentally sound manner and that the proposed activity will produce positive economic benefits and sustainable forest management systems;
- (2) Actions that will significantly degrade national parks or similar protected areas that contain tropical forests, or introduce exotic plants or animals into such areas;
- (3) Activities that would result in the conversion of forest lands to the rearing of livestock;
- (4) The construction, upgrading, or maintenance of roads (including temporary haul roads for logging or other extractive industries) that pass through relatively undergraded forest lands;
- (5) The colonization of forest lands; or
- (6) The construction of dams or other water control structures that flood relatively undergraded forest lands.

*However, funds may be used for activities in (3) through (6) above if an environmental assessment indicates that the proposed activity will contribute significantly and directly to improving the livelihood of the rural poor and will be conducted in an environmentally sound manner that supports sustainable development.*

**Is this applicable? Please comment.**

6. **EXPROPRIATION AND LAND REFORM.** (FAA Sec. 620(g)). Assistance may not be used to finance compensation to owners for expropriated or nationalized property, except to compensate foreign nationals in accordance with a land reform program certified by the President.

Is this applicable? Please comment.

7. **FAMILY PLANNING.**

- (a) **ABORTIONS AND INVOLUNTARY STERILIZATIONS PROHIBITED.** (FAA Sec. 104(f); FY 2005 Act Sec. 518 and, "Child Survival and Health Programs Fund" heading under Title II). Funds may not be used:

- (1) To perform abortions as a method of family planning or to motivate or coerce any person to practice abortions.
- (2) To pay for the performance of involuntary sterilization as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations.
- (3) To pay for any biomedical research that relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.
- (4) To furnish assistance to any country or organization if the President certifies that the use of these funds by such country or organization would violate the three provisions above.
- (5) To lobby for or against abortion.
- (6) To furnish assistance to any organization or program that supports or participates in the management of a program of coercive abortion or involuntary sterilization.

Is this applicable? Please comment.

- (b) **VOLUNTARY FAMILY PLANNING SUPPORT.** (FY 2005 Act, Title II, under heading "Child Survival and Health Programs Fund"). Funds may be made available only to voluntary family planning projects that:

- (1) Offer, either directly or through referral to, or provide information about access to, a broad range of family planning methods and services (as a legal matter, Development Assistance only).
- (2) Meet the following requirements:
  - (a) Service providers do not implement or are not subject to quotas, or targets, of numbers of births, family planning acceptors, or acceptors of a particular form of family planning (quantitative estimates or indicators for planning and budgeting purposes is acceptable);
  - (b) The project must not provide payment of incentives, bribes, gratuities, or financial rewards for becoming a family planning acceptor or achieving numerical target or quota;
  - (c) The project must not deny any right or benefit, including right of access to any program of general welfare or right of access to health care, as a consequence of any decision not to accept family planning services;
  - (d) The project must provide comprehensible information of the health benefits and risks of method chosen; and
  - (e) The project must ensure that experimental drugs and services are provided only in the context of scientific study in which participants are advised of potential risks and benefits.
- (3) No applicant may be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning (as a legal matter, Child Survival and Health Programs Fund account only).

**Is this applicable? Please comment.**

8. **INTERNATIONAL CONFERENCES.** (FY 2005 Act Sec. 540, see Guidance on Funding Foreign Government Delegations to International Conferences, Mandatory Reference to ADS 302, 303, 306, 308, 350, and 522). Development Assistance funds may not be used to pay the costs for participation of another country's delegation at international conferences held under the auspices of multilateral or international organizations.

**Is this applicable? Please comment.**

9. **LEGISLATIVE ACTION.** (FAA Sec. 611(a)(2)). If the obligation is more than \$500,000 and requires legislative action within the recipient country, there must be a basis for a reasonable expectation that such action will be completed in time to permit orderly accomplishment of the purpose of the assistance.

Is this restriction applicable? Please comment.

10. **LOANS.**

(a) (FAA Section 122(b)). In making loans, USAID must consider the following:

- (1) Information and conclusion on the capacity of the country to repay the loan at a reasonable rate of interest.
- (2) Does the activity give reasonable promise of assisting long-range plans and programs designed to develop economic resources and increase productive capacities?
- (3) If repayable in dollars, the interest rate must be at least 2 percent per annum during a grace period which is not to exceed 10 years, and at least 3 percent per annum thereafter, but no higher than the applicable legal rate of interest of the country in which the loan is being made.

Is this applicable? Please comment.

(b) **PRODUCTIVE ENTERPRISES COMPETING WITH U.S. ENTERPRISES.** (FAA Sec. 620(d)). No FAA loan funds may be used for any productive enterprise that will compete with U.S. enterprises, unless:

- (1) There is an agreement by the recipient country to prevent export for use or consumption in the U.S. of more than 20 percent of the enterprise's annual production during the life of the loan; or
- (2) If in the absence of such an agreement, the President has established import controls to effectuate that agreement.

This may also be waived by the President due to national security interest.

Is this restriction applicable? Please comment.

11. **MILITARY PURPOSES.** (FAA Sec. 531(e)). Congress has explicitly provided that ESF funds may not be used for military or paramilitary purposes (e.g., combat training programs and exercises or support for the military).

Is this restriction applicable? Please comment.

12. **POLICE AND PRISONS.** (FAA Sec. 660). Assistance may not be used to provide training, advice, or any financial support for police, prisons, or other law enforcement forces (see exceptions in sections 660, 119 and 534 of the FAA; Section 536 of the FY 2004 Act (permanent provision of law); Sections 534(a) (only with regard to Afghanistan), 534(g) (extends 660(b)(6) to regional activities), and 564 (community-based police assistance) of the FY 2005 Act).

Is this restriction applicable? Please comment.

13. **PUBLICITY, PROPAGANDA, AND LOBBYING.** (FY 2005 Act Sec. 539; Anti-Lobbying Act, 18 U.S.C. 1913). Assistance may not be used, intended, or designed to influence a Member of Congress, a jurisdiction or any official of any government in the United States, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation; to influence in any way the outcome of a political election in the United States; or for any publicity or propaganda purposes not authorized by Congress.<sup>2</sup> There are some exceptions to this general rule; please consult your ACG or RLA.

Is this applicable? Please comment.

14. **RESTRICTIONS ON VOLUNTARY CONTRIBUTIONS TO U.N. AGENCIES.** (FY 2005 Act Sec. 502). Assistance may not be used to pay any voluntary contribution of the United States to the United Nations (including the United Nations Development Program) if the United Nations implements or imposes any taxation on any United States persons.  
[New provision for FY 2005]

Is this restriction applicable? Please comment.

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<sup>2</sup>See also GC Memorandum dated 5/9/97 by Jan Miller discussing OMB Circular A-122 restrictions regarding lobbying and other advocacy activities.

**Part B. Congressional Notifications**

1. **GENERAL NOTIFICATION.** (FY 2005 Act Sec. 515; FAA Sec. 634A). Obligations must be notified to Congress. This is usually accomplished through the annual Congressional Presentation. It may be the subject of a Special Notification, as below. Additionally, a new Congressional Notification must be made 15 days in advance of the obligation if the amount of the obligation has increased 10 percent from that previously notified.

Is this applicable? Please comment.

2. **SPECIAL NOTIFICATION.** For activities, countries, and other actions requiring special notification see the Annex, "Changes Made by the FY 2005 Foreign Operations Appropriations Act to Current Law."

Is this applicable? Please comment.

**Part C. Obligating Documents**

1. **SOURCE, ORIGIN, AND NATIONALITY.** (See [ADS 310](#)).
  - (a) **GENERAL.** (FAA Sec. 604(a)). All procurement must be from the U.S., the recipient country or developing countries, except as otherwise determined in accordance with Agency rules, including the DFA Procurement Guidance. If planning procurement elsewhere, a waiver must be obtained.

Please comment.

- (b) **AUTOMOBILES – BUY ONLY U.S. MADE MOTOR VEHICLES.** (FAA Sec. 636(i)). Assistance may not be used to finance the purchase, sale, long-term lease, exchange, or guaranty of the sale of motor vehicles manufactured outside the U.S., unless a waiver is obtained.

Please comment.

- (c) **AGRICULTURAL PROCUREMENT.** (FAA Sec. 604(e)). Agricultural commodities and products thereof must be procured within the U.S. unless the commodity or product could not be reasonably produced in the U.S. in fulfillment of the particular assistance program. Waivers are available in some circumstances.

Please comment.

- (d) **CONSTRUCTION OR ENGINEERING SERVICES.** (FAA Sec. 604(g)). No engineering or construction services may be procured from advanced developing countries<sup>3</sup> eligible under Code 941 that have attained competitive capability in international markets, *unless*:

- (1) The advanced developing country is receiving direct economic assistance under the FAA, and
- (2) Its own assistance program would permit U.S. firms to compete for similar services.

Please comment.

2. **CASH TRANSFERS – REQUIREMENT FOR SEPARATE ACCOUNT.** (FY 2005 Act Sec. 529(b)). If assistance is in the form of a cash transfer or nonproject sector assistance, all such cash payments must be maintained by the country in a separate account and not commingled with any other funds (unless such requirements are waived by Congressional notice for nonproject sector assistance).

Please comment.

3. **CAPITAL ASSISTANCE.**

- (a) **MISSION DIRECTOR CERTIFICATION/ASSISTANT ADMINISTRATOR DETERMINATION.** (FAA Sec. 611(e)). When capital assistance is proposed (for example, construction), and total U.S. assistance for it will exceed \$1 million, the Mission Director must certify and the Regional Assistant Administrator must take into consideration the country's capability to maintain and utilize the assistance effectively.

Please comment.

<sup>3</sup> While GC has not formally defined the term “advanced developing countries,” GC has considered both World Bank and OECD/DAC definitions of that phrase. Any questions should be brought to the relevant regional AGC.

- (b) **DEVELOPMENTALLY SOUND PROJECTS.** (Jobs Through Export Act of 1992, Sections 303 and 306(b)), Pub. L. 102-549, 22 U.S.C. 2421b and 2421d(b). If assistance is being provided for a capital activity, the activity must be developmentally sound and measurably alleviate the worst manifestations of poverty or directly promote environmental safety and sustainability at the community level.

Please comment.

- (c) **U.S. ENGINEERING SERVICES.** (FAA Sec. 601(d)). If using capital (for example, construction) assistance, U.S. engineering and professional services must be used to the maximum extent, consistent with U.S. interests.

Please comment.

4. **ASSISTANCE GENERATING LOCAL CURRENCY.** (FY 2005 Act Sec. 529(a)). If assistance is furnished to a foreign government under arrangements that result in the generation of local currencies, then:

(a) USAID must:

- (1) Require that local currencies be deposited in a separate account established by the recipient government;
- (2) Enter into an agreement with that government providing the amount of local currencies to be generated and the terms and conditions under which the currencies so deposited may be utilized; and
- (3) Establish by agreement the responsibilities of USAID and the host government to monitor and account for deposits into and disbursements from the separate account.

(b) Local currencies, or an equivalent amount of local currencies, can be used only to carry out the purposes of the Development Assistance or Economic Support Fund chapters of the FAA (depending on which chapter is the source of the assistance) or for the administrative requirements of the United States Government.

(c) USAID should take all necessary steps to ensure that the equivalent of local currencies disbursed from the separate account is used for the agreed purposes.

- (d) If assistance is terminated to a country, unencumbered balances of funds remaining in a separate account should be disposed of for purposes agreed to by the recipient government and the United States Government.

Please comment.

5. **PRINTING COSTS.** The Bureau for Legislative and Public Affairs (LPA) must approve printing costs of a report of study (except feasibility, design, or evaluation reports or studies) more than \$25,000. [Note: While the requirement for this review is not in the FY 2005 Act, the USAID guidance still applies.]

Please comment.

6. **ALCOHOLIC BEVERAGES AND CERTAIN ENTERTAINMENT EXPENSES.** (FY 2005 Act Sec. 548). Child Survival and Health Programs Funds, Development Assistance, or Economic Support Funds may not be used for alcoholic beverages or entertainment expenses that are substantially of a recreational nature.

Please comment.

7. **STATE DEPARTMENT NOTIFICATION OF BILATERAL AGREEMENTS WITH AN OBLIGATION OF \$25 MILLION OR MORE.** (see [ADS 349](#) and Circular 175). The date of signing and the amount involved must be cabled to State's Office of Assistant Legal Adviser for Treaty Affairs (L/T) immediately upon signing and the full text of the agreement should be pouched to State/L/T within 20 days of signing.

Please comment.

8. **ENGINEERING AND FINANCIAL PLANS.** (FAA Sec. 611). Before an obligation of more than \$500,000, there must be:
- (a) Engineering, financial, or other plans necessary to carry out the assistance; and
  - (b) A reasonably firm estimate of the cost to the U.S. of the assistance.

And, if the plan relates to a water or water-related land resource construction, the plan should include a computation of benefits and costs. This figure must be computed to the extent practicable in accordance with the principles, standards, and procedures established pursuant to the Water Resources Planning Act (42 U.S.C. 1962, et seq.).

**Please comment.**

## ANNEX

Changes Made by the FY 2005 Foreign Operations Appropriations Act to Current Law,  
Memorandum from GC to AA/PPC and AA/LPA, December 17, 2004

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### MEMORANDUM

To: AA/LPA, J. Edward Fox  
AA/PPC (Acting), Barbara Turner

From: GC, John S. Gardner

Subject: Changes Made by the FY 2005 Foreign Operations Appropriations Act to  
Current Law

On December 8, 2004 the President signed into law H.R. 4818, the Consolidated Appropriations Act, 2005 (P.L. 108-447, H. Rept. No. 108-792). Division D of that Act contains the text of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005 (the Act). The purpose of this memorandum is to identify and briefly describe the changes made by the FY 2005 Act to legal requirements and authorities previously applicable to USAID. Those changes marked with an asterisk (\*) will require the modification or issuance of Agency-wide guidance. For the most part, the changes identified do not include earmarks and funding ceilings.

1. Congressional Notifications (\*). As in prior Acts, the Appropriations Committees use the phrase "subject to the regular notification procedures of the Committees on Appropriations" to denote those programs which require special notification. This means that inclusion of a project or activity in the FY 2005 Congressional Budget Justification document is not sufficient to satisfy prior notification requirements for those countries, programs, or activities, as the case may be, which the FY 2005 Act (and its accompanying Statement of Managers or "SOM") specifically makes "subject to the regular notification procedures of the Committees on Appropriations." Separate notifications will therefore need to be submitted to Congress to satisfy this additional notification requirement. Special notification requirements contained in the FY 2005 Act and the SOM include:
  - a. prior to obligating Development Credit Authority funds for the cost of modifying any guaranteed loans under the Act or prior Acts (unchanged from FY 2004);
  - b. prior to obligating funds to open a new USAID overseas office or mission of USAID (unchanged from FY 2004);
  - c. prior to obligating any funds appropriated to the Capital Investment Fund (unchanged from FY 2004);
  - d. prior to obligating Economic Support Funds (ESF) to provide assistance to the National Democratic Alliance of Sudan to strengthen its ability to

- protect civilians from attacks, slave raids, and aerial bombardment by the Sudanese Government forces and its militia allies (unchanged from FY 2004);
- e. prior to obligating ESF funds for a Middle East Financing Facility, Middle East Enterprise Fund, or any other similar entity in the Middle East (unchanged from FY 2004);
  - f. prior to obligating any funds appropriated to the Andean Counterdrug Initiative (ACI) for demobilization/reintegration of members of foreign terrorist organizations in Colombia (this is a new requirement);
  - g. prior to obligating funds pursuant to the authority in Section 508 of the Act to resume assistance to a country whose duly elected head of government has been deposed by military coup if a democratically elected government subsequently has taken office, or if the assistance is being provided to promote democratic elections or promote public participation in democratic processes (unchanged from FY 2004);
  - h. prior to obligating funds under the heading “Assistance for the Independent States of the Former Soviet Union” for the Russian Federation, Armenia, Georgia, and Ukraine (Section 517; unchanged from FY 2004);
  - i. prior to obligating funds for Liberia, Serbia, Sudan, Zimbabwe, Pakistan, or Cambodia (Section 520; the Democratic Republic of the Congo is removed from the FY 2004 list);
  - j. prior to obligating funds for democracy programs specified in Section 526 of the Act (*e.g.*, programs for the People’s Republic of China, Hong Kong, and “countries with significant Muslim populations”) (unchanged from FY 2004; see paragraph 12 regarding changes in the democracy programs provision);
  - k. prior to using the interest earned on local currency accrued to a nongovernmental organization as a result of economic assistance provided under Title II of the Act and placed in an interest bearing account (Section 528; this is a new requirement);
  - l. prior to obligating funds for any cash transfer or nonproject sector assistance using Development Assistance (DA) or ESF, as well as prior to waiving the separate account requirement for nonproject sector assistance (Section 529; unchanged from FY 2004);
  - m. prior to the distribution of any assets resulting from the liquidation, dissolution, or winding up of an Enterprise Fund under Section 530 of the Act (unchanged from FY 2004; see paragraph 37 regarding changes in the enterprise fund provision);

- n. prior to obligating funds for Burma under Section 531 of the Act (unchanged from FY 2004; see paragraph 20 regarding changes in the Burma provision);
- o. prior to obligating funds to combat trafficking in persons (Section 534(a); unchanged from FY 2004);
- p. prior to obligating DA funds to American educational institutions for programs and activities in the People's Republic of China relating to the environment, democracy, and the rule of law (Section 534(l); this is a new requirement);
- q. prior to obligating funds under Section 536(a) for nongovernmental organizations for assistance to countries that would otherwise be prohibited from receiving assistance (unchanged from FY 2004);
- r. prior to obligating reprogrammed funds withheld as a result of unpaid parking fines and penalties and unpaid property taxes owed by foreign countries (Section 543; the FY 2004 requirement is expanded to include unpaid property taxes);
- s. prior to obligating funds transferred to Child Survival and Health Programs Fund (CSH) from International Organizations and Programs (IOP) by operation of Section 560 of the Act. (this is a new requirement; see paragraph 11 regarding contributions to UNFPA);
- t. prior to obligating funds for certain community-based police assistance under Section 564 (this is expanded authority from FY 2004; see paragraph 13);
- u. prior to obligating in excess of \$45,000,000 in International Disaster and Famine Assistance (IDFA) and Transition Initiative (TI) funds for assistance for Sudan outside of the Darfur region. This notification must be provided not less than five days prior to obligation (Section 569; this is a new requirement and is in addition to the notification procedures required for Sudan in Section 520; see paragraph 16 regarding changes in the Sudan provision); and
- v. prior to any proposed increase or decrease to the amounts available for the programs and accounts contained in the tables in the SOM (Section 595; this is a new requirement; see paragraph 43 for list of accounts).

#### **DEVELOPMENT ASSISTANCE FUND**

2. Development Assistance (DA). DA funds are appropriated as "two-year" funds and remain available for obligation until September 30, 2006. This is a change from the FY 2004 Appropriations Act which appropriated DA funds to remain available for one fiscal year except for \$150 million that may be carried over for obligation in FY 2005.

Note: the Act removed the FY 2004 special notification provision for funds managed by or allocated to the Global Development Secretariat. However, the SOM requests that the USAID “present to the Committees its financial plan for continued implementation of the Global Development Alliance.”

### **ECONOMIC SUPPORT FUND**

#### 3. Economic Support Fund (ESF)

Egypt. The Act states that with respect to democracy and governance activities in Egypt, the organizations implementing such assistance and the specific nature of the assistance shall not be subject to the prior approval of the Government of Egypt. The SOM states that this language is intended to include nongovernmental organizations and other segments of civil society that may not be registered with, or officially recognized by, the Government of Egypt. The SOM also notes that the Government of Egypt “should be kept informed of funding provided pursuant to these activities.”

Pakistan (\*). Not to exceed \$200,000,000 of ESF may be used for the costs of modifying direct loans and guarantees for Pakistan. These amounts shall not be considered “assistance” for the purposes of provisions of law limiting assistance to Pakistan.

Note: the Act removed the provision that made ESF available to USAID for administrative costs for regional programs in Asia and the Near East, including the Middle East Partnership Initiative. (\*)

#### 4. Limitation on ESF for Foreign Governments that are Parties to the International Criminal Court (also known as the “Nethercutt Amendment”) (\*). Section 574(a) prohibits the provision of ESF for assistance to the government of a country that is a party to the International Criminal Court (ICC) and has not entered into an agreement with the U.S. pursuant to Article 98 of the Rome Statute preventing the ICC from proceeding against U.S. personnel present in that country.

In subsection (b), the President is given the authority, without prior notice to Congress, to waive the prohibition of subsection (a) with respect to a North Atlantic Treaty Organization (NATO) member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand<sup>4</sup>), or Taiwan if he determines and reports to the appropriate congressional committees that it is important to the national security interests of the United States.

In subsection (c), the President is given the authority, without prior notice to Congress, to waive the prohibition in subsection (a) for a particular country if he determines and reports to the appropriate congressional committees that the country has entered into an Article 98 agreement with the United States.

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<sup>4</sup> Note: This is the list in the Act; the Philippines and Thailand are also major non-NATO allies.

In subsection (d), the Act exempts assistance under the Millennium Challenge Act from the prohibition of this Section, notwithstanding Section 606(a)(2)(B) of that Act.

5. Disability Programs (\*). Section 579 provides that not less than \$2,500,000 of ESF shall be made available for programs and activities to address the needs and protect the rights of people with disabilities. The SOM notes that USAID has designated a Disability Coordinator, and expect the USAID Disability Coordinator and the State Department to work together to devise a plan for their respective roles in administering these funds, in consultation with the Committees on Appropriations.

The Act also provides authority to use a portion of the funds for an international conference on the needs of people with disabilities, including disability rights, advocacy, and access. USAID and the Department of State are to consult with the Committees on Appropriations regarding any plan to sponsor such a conference.

The Act requires that not later than 90 days after enactment of the Act, USAID must implement procedures to require that prospective grantees seeking funding from USAID specify, when relevant, how the proposed program, project, or activity for which funding is being requested will include protecting the rights and addressing the needs of persons with disabilities.

#### **MANAGEMENT ISSUES**

6. Hiring Authority (\*). Section 588 provides authority for USAID to use up to \$37,500,000 in program funds to hire 175 Foreign Service Limited employees. Upon completion of the consultations discussed below, this provision will supersede the authority in the FY 2004 Act which allowed in each of FY 2004, 2005, and 2006 the hiring of 85 Foreign Service limited term employees. The number of individuals hired in any fiscal year pursuant to the new authority may not exceed 175, of which not more than 75 maybe hired for employment in the U.S. The authority to hire these employees expires on September 30, 2007.

The SOM notes that for many years, "USAID has used multiple personnel authorities, such as Personal Services Contracts (PSCs), Participating Agency Service Agreements (PASAs), Resources Support Service Agreements (RSSAs) and other mechanisms to obtain the services of individuals necessary to carry out USAID's programs. Many of these individuals have unique skills that USAID will require only for a limited duration, although in most other respects these individuals are indistinguishable from USAID employees. USAID estimates it has over 800 of these individuals now working in Washington and in overseas missions."

Prior to using the new hiring authority, USAID must consult with the Committees on its use and USAID workforce issues generally. Also, the provision requires that in exercising this authority, USAID will eliminate an equivalent number of program-funded PSCs, PASAs, RSSAs, and other staff positions. The SOM expects that this will help rationalize USAID's personnel practices, make more

transparent the costs of program implementation, and “lead to budget savings as USAID is now required to pay other agencies and entities overhead costs of as much as 30 and 40 percent when it uses outside staff.”

While the Act retains the “Disaster Surge Capacity” language, it limits the use of USAID program funds to cover the costs of staff working to mitigate the effects of natural disasters. In FY 2004, Disaster Surge Capacity funds could be used for staffing costs associated with programs to address natural or man-made disasters, or Transition Initiatives programs. The SOM notes that this authority should be used sparingly and only when necessary to enable USAID to cope with the consequences of natural disasters, such as those on the scale of Hurricane Mitch in Central America in 1999.

7. Capital Investment Fund. The Act makes available amounts appropriated under this heading, not to exceed \$19,709,000, for the purposes of implementing the Capital Security Cost Sharing Program.

Note: the Act removed several provisions which required the USAID Administrator to (1) assess rental charges on other agencies in buildings constructed with Capital Investment Funds and (2) concur with the assignment of U.S. Government employees or contractors to space in buildings constructed using Capital Investment Funds. In addition, the Act removed a special notification requirement prior to obligating receipts from rental payments by other agencies for the use of space financed from the Capital Investment Fund.

## **GLOBAL HEALTH**

8. Child Survival and Health Programs (CSH) Fund. The Act includes a total of \$337,800,000 for the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund). The SOM notes that other donors have not contributed adequate matching funding to make available all of the potential U.S. FY 2004 Global Fund contribution. The total amount made available in the Act includes \$87,800,000 carried over from FY 2004 funds that were withheld because of failure of the Global Fund to meet certain statutory conditions. Absent this carryover, these funds could have been used for purposes other than a contribution to the Global Fund.

The Act also provides that up to 5 percent of the aggregate amount of funds made available to the Global Fund in FY 2005 may be made available to USAID for technical assistance related to Global Fund activities. The SOM notes that priority should be given to assistance that speeds the distribution of Global Fund grants and improves the accountability and efficiency of their use, rather than increases the pipeline of undisbursed funding.

9. Global HIV/AIDS Initiative. A FY 2004 CSH fund earmark was moved to this heading (administered by the Global HIV/AIDS Coordinator) and provides that of the funds appropriated under this heading, not less than \$27,000,000 should be made available for a U.S. contribution to the Joint UN Programme on HIV/AIDS (UNAIDS).

10. HIV/AIDS. Section 525 provides a new general provision that conditions 25 percent of the appropriation to the Global Fund, subject to a waiver, on managerial and process changes at the Global Fund to improve its efficiency and transparency. The Act also included language authorizing a HIV/AIDS Working Capital Fund to strengthen the ability of the Office of the Global AIDS Coordinator, USAID, and other U.S. Government agencies to effectively administer the procurement of pharmaceuticals and other products needed to provide care and treatment of persons with HIV/AIDS and related infections. Funds deposited in the HIV/AIDS Working Capital Fund are available without fiscal year limitation.
11. Contributions to the UN Population Fund. Section 560 provides \$34,000,000 for the United Nations Population Fund (UNFPA). Of this amount, \$25,000,000 is to be made available from funds appropriated under International Organizations and Programs (IOP) and \$9,000,000 is to be made available from funds appropriated under CSH.

The Act requires the reprogramming of FY 2004 funds originally appropriated under IOP in P.L. 108-199 for UNFPA. Specifically, \$12,500,000 for anti-trafficking programs and \$12,500,000 for family planning, maternal, and reproductive health activities.

If IOP funds cannot be obligated for UNFPA, they are to be transferred to CSH and used for family planning, maternal, and reproductive health activities. As noted in paragraph 1(s), the Act requires special notification prior to obligating funds transferred to CSH. The SOM notes that the purpose of this provision is to eliminate any ambiguity regarding Congressional intent that funds appropriated for UNFPA that are not provided to UNFPA as a result of the operation of any provision of law are to be made available to USAID for family planning, maternal, and reproductive health activities.

#### **DEMOCRACY, CONFLICT, AND HUMANITARIAN ASSISTANCE**

12. Democracy Programs (\*). Section 526 provides new authority to conduct democracy, human rights, and rule of law programs for Syria. The Section removed a provision that required funds appropriated under this heading to be made available to support civil society organizations working for democracy in Egypt.
13. Community-Based Police Assistance (\*). Section 564 expands the authority to use DA and ESF assistance for programs that improve community-based policing, notwithstanding Section 660 of the Foreign Assistance Act of 1961. The FY 2004 Appropriations Act had limited the authority to Jamaica and El Salvador. The expanded authorities in this Section are limited to improving the effectiveness and accountability of civilian police authority through training and technical assistance in human rights, the rule of law, strategic planning, and through assistance to foster civilian police roles that support democratic governance [including assistance for programs to prevent conflict, respond to disasters, address gender-based violence, and foster improved police relations with the communities they serve]. The SOM notes that the Act includes a consultation requirement that it expects to be invoked at the preliminary planning

stages of such programs. As previously noted, the Section also requires special notification prior to any obligation of funds using the authority of this Section.

#### **ECONOMIC GROWTH, AGRICULTURE, AND TRADE**

14. Development Credit Authority (DCA). The Act restores the FY 2003 Appropriations Act provision which states that Section 107A(d) (relating to general provisions applicable to the DCA) of the Foreign Assistance Act of 1961, as contained in Section 306 of H.R. 1486 as reported by the House Committee on International Relations on May 9, 1997, shall be applicable to direct loans and loan guarantees provided under this heading. Among other things, the provision provides that the full faith and credit of the United States is pledged in the performance of DCA guarantees.
15. Trade Capacity Building. Section 570 states that not less than \$507,000,000 should be made available for trade capacity building assistance from various accounts (including DA, TI, ESF, IOP).

The Act states that \$20,000,000 of ESF shall be made available for labor and environmental capacity building activities related to the free trade agreement between the U.S. and the countries of Central America and the Dominican Republic. The SOM notes that such activities should include labor cooperation, capacity building priorities on fundamental labor rights and the elimination of child labor, and improvements in labor administration. In addition, the SOM notes that these activities should also include programs relating to the environment, specifically technical assistance on the development and enforcement of environmental laws and regulations, environmental management systems, partnerships to enhance environmental efforts, and market-related and economically sustainable conservation programs. Prior to the obligation of funds for these purposes, the managers request that the Department of State consult with the Committees on Appropriations.

#### **AFRICA**

16. Sudan. Section 569 provides that not less than \$311,000,000 from this Act should be made available for assistance for Sudan. No funds from this Act may be available for assistance for the Government of Sudan or to alleviate the sovereign debt of that government unless specific steps are taken to improve security and humanitarian assistance in Darfur. Limitations on assistance do not apply to humanitarian assistance and assistance for Darfur and for areas outside the control of the Government of Sudan. In addition to the special notification procedures required for Sudan in Section 520, this general provision limits the amount of IDFA and Transition Initiatives funds that may be spent without notification outside of Darfur to \$45,000,000.

The Act defines the terms "Government of Sudan," "areas outside of control of the Government of Sudan," and "area in Sudan outside of control of the Government of Sudan" as having the same meaning and application as was the case immediately prior to June 5, 2004, and, with regard to assistance in support of a viable peace agreement, Southern Kordofan/Nuba Mountains State, Blue Nile State, and Abyei.

Subsection (g) also provides \$75,000,000 in emergency appropriations for “Peacekeeping Operations” to support peace and humanitarian intervention operations for Sudan, and an additional \$18,000,000 for IDFA for humanitarian assistance and related activities for Sudan. The Secretary of State is instructed to consult with the Committees on Appropriations regarding the proposed uses of these funds within 30 days of enactment of this Act. The SOM notes that funds made available pursuant to this Section are provided in response to a situation which poses a direct threat to life and property, is sudden, is an urgent and compelling need, is unpredictable, and is not permanent in nature.

17. Nigeria. Section 582 requires a report on the involvement of the Nigerian Armed Forces in an incident in Benue State, the steps being taken to prosecute those involved, and whether such units have received U.S. assistance.

Note: the Act removed the FY 2004 provisions that restricted the use of International Military Education and Training (IMET) and Foreign Military Financing Program (FMF) funds for Nigeria until a Presidential certification regarding actions taken against members of the Nigerian Armed Forces, against whom there is credible evidence of gross violations of human rights in Benue State in October 2001, and the Government of Nigeria and the Nigerian Armed Forces are taking effective measures to bring such individuals to justice.

18. Compliance with the Algiers Agreement. Section 592 restricts U.S. assistance, with certain exceptions and a waiver provision, to the central governments of Ethiopia or Eritrea unless the Secretary of State certifies that the government is taking steps to comply with the Algiers Agreement. The Section does not apply to democracy, rule of law, peacekeeping programs and activities, child survival and health, basic education, and agriculture programs.

## **ASIA AND NEAR EAST**

19. Afghanistan. Section 523 provides that not less than \$980,000,000 of the funds appropriated by Titles II (economic assistance) and III (military assistance) should be made available for humanitarian, reconstruction, and related assistance for Afghanistan. The “related assistance” language is new and makes available funds for a wide range of economic and military assistance, including narcotics control and law enforcement. The Act also provides that to the maximum extent practicable, members of the Afghan National Army should be vetted for involvement in terrorism, human rights violations, and drug trafficking.
20. Burma. Section 531 provides that in addition to “Migration and Refugee Assistance” funds, not less than \$4,000,000 shall be allocated to USAID for humanitarian assistance for displaced Burmese and host communities in Thailand. This Section also includes a new provision which states that an amount equivalent to the amount of contributions made by the Global Fund to the State Peace and Development Council in Burma and its affiliate organizations will be withheld according to the provisions of Section 202(d)(4)(A)(ii) of Public Law 108-25 (the Global AIDS Leadership Act). That section of Public Law 108-25 states that if the President determines that the Global Fund has provided assistance to a country, the government of which the Secretary of State has

determined has repeatedly provided support for acts of international terrorism, then the U.S. shall withhold from its contribution of the next fiscal year an amount equal to the amount expended by the Fund to the government of such country.

21. People's Republic of China. Section 534(l) provides authority for USAID, notwithstanding any other provision of law and subject to special notification procedures, to provide DA funds to American educational institutions for programs and activities in the People's Republic of China relating to the environment, democracy, and the rule of law.
22. Pakistan. Subsection 534(n) further amends Public Law 107-57, by extending the waiver authority with respect to Pakistan to FY 2005.
23. Cambodia. Section 534(o) makes available funds appropriated by this Act and prior Appropriations Acts for assistance for Cambodia: (1) \$2,000,000 for an endowment for a Cambodian nongovernmental organization to document genocide and crimes against humanity in Cambodia; and (2) \$3,750,000 for an endowment for an American nongovernmental organization to sustain rehabilitation programs in Cambodia for persons suffering from physical disabilities. These organizations may place the funds in interest bearing accounts and interest earned must be used for the purpose for which the funds were made available.

Section 554 continues the prohibition on assistance to the central Government of Cambodia but carves out an expanded list of exceptions to that prohibition including assistance for "basic education, reproductive and maternal and child health, cultural and historic preservation, programs for the prevention, treatment, and control of, and research on, HIV/AIDS, tuberculosis, malaria, polio and other infectious diseases, development and implementation of legislation and implementation of procedures on inter-country adoptions consistent with international standards, rule of law programs, counternarcotics programs, programs to combat human trafficking that are provided through nongovernmental organizations, and for the Ministry of Women and Veterans Affairs to combat human trafficking."

24. Israel. Section 534(p) extends the availability of loan guarantees to Israel from September 30, 2005, to September 30, 2007.
25. West Bank and Gaza Program (\*). Sec. 559(b) states that prior to the obligation of ESF, the Secretary of State shall take all appropriate steps to ensure that such assistance is not provided to or through any individual, private or government entity, or educational institution that the Secretary has reason to believe is involved in terrorist activity. The Secretary shall terminate assistance to any individual, entity, or educational institution which he has determined to be involved in or advocating terrorist activity.

The Act includes a new subsection (c) which prohibits funds appropriated by this Act from being used to recognize or honor individuals who commit acts of terrorism.

## **EUROPE AND EURASIA**

26. Assistance for Eastern Europe and the Baltic States. Funds in this account are allocated in the tables included in the SOM. As stipulated in Section 595, any changes to the allocations are subject to special notification.

Note: the Act does not include a provision requiring the Administrator of USAID to provide prior written approval for grants and loans for the economic revitalization program in Bosnia and Herzegovina.

27. Assistance for the Independent States of the Former Soviet Union. Funds in this account are allocated in the tables included in the SOM. As stipulated in Section 595, any changes to the allocations are subject to special notification.
28. Independent States of the Former Soviet Union. Section 517 removed FY 2004 language which restricted assistance to the governments of certain countries unless they were making progress in implementing economic reforms, and if those governments used U.S. assistance to facilitate the expropriation or seizure of assets. The reference to the Coordinator for U.S. Assistance to the New Independent States has been changed to the Coordinator for U.S. Assistance to Europe and Eurasia.

The Act moved former subsection (f) which required that Enterprise Funds be expended at the minimum rate necessary to make timely payment for projects and activities. This provision is now in 530(b) under the heading Enterprise Fund Restrictions (see paragraph 37).

29. Funding for Serbia. Section 563 modifies FY 2004 language that now conditions assistance for the central government of Serbia, after May 31, 2005, on certain specified conditions. In FY 2004, the restriction was not limited to the central government and required the determination by March 31. In addition, a FY 2004 condition regarding the release of political prisoners from Serbian jails and prisons has been removed. References in the Section to the Federal Republic of Yugoslavia have been replaced with the Government of Serbia and Montenegro.

## **LATIN AMERICA AND THE CARIBBEAN**

30. Andean Counterdrug Initiative (ACI). Funds in this account are allocated in the tables included in the SOM, and any changes to the allocations are subject to special notification. In addition to amounts otherwise available for such purposes, not more than \$7,800,000 (up from \$4,500,000 in FY 2004) may be available for administrative expenses of USAID.

The Act provides that not less than \$264,600,000 shall be made available for alternative development and institution building activities by USAID, the Department of Justice, and the Department of State of which \$237,000,000 shall be directly apportioned to USAID, including \$125,700,000 for assistance for Colombia. The Act includes a provision that states the Administrator of USAID, in consultation with the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, shall have responsibility for the use of ACI funds directly apportioned to USAID.

The Act also provides that: (1) not less than \$6,000,000 should be made available for judicial reform programs in Colombia; (2) not less than \$6,000,000 shall be made available to USAID for organizations and programs to protect human rights; and (3) \$2,000,000 should be made available through nongovernmental organizations for programs to protect biodiversity and indigenous reserves in Colombia.

As noted above, the Act requires special notification prior to the obligation of funds appropriated to the ACI for demobilization/reintegration of members of foreign terrorist organizations (FTOs) in Colombia. The SOM notes that USAID included \$3,250,000 in its FY 2005 budget justification for "Peace Initiatives" in Colombia, including demobilization/integration. The SOM states that "the costs of demobilizing illegal armed groups should be borne by the Colombian Government, not the United States. The managers are concerned that the demobilization process is being undertaken without adequate safeguards to ensure the dismantling of such FTOs, to deter members of such groups from resuming illegal activities, or to prosecute and punish those involved in drug trafficking and human rights violations."

The SOM further states that the Administration should not request funds in FY 2006 for the demobilization/reintegration of members of such FTOs unless it is for limited activities that are determined by the Justice Department to be consistent with United States anti-terrorism laws, and the following conditions can be met: (1) the FTO is respecting a ceasefire and the cessation of illegal activities; (2) the Government of Colombia has not adopted any law or policy inconsistent with its obligations under the United States-Colombian treaty on extradition, and has committed to the United States that it will continue to extradite Colombian citizens to the United States, including members of such illegal armed groups, in accordance with that treaty; (3) the Colombian legal framework governing the demobilization of such groups provides for prosecution and punishment, in proportion to the crimes committed, of those responsible for gross violations of human rights, violations of international humanitarian law, and drug trafficking, for reparations to victims, and for the monitoring of demobilized individuals; (4) the Government of Colombia is implementing a policy of effectively dismantling such groups, including the seizure of financial and property assets; and (5) the Government of Colombia is taking actions to enable the return of stolen assets, including real property, to their original owners.

31. Haiti. Section 549 appropriates funding for Haiti at a level not less than the following amounts: (1) \$20,000,000 from CSH; (2) \$25,000,000 from DA, of which funds should be made available for poverty reduction, agriculture, environment, and basic education programs; and (3) \$40,000,000 from ESF, of which funds should be made available for judicial reform programs, police training, and activities in support of national elections.

The SOM directs that \$2,000,000 should be provided from the CSH account to strengthen and expand Zanmi Lasante's maternal child health activities in Haiti's Central Plateau region. This amount is in addition to other amounts that USAID provides to Zanmi Lasante for HIV/AIDS activities under this account and other headings in the Act. In addition, the SOM requests the Administrator to consult

with the Secretaries of State, Agriculture, and Energy, with Haitian officials, nongovernmental organizations and communities, and with appropriate international donor agencies, to devise a reforestation strategy for areas that are vulnerable to erosion.

32. Colombia. Section 556 conditions the provision of assistance to the Colombian Armed forces by requiring a certification that the Colombian Government is dismantling paramilitary leadership and financial networks. The FY 2004 provision required only the Colombian Armed Forces to meet this condition.
33. Central America. Section 584 is a new general provision earmarking funds for the countries of Central America. Subsection (a) provides that of the funds appropriated by this Act under CSH and DA, not less than the amount of funds initially allocated pursuant to Section 653(a) of the Foreign Assistance Act of 1961 for FY 2004 should be made available for El Salvador, Guatemala, Nicaragua and Honduras. The SOM notes that the total funding levels for these countries are as follows: \$35,755,000 for El Salvador, \$22,499,000 for Guatemala, \$35,144,000 for Honduras, and \$35,011,000 for Nicaragua.

Subsection (b) conditions \$3,227,000 of prior year Military Assistance Program funds for non-lethal defense items for Guatemala.

Subsection (c) amends Section 527 of the Foreign Relations Authorization Act for FY 1994 and FY 1995 to exempt the government of Nicaragua from sanctions as a result of expropriation of property claims after a certain date set by the Secretary of State.

The SOM notes that the Procuraduria de la Republica in Nicaragua and the Fiscalia de Anti-corruption in Guatemala have played leading roles in the fight against corruption in Central America. As a result, the SOM endorses the Senate recommendation of \$250,000 for the Procuraduria and \$250,000 for the Fiscalia in FY 2005.

#### **ACQUISITION AND ASSISTANCE**

34. Limitations on Contracts (\*). Section 573 prohibits funds from this Act from being used to fund any contract contravening Section 8(d)(6) of the Small Business Act, which requires certain reporting and certification requirements from government subcontractors.
35. Disability Programs (\*). See paragraph 5 regarding Section 579 which directs USAID to implement procedures that require prospective grantees to address protecting the rights of persons with disabilities.

#### **OTHER PROVISIONS**

36. Millennium Challenge Corporation (MCC). The Act appropriates \$1,500,000,000 for the MCC to be available until expended, of which \$50,000,000 is available for administrative expenses. In addition, up to 10 percent of the funds are available for threshold countries.

Before any MCC funds may be made available, the MCC must provide a written budget justification and a report on the threshold country program to the Committees on Appropriations. The Act also extends Section 605(e)(4) of the Millennium Challenge Act of 2003 (the prohibition on use of funds for abortions and involuntary sterilizations), and requires the MCC to fully fund multi-year compacts for FY 2004 and 2005.

Subsection 534(q) of the general provisions amends the eligibility criteria of the MCC. The term in the eligibility criteria “investments in the people” is expanded and defined as government policies and programs of an eligible country that promote the health, education, and other factors which contribute to the well-being and productivity of their people, such as decent, affordable housing.

The SOM directs the MCC to consult with the Committees on Appropriations and other appropriate committees if the MCC plans to propose an expansion of the “investment in the people” criteria beyond the areas of health and education for purposes of country eligibility. In the event of such a proposed expansion, the SOM directs the MCC to provide this consultation not later than 21 days prior to the release of the report on the criteria and methodology for determining eligibility. The consultation must include “a justification, including supporting documents, that the proposed expansion will meet requirements and expectations of country coverage, transparency and availability, objectivity and reliability, an appropriate inclusion in the eligibility methodology, and a link to economic growth and poverty reduction that merits the provision of eligibility incentives.”

37. Enterprise Fund Restrictions. Section 530 added a new subsection (b) which requires all Enterprise Funds to be expended at the minimum rate necessary to make timely payment for projects and activities. This subsection was formerly located under and limited to the heading “Independent States of the Former Soviet Union” in the FY 2004 Appropriations Act (see also paragraph 27).

38. Special Authorities. Section 534.

Contingencies. In subsection (f) the Act increases the funding ceiling of \$25,000,000 in Section 451(a) of the Foreign Assistance Act of 1961 to \$45,000,000 for FY 2005.

Definition. Subsection (q) amends the eligibility criteria of the MCC. See paragraph 36.

See paragraphs 21 on educational programs in the People's Republic of China; 22 regarding extension of the waiver authority with respect to Pakistan; 23 regarding endowments in Cambodia; and 24 on loan guarantees to Israel.

39. Parking Fines and Real Property Taxes (\*). Section 543 requires the withholding of U.S. assistance to the central governments of countries with adjudicated unpaid real property taxes and parking fines in the U.S. The reference to the “central governments” of countries is new. In addition, the new reference to

unpaid property taxes is defined as the amount of unpaid taxes and interest determined to be owed by a foreign country on real property in the District of Columbia or New York, New York.

40. Environment Programs. Section 576 provides \$165,000,000 in DA shall be made available for biodiversity programs, of which not less than \$8,000,000 should be made available to implement a new regional strategy for biodiversity conservation in the countries comprising the Amazon basin of South America, including to improve the capacity of indigenous communities and local law enforcement agencies to protect the biodiversity of indigenous reserves. The SOM notes that \$7,000,000 in unobligated FY 2004 funds are also available for this purpose and request to be consulted prior to the obligation of funds.

The Section also provides that not less than \$180,000,000 shall be made available to support clean energy and other climate change policies and programs in developing countries. Of this amount, \$100,000,000 should be made available to promote and deploy energy conservation, energy efficiency, and renewable and clean energy technologies. The SOM states concerns that funding for these energy activities and for USAID's Office of Energy and Information Technology, has decreased in recent years, and therefore \$15,000,000 above the amount allocated by USAID in FY 2004 is provided for these purposes. The SOM also requests that the Caribbean be considered by USAID for support for solar, hydro and other renewable energy technologies, in addition to the regions listed in the Senate report (rural Latin America, Africa, and Pacific island nations).

41. HIPC Debt Reduction and Trust Fund. Section 591 authorizes not more than \$150,000,000 for contributions to the HIPC Trust Fund for FY 2004-2006.
42. Administrative Provisions Related to Multilateral Development Banks (\*). Section 593 amends Section 1307 of the International Financial Institutions Act (22 U.S.C. 262m-7). Multilateral development banks may not vote in favor of any proposed action which may result in a significant impact on the environment, unless the Secretary of the Treasury, after consultation with the Secretary of State and the Administrators of USAID and the Environmental Protection Agency, determines that an environmental impact assessment has been completed, and the findings have been made available to the affected groups.

The term "multilateral development bank" is defined as the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Inter-American Development Bank, the Inter-American Investment Corporation, any other institution (other than the International Monetary Fund) specified in Section 1701(c)(2) of the International Financial Institutions Act, and any subsidiary of any such institution.

43. Joint Explanatory Statement (\*). Section 595 includes a new general provision requiring that funds in the following accounts be allocated as indicated in the respective tables in the SOM accompanying this Act:

Economic Support Fund,  
Assistance to Eastern Europe and the Baltic States,  
Assistance for the Independent States of the Former Soviet Union,  
Nonproliferation, Anti-terrorism, Demining and Related Programs,  
Andean Counterdrug Initiative,  
Foreign Military Financing Program, and  
International Organizations and Programs.

Any change to these allocations is subject to prior notification.

#### **PERMANENT PROVISIONS OF LAW IN THE FY 2004 ACT**

The following USAID-related provisions were contained in the FY 2004 Foreign Operations Appropriations Act and continue to be applicable although not included in the FY 2005 Act:

1. Section 534(f):

SHIPMENT OF HUMANITARIAN ASSISTANCE- During fiscal year 2004 and each fiscal year thereafter, of the amounts made available by the United States Agency for International Development to carry out the provisions of Section 123(b) of the Foreign Assistance Act of 1961, funds may be made available to nongovernmental organizations for administrative costs necessary to implement a program to obtain available donated space on commercial ships for the shipment of humanitarian assistance overseas.

2. Section 536, Administration of Justice Activities:

SEC. 536. Of the funds appropriated or otherwise made available by this Act or any subsequent Act for 'Economic Support Fund', assistance may be provided to strengthen the administration of justice in countries in Latin America and the Caribbean and in other regions consistent with the provisions of Section 534(b) of the Foreign Assistance Act of 1961, except that programs to enhance protection of participants in judicial cases may be conducted notwithstanding Section 660 of that Act. Funds made available pursuant to this Section may be made available notwithstanding Section 534(c) and the second and third sentences of Section 534(e) of the Foreign Assistance Act of 1961.

#### **PROVISIONS NOT RETAINED IN THE FY 2005 ACT**

In addition to the provisions noted above, the FY 2005 Act does not include the following provisions that had been included in the FY 2004 Act:

1. Private and Voluntary Organizations (\*). Section 502 of the FY 2004 Appropriations Act required that DA funds to any U.S. private and voluntary

organizations must obtain less than 20 percent of its total annual funding for international activities from sources other than the U.S. Government.

2 Special Notifications.

- prior to obligating funds managed by or allocated to the Global Development Alliance Secretariat;
- prior to obligating DA funds for programs and activities in rural Mexico to promote microfinance, small business development, energy and environmental conservation, and private property ownership in rural communities, and to support small farmers who have been affected by adverse economic condition;
- prior to a decision to reduce the number of full-time equivalent USAID Foreign Service employee positions for countries in the Latin America and Caribbean region below the number for such employees for countries in that region as of September 30, 2003;
- prior to obligating receipts from rental payments by other agencies for the use of space financed from the Capital Investment Fund;
- prior to obligating ESF funds for assistance for the central Government of Lebanon; and
- prior to any proposed reprogramming or transfers of funds into or out of the Global HIV/AIDS Initiative account.

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