

## FY 2004 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 2004 Foreign Operations Appropriations Act, (FY 2004 Act), Division D, Pub. L. 108-199, January 23, 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 2004 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 2004 Act Sec. 522).
3. Assistance for Eastern Europe and the Baltic States (Title II of the FY 2004 Act).
4. Assistance to the Independent States (FAA Sec. 498B(j)).
5. Afghanistan (only for loan defaults under section 512 of the FY 2004 Act and section 620(q) of the FAA); Lebanon; Montenegro; Pakistan; victims of war; displaced children; displaced Burmese; victims of trafficking in persons; and, except for sections 116, 502(b) and 620A of the FAA, tropical forestry, biodiversity conservation and energy programs aimed at reducing greenhouse gas emissions (FY 2004 Act Sec. 534).
6. Non-governmental organizations and PL 480 (FY 2004 Act Sec. 537).
7. Title II Emergency Programs (PL, 480 Sec. 202(a)).
8. ESF funds for democracy activities in the People's Republic of China, and Hong Kong (FY 2004 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 the Presidential Determination No. 2003-38, September 15, 2003, <http://www.whitehouse.gov/news/releases/2003/09/20030915-2.html>, this provision applies only to Burma. All the 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, Thailand, Venezuela, and Vietnam) were determined either

- 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 section 489(a)(1) of the FAA; or
- To be vital to the national interests of the United States.

**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 2/8/2004 the only country identified is Nicaragua, which has received a waiver

[Contact: State/EB/IFD/OIA, Ted Bryan, 202-736-4246]

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

4. **Specific Countries** (FAA Secs. 620(a) and 620(f); FY 2004 Act Sec. 507). Assistance is prohibited to Cuba, Iran, Libya, North Korea, and Syria. [Notes: 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 2004 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 by clicking on financial management then clicking on 620Q. <http://inside.usaid.gov/M/FM>

[Contact: Sheila Miller, FM/LM, 202-712-4184.]

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 2004 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: L/LEI, William Hoffman, 202-736-4834.]

Is this restriction applicable? Please comment.

- 8. Export of Lethal Military Equipment to Terrorist States** (FY 2004 Act Sec. 543; 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: Newell Highsmith, State/L/NP, 202-647-4621]

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, Katherine McManus, 202-647-4621]

Are these restrictions applicable? Please comment.

**11. Military Coup or Decree** (FY 2004 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** (FY 2004 Act Sec. 544). Assistance to a recipient country must be reduced by 110 percent of the amount of unpaid parking fines 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: Sharon Nichols, PPC/M/RA, 202-712-4533.]

**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: L/HRR, Gilda Brancato, 202-647-4065]

Is this restriction applicable? Please comment.

**17. Trafficking in Persons (TIP)** (22 USC 7107) Is this country listed as Tier III in the current TIP report?" If so, consult with your AGC. The report is available on ([www.state.gov/g/tip](http://www.state.gov/g/tip)).

[Contact: 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

## **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.

### 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 AIS for the activity, has it been reviewed and updated. See Additional Help document, database for accessing Blank Activity Information Sheet (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).

<p>Please comment</p>    
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2. **Agricultural Activities (Bumpers Amendment)** (FY 2004 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 the Communist-bloc countries.

Please comment.

4. **Adverse Economic Impact Upon the United States.**

- (a) **Impact on U.S. Jobs: Relocation; Export Zones; Violation of Workers' Rights** (FY 2004 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 not to preclude assistance for the informal sector including micro and small-scale enterprise and smallholder agriculture. However under the provision in the FY 2004 Act, these exceptions no longer apply to the right of workers to associate, to organize and bargain collectively, and the prohibition on the use of any form of forced or compulsory labor.

Please comment.

- (b) **Production of Surplus Commodities** (FY 2004 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 undegraded 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.

<p><b>Is this applicable? Please comment.</b></p>
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- 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.

<p><b>Is this applicable? Please comment.</b></p>
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**7. Family Planning.**

- (a) Abortions and Involuntary Sterilizations Prohibited** (FAA Sec. 104(f); FY 2004 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. (Note that the term "motivate" does not include the provision, consistent with local law, of information or counseling about all pregnancy options.)
- (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 2004 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 2004 Act Sec. 541, 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.

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 and 536 and 582 of FY 2004 Act).

Is this restriction applicable? Please comment.

**13. Publicity, Propaganda, and Lobbying** (FY 2004 Act Sec. 540; Anti-Lobbying Act, 18 U.S.C. 1913). Assistance may not be used to support or defeat legislation pending before Congress, 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.

Is this applicable? Please comment.

**14. PVOs -- Funding Sources for U.S. PVOs** (FY 2004 Act Sec. 502). If assistance is to be made to a United States private voluntary organization (PVO) (other than a cooperative development organization), it must obtain at least 20 percent of its total annual funding for

international activities from sources other than the United States Government. This may be waived in certain circumstances. Check with the Bureau for Humanitarian Response, Office of Private and Voluntary Cooperation (BHR/PVC) to see if the U.S. PVO has met the requirement.

Is this applicable? Please comment.

**Part B. Congressional Notifications.**

**\*1. General Notification** (FY 2004 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 2004 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 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 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 2004 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.

(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 2004 Act Sec. 529). If assistance is furnished to a foreign government under arrangements that result in the generation of local currencies

(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 2004 Act, the USAID guidance still applies.]

Please comment.

6. **Alcoholic Beverages and Certain Entertainment Expenses** (FY 2004 Act Sec. 549). 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). The date of signing and the amount involved must be cabled to State 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 2004 Foreign Operations Appropriations Act to Current Law, Memorandum from GC to AA/PPC and AA/LPA, January 28, 2004

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January 28, 2004

#### **INFORMATION MEMORANDUM**

To: AA/PPC (Acting), Barbara Turner  
AA/LPA, Ed Fox

From: GC, John S. Gardner

Subject: Changes Made by the FY 2004 Foreign Operations Appropriations Act to Current Law

On January 23, the President signed into law H.R. 2673, the Consolidated Appropriations Act, 2004 (P.L. 108-199, H. Rept. No. 108-401). Division D of that Act contains the text of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2004 (the Act). The purpose of this memorandum is to identify and briefly describe the changes made by the FY 2004 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. The authorization for the Millennium Challenge Corporation is also not discussed.

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 2004 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 2004 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 need to be submitted to Congress to satisfy this additional notification requirement. The following is a list of special notification requirements contained in the FY 2004 Act and the SOM:

a. prior to obligating funds managed by or allocated to the Global Development Alliance Secretariat (this is the same as FY 03);

\*b. prior to obligating Development Assistance 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 conditions (this is a new requirement);

\*c. prior to obligating Development Credit Authority funds for the cost of modifying any guaranteed loans under the Act or prior Acts (this is a new requirement);

\*d. prior to obligating funds to open a new USAID overseas office or mission of the United States Agency for International Development (this is a new requirement and is not a 15 day notification);

\*e. prior to a decision to reduce the number of full-time equivalent positions for United States foreign service employees of the United States Agency for International Development 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 (this is a new provision);

f. prior to obligating receipts from rental payments by other agencies for the use of space financed from the Capital Investment Fund (this is the same as in FY 03);

g. prior to obligating any funds appropriated to the Capital Investment Fund (this is the same as in FY 03);

h. prior to obligating ESF funds for assistance for the central Government of Lebanon (this is the same as in FY 03);

i. prior to obligating ESF funds 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 (this is the same as in FY 03);

\*j. prior to obligating ESF funds for a Middle East Financing Facility, Middle East Enterprise Fund, or any other similar entity in the Middle East (this is a new requirement);

\*k. prior to increasing or decreasing amounts allocated for ESF by the table contained in the SOM (this is a new requirement);

\*l. prior to increasing or decreasing amounts allocated for Eastern Europe and the Baltics by the table contained in the SOM (this is a new requirement);

m. 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 (this is the same as in FY 03);

n. 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, and is the same as in FY 03);

\*o. prior to obligating funds for Liberia, Serbia, Sudan, Zimbabwe, Pakistan, Cambodia or the Democratic Republic of the Congo (section 520; Cambodia is a new addition);

p. in section 526, prior to obligating funds for the democracy programs specified in that section (e.g., programs for the People's Republic of China, Tibet, Hong Kong, and "countries with significant Muslim populations")(this is the same as in FY 03);

q. prior to obligating funds for any cash transfer or nonproject assistance (this is the same as in FY 03);

r. prior to the distribution of any assets resulting from the winding up of an Enterprise Fund under section 530 of the Act (this is the same as in FY 03);

s. prior to obligating funds for Burma under section 531 of the Act (this is the same as in FY 03);

t. prior to obligating funds to combat trafficking in persons (section 534(a), the same as in FY 03);

u. prior to obligating funds under section 537 of the Act for nongovernmental organizations for assistance to countries that would otherwise be prohibited from receiving assistance (the same as in FY 03);

v. prior to obligating reprogrammed funds withheld as a result of unpaid parking fines (section 544, the same as in FY 03);

w. prior to obligating funds for community-based police assistance for Jamaica and El Salvador under section 573 of the FY Act (the same as in FY 03);

\*x. prior to any proposed reprogramming or transfers of funds into or out of the Global HIV/AIDS Initiative account (SOM)(this is a new requirement).

2. \*Availability of Assistance Funds. Funds appropriated under the heading "Development Assistance" are appropriated to remain available for obligation until September 30, 2004, except that \$150 million may be carried over and obligated in fiscal year 2005. This is a change from the FY 03 appropriations act which appropriated all funds in this account to remain available for two fiscal years.

\*Funds appropriated under the heading "Child Survival and Health Programs Fund" are appropriated to remain available for obligation until September 30, 2005. This is a change from the FY 03 appropriations act which appropriated all bilateral assistance funds in this account to remain available for three fiscal years.

3. \*HIV/AIDS.

a. Global Fund to Fight AIDS, Tuberculosis and Malaria (the "Global Fund"). Under the heading "Child Survival and Health Programs Fund", the Act earmarks \$400 million for a United States contribution to the Global Fund. The contribution to the Global Fund is made available notwithstanding any other provision of law except for the provisions of the United States Leadership Against HIV/AIDS,

Tuberculosis and Malaria Act of 2003 (the “AIDS Authorization”) as amended by section 595 of the appropriations Act.

Section 595 of the Act amends the AIDS Authorization as follows:

1. Section 202(d)(4)(A) of the AIDS Authorization requires that no United States contribution to the Global Fund can cause the total amount of U.S. Government contributions to the Global Fund to exceed 33 percent of the total amount contributed from all sources. The amendment made by section 595 makes clear that the contributions from “all sources” means funds contributed to the Global Fund during fiscal years 2004 through 2008 that are not contributed to fulfill commitments made for a fiscal year prior to fiscal year 2004. The phrase “all sources” includes United States contributions.

2. Section 202(d)(4)(B) of the AIDS Authorization provides that any U.S. contribution withheld because of the operation of the 33 percent requirement are to be made available to the Global Fund as soon as possible after that requirement is met. The appropriations Act amends this section by providing an option to the President to reprogram such funds that are not made available after July 31 of each year to bi-lateral AIDS, malaria, and tuberculosis programs.

3. Section 301(f) of the AIDS Authorization provides that no funds authorized by the act may be made available to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking. The appropriations act amends this section by exempting the Global Fund, the World Health Organization, the International AIDS Vaccine Initiative, and any “United Nations agency”. The SOM states that the conferees “intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO).”

In addition, section 593 of the Act amends the International Organizations Immunities Act to authorize the President to designate the Global Fund as a public international organization for purposes of making available to the Fund certain privileges and immunities.

b. Bi-lateral Programs. The Act provides \$516.5 million for HIV/AIDS programs and \$185 million for other infectious disease programs under the Child Survival and Health Programs Fund. In addition, the Act appropriates \$491 million, to remain available until expended, to a new “Global HIV/AIDS Initiative” account. Among other things, the Global HIV/AIDS Initiative account provides administrative expenses for the office of the HIV/AIDS Response Coordinator in the Department of State. The AIDS Authorization identifies 14 countries as focus countries and requires the Coordinator to directly approve all activities of the United States to combat HIV/AIDS in each of those countries. A provision in the new Global HIV/AIDS Initiative account states that the Coordinator “shall ensure” that assistance under this authority is provided to at least 15 countries, at least one of which cannot be in the Africa or Caribbean region. The SOM notes that the Act does not include House language limiting the aggregate dollar amount of grants and contracts that could be let by the Coordinator’s office. The SOM states, however, that the Coordinator “has informed the Committees that his office will rely primarily upon the procurement and contracting capacity existent in United States



agencies. The managers expect the Coordinator to consult with the Committees on Appropriations prior to exercising his contracting and grant-making authority to directly implement overseas programs.”

Limitations on the use of various transfer authorities to restrict transfers of Child Survival and Health Programs Fund monies to the Department of Health and Human Services (except to CDC) have not been repeated in the Act.

Section 522 provides that bilateral assistance for child survival or disease programs, including HIV/AIDS, may be made available, notwithstanding any other provision of law, except the provisions of the AIDS Authorization (as amended) and the provisions contained in the Child Survival and Health Programs Fund account. Provisions contained in the Child Survival and Health Programs Fund include the Kemp-Kasten amendment, which prohibits provision of any assistance (i.e., not solely the provision of family planning assistance) to an organization that the President determines “supports or participates in the management of a program of coercive abortion or involuntary sterilization”, the Helms amendment language prohibiting the use of appropriated funds to pay for the performance of abortion as a method of family planning, and the prohibition on using appropriated funds to lobby for or against abortions.

4. \*Family Planning.

a. Condom Procurement. A provision under the Child Survival and Health Programs Fund contains the requirement that, to the maximum extent feasible, “taking into consideration cost, timely availability, and best health practices”, funds in the FY 04 appropriations act and prior acts that are made available for condom procurement are to be used to procure condoms manufactured in the United States.

b. Information Concerning the Use of Condoms. Another provision under the Child Survival and Health Programs Fund requires that information provided about the use of condoms, as part of programs funded under the Act, must be “medically accurate and shall include the public health benefits and failure rates of such use.”

On a related matter, in a colloquy on the Senate floor regarding the application of section 301(d) of the AIDS Authorization (which deals with the eligibility of organizations to provide HIV/AIDS assistance, Senator Frist noted as follows: “I fully agree that it is essential that information about approaches to HIV/AIDS prevention be medically accurate, including both the public health benefits and failure rates of the approach involved. That is what is intended by this provision. In fact, the provision uses the words “an organization that is otherwise eligible to receive assistance”. I believe that “otherwise eligible” should be interpreted to require explicit assurances by such organizations that when it provides information about HIV/AIDS prevention approaches it will meet this standard of accuracy.”

Section 567 of the Act addresses FY 04 and prior appropriations made available for the United Nations Population Fund (UNFPA) in the following manner:

a. The Act earmarks a total of \$34 million for UNFPA from International Organizations and Programs (\$25 million) and Child Survival and Health Programs Fund (\$9 million).

b. The \$34 million in FY 02 funds that were available for UNFPA (i.e., including all funds transferred to the CSH account from International Organizations and Programs) are to be made available for family planning, maternal and reproductive health activities in specified countries. Assistance with these funds to the specified countries is deemed to have been justified for purposes of satisfying congressional prior notification requirements.

c. The \$25 million of International Organizations and Programs funds that were transferred to CSH in FY 03 are to be used for assistance for young women, mothers and children who are victims of trafficking in persons. Assistance with these funds is deemed to have been justified for purposes of satisfying congressional prior notification requirements.

5. Child Survival. Funds for UNICEF, for the past several years appropriated under this account, are contained in the International Organizations and Programs account for FY 04.

6. Famine Fund. As part of a new account entitled "International Disaster and Famine Assistance", the Act appropriates \$20 million for famine prevention and relief, to remain available until expended. These funds may be made available utilizing the general authorities applicable to international disaster assistance (i.e., assistance may be provided notwithstanding any other provision of law). In addition, these funds may be made only after consultation with the Committees on Appropriations. This appropriation is in lieu of the Administration's \$200 million request for a Famine Fund.

7. \*Transition Initiatives. Under this heading, the Act provides a new authority to provide transition assistance. If the President determines that it is important to the national interest, up to \$15 million of other economic assistance funds can be used for transition initiatives purposes and under the notwithstanding authority available to the use of those funds. The exercise of this authority is subject to prior consultation with the Committees on Appropriations.

Section 594 of the Act requires that no funds appropriated under Migration and Refugee Assistance and Transition Initiatives for the provision of assistance to refugees or internally displaced persons can be provided to an organization that has failed to adopt a code of conduct consistent with the Inter-Agency Standing Committee Task Force on Protection From Sexual Exploitation and Abuse in Humanitarian Crises six core principles for the protection of beneficiaries of humanitarian assistance. In administering MRA and OTI funds, the Secretary of State and USAID Administrator "shall incorporate specific policies and programs for the purpose of identifying specific needs of, and particular threats to, women and children at the various stages of humanitarian emergencies, especially at the onset of such emergency." The Secretary of State is required to submit a report on the activities of the United States Government to protect women and children affected by humanitarian emergencies. The report is due within 90 days from date of enactment of the Act.

8. \*Development Credit Authority. The Act provides authority to use funds made available under the Act to pay for the cost of loans and loan guarantees entered into under the Act or prior acts. The exercise of this authority is subject to prior congressional notification.

9. \*Operating Expenses. The Act contains a number of new provisions affecting operating expenses, in addition to provisions contained in previous appropriations legislation allowing the use of program funds for operating expense purposes:

a. Of the funds appropriated for USAID operating expenses, \$25 million may be carried over and obligated in fiscal year 2005.

b. Contracts and agreements entered into using operating expense funds may commit those funds for expenditure through fiscal year 2005, i.e., forward fund.

c. Of the funds appropriated for the Iraq Relief and Reconstruction Fund in P.L. 108-11, not to exceed \$15 million is to be used to support the USAID mission in Iraq.

d. No funds in the Act may be used to open a new USAID overseas mission without the prior written notification of the Committees on Appropriations.

e. The authority contained in sections 109 and 610 of the Foreign Assistance Act of 1961 may be used by the Secretary of State (vice the President) to transfer development assistance funds into the Operating Expenses account.

f. During FY 04, the number of full-time equivalent positions for United States foreign service employees of USAID for countries in the LAC regions cannot be reduced below the number of such employees as of September 30, 2003, except as provided through the regular notification procedures of the Committees on Appropriations.

g. With regard to the Economic Support Fund, funds appropriated for ESF are to be made available for USAID's administrative costs to implement regional programs in Asia and the Near East, including the Middle East Partnership Initiative.

h. Section 525 of the Act provides the authority to use economic assistance funds in this Act and subsequent acts, including funds for the New Independent States and for Eastern Europe and the Baltic States, to employ individuals, including retired foreign service officers, on a limited basis. Up to 85 individuals may be hired under the authority of this section in each of fiscal years 2004 through 2006.

i. Section 534(c) of the Act authorizes the use of funds to employ up to 25 personal services contractors in the United States provided that not more than 10 of such contractors may be assigned to any bureau or office. The specification of bureaus and offices which could make use of this authority is not included in the FY 04 Act.

j. Section 576 of the Act authorizes the use of program funds for the cost (including support costs) of individuals employed by USAID whose primary purpose is to "carry out programs to address natural or manmade disasters or Transition Initiatives programs.

k. Section 591 of the Act authorizes an increase in post differential and danger pay allowances to 35 percent of basic pay for USAID individuals stationed in Iraq

and Afghanistan. The authority would be extended to all USAID employees upon enactment of comparable authority for Department of State personnel.

10. \*Economic Support Fund. The Act contains a number of earmarks and ceilings on the uses of funds. In addition, the language under this heading provides that ESF funds appropriated by the Act are to be made available for programs and countries in the amounts contained in the table accompanying the joint explanatory statement of the managers accompanying the Act (the "SOM"). Any proposed increases or decreases to the amounts contained in the table in the SOM are subject to the regular notification procedures of the Committees on Appropriations. Similar language is also included in the account making appropriations for Eastern Europe and the Baltic States.

The Act also permits the transfer of up to \$100 million of funds appropriated in P.L. 108-106 for the Iraq Relief and Reconstruction Fund to the ESF account for assistance for Turkey, and up to \$30 million of such funds for assistance for the Middle East Partnership Initiative.

Section 301(c) of the FAA requires that United States contributions to the UN Relief and Works Agency for Palestine Refugees (UNRWA) be conditioned on UNRWA taking all possible measures to assure that no part of the U.S. contribution is used to furnish assistance to any refugee receiving military training as a member of the Palestinian Liberation Army or any other guerrilla type organization. In response to a GAO study on compliance with this section, the managers urge UNRWA to implement State Department recommendations to (1) issue explicit guidelines to staff to report compromises of UNRWA staff or facilities, (2) sever connections with Gaza Youth Activity Centers because of ties to Palestinian radicals, (3) make the Operations Support Officer program a permanent part of UNRWA's monitoring program, and (4) continue to make all efforts to meet Israeli authorities.

11. Eastern Europe and the Baltic States. As noted above, SEED funds appropriated by the Act are to be made available for programs and countries in the amounts contained in the table accompanying the joint explanatory statement of the managers accompanying the Act (the "SOM"). Any proposed increases or decreases to the amounts contained in the table in the SOM are subject to the regular notification procedures of the Committees on Appropriations.

In addition, a provision contained in prior appropriations Acts that allowed Enterprise Funds established with SEED funds to retain interest accruing to those funds, has been deleted since a virtually identical provision is contained in the SEED Act.

Section 572 of the Act retains the current requirement conditioning assistance to Serbia on a Presidential certification and determination and makes March 31, 2004 the date by which the certification and determination are required. As part of the certification and determination, the President must find that the Government of the Federal Republic of Yugoslavia is cooperating with the International Criminal Tribunal for the former Yugoslavia including, among other things, all practicable efforts to apprehend and transfer Ratko Mladic.

12. Independent States of the Former Soviet Union. A provision contained in prior appropriations Acts that allowed Enterprise Funds established with NIS funds to

retain interest accruing to those funds has been deleted since a virtually identical provision is contained in the FREEDOM Support Act.

In addition, for the first time in a number of years the Act does not identify any funding for Georgia.

Section 568 of the Act prohibits assistance to the central Government of Uzbekistan unless the Secretary of State makes a determination that the Government is making substantial and continuing progress in meeting certain agreements with the United States. The FY 03 Act had prohibited assistance to the government of Uzbekistan unless the Secretary made the same determination. Restrictions on assistance to the Government of Kazakhstan are the same as in current law. The same waiver authority as in current law is also carried over into FY 04.

Section 569 of the Act provides that none of the funds appropriated under the Act may be made available for the Government of the Russian Federation (i.e., the central government) after 180 days from the date of enactment. This holds true unless the President determines and certifies in writing to the Committees on Appropriations that the Government of the Russian Federation has implemented no statute, executive order, regulation or similar government action that would discriminate, or who have as its principal effect discrimination, against religious groups or religious communities in the Russian Federation in violation of accepted international agreements on human rights and religious freedoms to which the Russian Federation is a party. This limitation has been in prior appropriations acts but was not included in the FY 03 Act.

13. Millennium Challenge Corporation. The Act contains a new account, "Millennium Challenge Corporation", and appropriates \$650 million to the account. In addition, \$350 million is provided elsewhere in the Omnibus Appropriations Act for the MCC. Title VI of the Act contains the text of the authorization for the MCC and the programs to be administered by the Corporation. In addition, section 505 of the appropriations Act caps Millennium Challenge Corporation entertainment and representation funding at \$130,000. Section 515 of the Act requires advance notification, by country only, of MCC programs.

14. \*Taxation of Assistance. Section 506 of the Act makes a number of changes to the provision first enacted in the FY 03 Foreign Operations Appropriations Act as section 579, Prohibition on Taxation of United States Assistance. Section 506(h) makes these changes applicable to the implementation of the FY 03 provision.

Section 506(b) modifies current law to require that the amount of withheld funds is to be based on the amount of taxes assessed during FY 04 on commodities procured with funds appropriated by the Act. With regard to calculating the amount of assessed taxes and the amount of reimbursements, the SOM notes the following: "In addition, in order not to create an undue reporting burden on contractors, grantees and other entities...and in recognition that the reimbursement process is often not completed by the time it is necessary to determine what amounts are to be withheld, the managers agree that in determining amounts to be withheld agencies may use estimates and statistical sampling to determine the amount of assessed taxes and the amount of reimbursements that will be paid over a reasonable period of time."

Section 506(d) permits all withheld funds to be reprogrammed for assistance to countries which do not assess taxes on U.S. assistance or which have an effective arrangement that is providing substantial reimbursement of those taxes. (Section 579 had provided that half of the 200 percent withheld must be returned to the Treasury.)

Section 506(e) provides that this section does not apply to any country the Secretary of State determines either (1) does not assess taxes on U.S. assistance or has an effective arrangement that is providing substantial reimbursement of those taxes, or (2) the foreign policy interests of the United States outweigh the policy of this section to ensure that U.S. assistance is not subject to taxation. Exercise of this authority is subject to consultation with the Committees on Appropriations 15 days in advance.

Unless otherwise changed by the State Department, the existing deadlines for implementing section 579 of the FY 03 appropriations Act remain the same.

15. Prohibition on Direct Assistance to Certain Countries. Section 507 of the Act bars assistance to Cuba, Libya, North Korea, Iran, and Syria. This list of countries does not include Iraq and Sudan, which were included in the comparable provision for FY 03.

16. \*Requirement for Prior Notification. Section 515 of the Act is the general requirement to provide notification to the Committees on Appropriations at least 15 days prior to obligating funds for a program, project, or activity. For a number of years an exception has been made for prior notification of a development assistance program, project, or activity where the proposed obligation was less than 10 percent of the amount previously justified to Congress. This exception has been extended in the Act to all economic assistance programs, including ESF, NIS and SEED programs.

17. Burma. Section 531 of the Act contains a new reporting requirement regarding HIV/AIDS assistance for Burma. The report is to be submitted by the Secretary of State in consultation with USAID.

18. \*Special Authorities. Section 534 of the Act contains a number of special authorities that have been included in prior appropriations Acts. However, the following are changes from what has been enacted in the past:

a. Afghanistan. Assistance under the Act may be made available notwithstanding section 512 of the Act (and the comparable provision in the Foreign Assistance Act, section 620(q)) and section 660 of the FAA (relating to assistance to law enforcement forces).

Note also, that section 587 of the Act requires the Administrator to seek to ensure that programs, projects, and activities administered by USAID in Afghanistan comply fully with USAID's policy paper on disability issued on September 12, 1997. By December 31, 2004, the Administrator is to submit a report to the Committees on Appropriations describing the manner in which the needs of people with disabilities were met in the Afghan program in fiscal year 2004.

b. Pakistan. Economic assistance furnished for Pakistan under the Act may be made available notwithstanding any other provision of law.

c. Unanticipated Contingencies. The Act does not include any additional authority to make available assistance to meet unanticipated contingencies pursuant to section 451 of the FAA. Therefore, the \$25 million ceiling contained in that section will be applicable to FY 04.

d. Shipment of Humanitarian Assistance. The Act makes permanent the authority for USAID to use program funds to pay the administrative costs of nongovernmental organizations that are implementing a program to receive donated space on commercial vessels for the shipment of humanitarian assistance overseas.

e. Sudan. The Act contains language that permits assistance to be provided to Sudan under the authority of section 501 of the Assistance for International Malaria Control Act (P.L. 106-570) to areas outside the control of the Government of Sudan in the event of a peace agreement between the Government and the Sudan People's Liberation Movement.

19. Administration of Justice. Section 536 of the Act makes permanent the authority contained in section 534(b) of the FAA to provide administration of justice assistance, as modified by section 536, notwithstanding the prohibition on assistance to police.

20. Parking Fines. Section 544 of the Act modifies the current requirements to withhold funds to countries that have not paid parking fines and penalties owed to the District of Columbia and New York City. Section 544 now specifically allows for reprogramming funds withheld from countries that have not paid their fines and permits the Secretary of State to waive the provision on a country-by-country basis.

21. \*Environment. Section 555 is largely identical to provisions contained in previous appropriations Acts earmarking funds for environment programs. However, a new provision requires the Secretary of State, in coordination with USAID and other appropriate agencies, to develop and submit a strategy for biodiversity conservation in the Amazon Basin. Development Assistance and Andean Counterdrug Initiative funds are to be made available for this purpose. The strategy is to be submitted to the Committees on Appropriations within one year from date of enactment of the Act.

22. East Asia and the Pacific--Democracy Programs. Section 556 of the Act requires that ESF funds requested for "Regional Democracy" assistance for East Asia and the Pacific are to be made available to the Human Rights and Democracy Fund administered by the Department of State.

23. \*Basic Education. Section 579 of the Act earmarks \$326.5 million of economic assistance funds for basic education programs. In addition, this section requires a report from the Secretary of State, in consultation with USAID, articulating a strategy for the use of basic education funds in Africa, East Asia and the Pacific, the Near East, South Asia, and the Western Hemisphere. The report, contents of which are described more completely in this section, is due not later than 120 days from date of enactment of the Act.

24. \*Disability Access. Section 587 of the Act requires the Administrator, within 180 days after the date of enactment, after consultation with other agencies including the Architectural and Transportation Barriers Compliance Board, and

nongovernmental organizations, to develop and implement appropriate standards for access for people with disabilities for construction projects funded by USAID.

25. War Crimes in Africa. Section 589 of the Act states that assistance may be provided to the central government of a country in which individuals indicted by the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone are credibly alleged to be living, if the Secretary of State determines that such government is cooperating with those tribunals, including the timely surrender and transfer of individuals who have been indicted. The President may waive the prohibition on a country-by-country basis if he determines that it is in the national security interest to do so. Prior to exercising this waiver authority, the President is required to submit a report to the Committees on Appropriations concerning, generally, the steps the country is taking to cooperate with the tribunals. The section also earmarks \$3 million of FY 03 ESF funds for a contribution to the Special Court for Sierra Leone.

26. \*Delivery of Assistance by Air. Section 599A of the Act requires the Secretary of State and the USAID Administrator to seek to ensure that, where appropriate, dedicated air service is provided for transportation to areas where scheduled air service is not adequate to meet assistance requirements. To the maximum extent practicable, consistent with full and open competition requirements, contracts for such dedicated air service are to be entered into with United States air carriers.

#### Provisions Not Retained in the FY 04 Act

The following provisions, included in prior foreign operations appropriations acts, have not been included in the FY 04 Act:

1. Section 501 of the FY 03 Act requiring that not more than 15 percent of the funds appropriated for each account may be obligated during the last month of availability (also known as the "June rush rule").
2. Section 502(b) of the FY 03 Act stating that the level of assistance made available through private and voluntary organizations should be at least the level provided in fiscal year 1995.
3. Section 506 of the FY 03 Act prohibiting assistance to finance the export of nuclear equipment, fuel, or technology.
4. The prohibition under the "Development Assistance" heading that prohibits the use of Development Assistance funds for activities in contravention of the Convention on International Trade in Endangered Species of Flora and Fauna.



**CLEARANCE PAGE FOR INFORMATION MEMORANDUM ON APPROVAL  
CHANGES MADE BY THE FY 2004 FOREIGN OPERATIONS APPROPRIATIONS  
ACT TO CURRENT LAW**