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AGENCY FOR INTERNATIONAL DEVELOPMENT

22 C.F.R. Part 226

[Aid Reg 226]

RIN 0412-AA55

Administration of Assistance Awards to U.S. Non-Governmental
Organizations; Marking Requirements

AGENCY: Agency for International Development (USAID).

ACTION: Final rule.

SUMMARY: This final rule implements the statutory requirement that all USAID programs be marked appropriately overseas as 'American Aid.' It does so by adding a USAID regulation that requires recipients of USAID funded grants and cooperative agreements and other assistance awards -- with certain Presumptive Exceptions and subject to a waiver if warranted by specific conditions in the cooperating country -- to mark programs, projects, activities, public communications, and commodities with the USAID Standard Graphic Identity (USAID Identity, defined in 22 C.F.R. §226.2).

EFFECTIVE DATE: January 2, 2006.

FOR FURTHER INFORMATION CONTACT: John Niemeyer (or designee), Assistant General Counsel, Office of the General Counsel, USAID, Rm. 6.06.95, 1300 Pennsylvania Ave., NW., Washington, DC 20523; telephone: (202) 712-4776 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On December 20, 2004, USAID published in the Federal Register (69 FR 75885-75887) a proposed rule to implement fully Section 641 of the Foreign Assistance Act of 1961, as amended. The Agency provided a forty five (45)-day public comment period on the proposed rule, which ended on February 3, 2005. The Agency also offered the public the opportunity to submit comments by surface mail, e-mail or fax.

I. Background

The marking of foreign aid as assistance from the U.S. Government was first required during the Marshall Plan when Congress became concerned about poorly marked U.S. foreign aid donations to European countries. USAID's framework legislation, the Foreign Assistance Act of 1961, as amended, section 641, requires that all programs under the Foreign Assistance Act, including assistance awards, be identified appropriately overseas as "American Aid." While USAID has required its contractors to mark U.S.

Government-funded foreign assistance, that requirement has applied to recipients of grants and cooperative agreements only to the limited extent of acknowledging USAID funding in publications and media releases. A Commission on Public Diplomacy report,

“Changing Minds, Winning Peace: a New Strategic Direction for U.S. Public Diplomacy in the Arab World,” both commends and encourages USAID to continue to “become more forthright about branding its activities, so recipients know that they are receiving contributions from the American people.”

Beneficiaries of U.S. aid receive billions of dollars of foreign assistance every year in the form of grants and cooperative agreements, often with little to no awareness that the assistance is provided by the American people through USAID. Clear evidence of the new visibility and value of foreign aid came in the aftermath of the recent U.S. tsunami relief effort, the first time USAID’s new “brand identity” was used publicly. According to a State Department study, in 2004, favorable opinions of the U.S. were at record lows in many Muslim countries. But, in early 2005, favorability of the U.S. nearly doubled in Indonesia (from 37 to 66 percent) thanks to the massive delivery of -- for the first time “well branded” -- U.S. foreign assistance. A Pew Research study confirms this: “Positive opinions of the U.S. in Indonesia, which had plummeted to as low as 15 percent in 2003, also have rebounded to 38 percent. The U.S. tsunami aid effort has been widely hailed there; 79 percent of Indonesians say they have a more favorable view of the U.S. as a result of the relief efforts.” A senior U.S. diplomat summarized the impact of our campaign this way: “The people of Aceh (Indonesia) saw the branding; they knew right away the U.S. Government was responding. That absolutely had a major impact on their perception of the U.S. I think our new global branding is a major foreign policy achievement.” Such awareness of the generosity of the American people is an important

part of the U.S. Government’s public diplomacy strategy and a critical part of the post 9/11 war against terrorism.

USAID takes the following action to ensure that the American people are visibly acknowledged for their generosity in providing foreign assistance. USAID has carefully considered comments to the proposed rule, and adjusted the final rule in response,¹ as set out more fully below.

II. This Rule

A. Purpose of Rule

The purpose of this rule is to bring USAID regulations into full alignment with Section 641 of the Foreign Assistance Act of 1961, as amended, which requires that all programs under the Foreign Assistance Act be marked appropriately overseas as “American Aid.” USAID also takes this action for the policy reasons noted above.

B. USAID Regulations Amended by Rule

¹ Changes to the proposed rule in the final rule demonstrate that USAID has taken the comments into account, and all changes are a logical outgrowth of the proposed rule and comments. Natural Resources Defense Council, Inc. v. EPA, 824 F. 2d 1258, 1283 (1st Cir. 1987) (Agency can make even substantial changes from proposed version as long as changes are ‘in character with’ and a ‘logical outgrowth of’ proposed rule.).

This rule adds a new provision, §226.91, to 22 C.F.R. part 226, Administration of Assistance Awards to U.S. Non-Governmental Organizations, and amends §226.2 by adding new definitions.

The new §226.91 applies to all Federal financial assistance awarded by USAID to U.S. Non-Governmental Organizations (NGOs). Award documentation for such Federal financial assistance will include standard clauses that incorporate the requirements of § 226.91, and USAID internal directives will highlight, explain, and incorporate § 226.91 by reference.

1. Scope of the marking requirement. The rule is intended to require marking for all implementation activities overseas under USAID funded grants and cooperative agreements and other assistance awards to NGOs, and to require use of a marking provision in any NGO-issued subaward of USAID funding.

2. Threshold for marking requirements. The rule applies to all USAID partially or fully funded grants and cooperative agreements and other assistance awards to U.S. NGOs, and to subawards of USAID funding issued by U.S. NGOs.

3. Extent of the marking requirements. In most cases, marking of a size and prominence equivalent to that of the recipients and/or other donors is required. USAID reserves the right to require marking of a greater size or prominence on a per case basis, when it is the majority donor of a program, project, activity, public communication, or

commodity. In the event the recipient or other donor does not chose to mark with its own graphic identity or logo, USAID reserves the right to require marking with the USAID Identity.

USAID has greatly reduced the paperwork required to comply with this rule by limiting those who must submit it. The Agreement Officer will request a “Branding Strategy,” defined in 22 C.F.R §226.2, only from “Apparent Successful Applicants,” defined in 22 C.F.R. §226.2., for USAID funds which have been recommended for award after technical evaluation of their applications. The Branding Strategy will describe how the program will be named, promoted, and communicated to beneficiaries and cooperating country citizens and how donors will be acknowledged. The Branding Strategy will be a required submission but will not be competitively evaluated. The Branding Strategy will be reviewed for adequacy, negotiated, and included in the award by the Agreement Officer. The Agreement Officer also will request Apparent Successful Applicants to provide a “Marking Plan,” defined at 22 C.F.R. §226.2., detailing the type (for example, plaque or adhesive labels) and level of marking (for example, every computer or just one sign) for activities, commodities, public communications and other deliverable items that will visibly bear the USAID Identity. The Marking Plan also will be reviewed for adequacy, negotiated, and included in the award by the Agreement Officer. The approved Marking Plan will be used to monitor compliance with marking requirements. Further, specific marking instructions and examples will be provided to recipients in the USAID Partner Co-Branding Guide. USAID will consult with interested parties on development of the guide.

4. Exceptions. USAID has established “Presumptive Exceptions,” that may apply to obviate marking requirements where marking would interfere with USAID and recipient program goals, or marking would be inefficient or ineffective. Applicants may request the USAID Agreement Officer to approve one or more applicable Presumptive Exceptions as part of their Marking Plan. Any approved exceptions will apply for the life of the award, unless provided otherwise. The ‘Presumptive Exceptions’ provision is described fully at 22 C.F.R §226.91 (h).

5. Waiver provisions. Because USAID intends that marking requirements be carried out reasonably, erring on the side of safety, USAID has provided in the rule an ‘emergency’ waiver authority for USAID Principal Officers, defined at 22 C.F.R. §226.2, who currently exercise similar waiver authority for marking requirements under contracts. By virtue of being posted in the cooperating country, Principal Officers have access to current and relevant information concerning political, safety and security concerns, including that provided by recipients, and can anticipate adverse impact in the cooperating country. No marking is required while a waiver request is pending determination by a USAID Principal Officer. The waiver provision is described fully below.

In sum, Presumptive Exceptions will be approved by the Agreement Officers, waivers by the Principal Officers. Inclusion of the Presumptive Exceptions provision is intended to address the majority of common cases where USAID marking requirements may not

apply; the waiver provision is intended to address cooperating country political, safety and security concerns, emergencies, or special cases.

Please note, when marking with the USAID Identity is not required due to an exception or waiver, USAID may review how program materials will be marked if the USAID identity is removed.

6. Compliance. USAID will monitor and enforce the approved Marking Plan in USAID awards, and USAID's Office of the Inspector General will audit both USAID and recipient compliance with the approved Marking Plan. Recipients in non-compliance with the Marking Plan are subject to the suspension and termination provisions of 22 C.F.R. §226.61 and §226.62.

7. Costs. Recipients are required to submit proposed costs for branding and marking as part of their total cost estimate, which may be revised and negotiated when Apparent Successful Applicants are required to submit a Marking Plan. All marking costs that are reasonable, allocable and allowable will be funded by USAID.

III. Response to Comments Received on the Proposed Rule

On December 20, 2004, USAID published in the Federal Register (Volume 69, Number 243, Page 75885-75887) a Proposed Rule for Administration of Assistance Awards to U.S. Non-Governmental Organizations, Marking Requirements. By February 3, 2005,

the closing date for comments, USAID received forty-seven (47) comments, including comments from NGOs that have received USAID funding, trade associations that represent them, and other interested parties. All of the comments were read, and most are discussed below and reflected in the final rule, on the following basis: while there is no legal requirement to respond to every comment or discuss every fact or opinion included, all have been considered that could potentially challenge a fundamental premise or are relevant and significant.

The following is a summary of comments by issue, and the Agency's responses to those comments.

A. General Comments

Comment: Several comments expressed concern that USAID restricted discussion of the proposed marking requirements by sending an Agency notice to employees, requesting that all comments on the proposed rule be made through the rulemaking process.

Response: USAID engaged in rulemaking to ensure that the proposed rule would benefit from public comment; to provide transparency; and so all interested parties would have an equal opportunity to comment, not just those in the Washington area or with access to USAID staff. The Agency notice was intended to ensure that comments by NGOs and other interested parties would be taken into account during a formal process, rather than through informal conversations with USAID employees who could not directly affect its

outcome. As part of this formal rulemaking process, USAID is bound by the ‘ex parte contact’ rule to limit comments to the rulemaking process, to ensure the final rule was based on comments in the public record, as well as Agency expertise.

Comment: While there was nearly uniform support for the purpose of the proposed rule, to ensure that aid recipients overseas understand that all USAID-funded assistance awards are from the American people, several comments challenged the authority of the Agency to issue a rule requiring NGOs to mark USAID funded assistance with the USAID Identity.

Response: USAID’s framework legislation, the Foreign Assistance Act of 1961, as amended, Section 641, provides that “[p]rograms under this Act shall be identified appropriately overseas as ‘American Aid.’” Section 621 of that same Act provides that the head of USAID “may from time to time promulgate such rules and regulations as may be necessary” to carry out Agency functions under the Act, including Section 641 marking requirements. This authority is not contradicted, as one commenter argues, because Congress did not say explicitly how the marking requirement was to be implemented. Under the above authority, implementation is left to Agency discretion.

Comment: Several comments also questioned the timing and reason for the rule, pointing out that USAID has existing, less comprehensive marking requirements for media products and publications in its standard provisions for grants to NGOs.

Response: In response to the 9/11 tragedy, the U.S. national security strategy has been revised to include, for the first time, development along with diplomacy and defense. As the lead development assistance agency of the U.S. Government, USAID has the responsibility to ensure that international development plays a vital role in national security by ensuring beneficiaries are aware the aid -- including the funding of grants and cooperative agreements -- is from the American people. Recent surveys show that more comprehensive marking requirements result in a much more favorable impression of the U.S. abroad.

Comment: Several comments also questioned the approval of the proposed rule by the Office of Management and Budget (OMB) or argued that before engaging in rulemaking, USAID had to seek a deviation from OMB under 22 C.F.R §226.4.

Response: Both the proposed rule and final rule have been reviewed by OMB's Office of Information and Regulatory Affairs under Executive Order 12866. The deviation procedure set forth at 22 C.F.R. §226.4 is not pertinent. As noted above, Section 621 of the Foreign Assistance Act of 1961, as amended, provides USAID with statutory rulemaking authority. USAID used this rulemaking authority to issue 22 C.F.R. Part 226, Administration of Assistance Awards to U.S. Non-Governmental Organizations, including §226.1, which provides that "[e]xcept as otherwise authorized by statute, this part establishes uniform administrative requirements..." As noted in the proposed rule and above, marking is expressly required by statute, and so comes within the 'otherwise authorized by statute' exception of §226.1. §226.4, "Deviations," is not related to the

purpose and applicability of the regulations, but rather deviations from their general applicability as authorized by OMB and if not prohibited by statute. The comments calling for USAID to obtain an OMB deviation to engage in rulemaking have the purpose of such a deviation backwards: a deviation is not required to permit rulemaking, particularly when rulemaking is expressly required by a statute – but to deviate from rules already promulgated by rulemaking and included in any part 226 of 22 C.F.R. Any reading of §226.4 to the contrary contradicts with its plain language, and would frustrate its purpose by locking the current version of 22 C.F.R. part 226 in stone, a result contrary to USAID’s express and ongoing rulemaking authority, Section 621 of the Foreign Assistance Act of 1961, as amended.

Comment: No similar policy concerning marking is apparently being pursued by the Department of State, which has overall responsibility for conduct of foreign relations. Thus the marking requirement is simply ‘a USAID attempt to raise its visibility.’

Response: The USAID marking initiative, including the extension of full marking requirements to NGOs, has been coordinated with the U.S. Department of State. Programs implemented by the State Department, such as the Middle East Partnership Initiative (MEPI) and the President’s Emergency Plan For AIDS Relief (PEPFAR) under the authority of the Global AIDS Coordinator, have their own marking requirements. USAID is the lead foreign assistance agency of the U.S. Government, and it is appropriate for USAID to exercise leadership in the marking of foreign assistance. Because USAID often plays a role in implementing programs funded in part or in whole

by sister agencies such as the Department of State, recipients may be required to include the logo of other U.S. Government agencies on USAID funded programs, projects, activities, public communications, and commodities. In such circumstances, guidance will be provided on a case by case basis.

The characterization of the initiative as simply a ‘USAID attempt to raise its visibility overseas’ misinterprets the intention of the message and the design of the USAID Identity with its emphasis not on ‘USAID’ as the acronym for the Agency but US-AID (differentiated by colors) as a “brand” of foreign assistance, like Japanese or British aid, as well as the emphasis of the tagline “From the American People.”

Comment: USAID also received many comments to the effect that the proposed rule undercuts the independence of grantees, oversteps the Federal Grant and Cooperative Agreement Act, makes grantees an arm of the U. S. Government and, by extending marking requirements, is treating grantees like contractors.

Response: Marking is required by the Foreign Assistance Act, as noted above. Nothing in the marking requirement is inconsistent with the definition of a grant -- to accomplish a public purpose of support or stimulation authorized by a federal statute -- in this case the Foreign Assistance Act. Marking does not change the funding or purpose of a grant or cooperative agreement. All the marking requirement does is raise the level of visibility of the American people’s donation. Other donors to NGOs require similar acknowledgement. See EU Visibility Guidelines for External Actions, November 2002.

The co-branding requirements established by this rule are much less comprehensive than USAID's branding requirements for contractors, which do not permit co-branding or marking with a contractor logo, and establish rigorous design standards similar to those used for USAID's own external communications.

Comment: Several comments expressed concern that markings with high visibility would block host-country national 'ownership' of the program or project, cause local citizens to view projects adversely, compromise NGOs' apolitical position in a cooperating country or otherwise harm the acceptance and effectiveness of programs and projects in some situations.

Response: The Branding Strategy and Marking Plan submitted by the Apparent Successful Applicant provides the opportunity to propose a program or project name, outline the promotional and communication activities, and to recommend which items are to be marked. Such participation by recipients 'up front' should ensure that their concerns about marking requirements are addressed in program implementation. USAID also has included a "Presumptive Exceptions" provision that may apply to obviate marking requirements, see §226.91(h) below. Also, USAID has amended the 'waiver provision' of the final rule to include waivers in case of adverse reaction in the cooperating country, see §226.91 (j), below.

USAID employees are dedicated development professionals who share NGO partners' focus on designing and implementing successful programs. They are responsible for

reporting results and ultimately accountable to the Executive Branch, Congress, and the American people for return on their investment. For these reasons, USAID will ensure that use of markings does not cause the program or project to fail.

Comment: Several comments suggested including marking requirements in the initial Request for Proposals (RFPs) or Annual Program Statements (APS) for implementation of a program or project. The comments also included many suggestions for more flexibility in application of the marking requirements.

Response: USAID has drafted the rule to minimize the burden on applicants, and to maximize flexibility. Only those Apparent Successful Applicants who have been recommended for award after technical evaluation will be requested to submit a Branding Strategy and Marking Plan by the Agreement Officer. Both the Strategy and Plan enable implementing partners to recommend how to customize global marking requirements to individual activities, subject to the approval of the Agreement Officer.

Comment: The comments also expressed concern over, and requested clarification about, the breadth - for example, 'all' commodities - of the marking requirements.

Response: The Marking Plan enables implementing partners to propose the appropriate level of marking by detailing program commodities that will visibly bear the USAID Identity (for example, mark all computers but not all desks and chairs in a school room). The new 'Presumptive Exceptions' provision narrows the breadth of the marking

requirement on a case-by-case basis, as set forth in the final rule. It also includes a de minimis' rule for items too small or otherwise impracticable to mark.

Comment: The comments also raised calls for consultation by USAID on the creation of the referenced 'USAID Partner Co-Branding Guide.'

Response: While the specific implementation of statutory marking requirements is well within USAID's sole discretion, USAID will actively consult with interested parties on the USAID Partner Co-Branding Guide.

Comment: Several comments requested clarification that the marking requirement does not apply to recipient organization offices or vehicles.

Response: Because the intent of the USAID marking requirements is to mark programs and projects, not people, the final rule does not require marking of vehicles, offices, and other administrative items for internal use by the recipient. See Definitions, "Commodities," §226.2, below.

Comment: Many of the comments raised security concerns and, while praising the concept, additional questions about the waiver procedure. There was also considerable confusion about application of the 'no double standard' policy and requests to delete the provision directing Mission Directors to recommend removal of a recipient organization's own marking when granting a waiver. Finally, there were calls for

waivers of longer than six months duration without review and for blanket waivers under certain circumstances, such as when a recipient was implementing a USAID funded program in a country in which U.S. Government employees received danger pay or where there were active U.S. Government military operations.

Response: USAID is determined to implement these marking requirements by erring on the side of safety. Recipients in good faith may request a waiver through the Cognizant Technical Officer (CTO) at any time after award. No marking is required while a waiver determination is pending. The waiver provision has been changed to clarify that the ‘no double standard’ provision requires the USAID Principal Officer making the waiver determination to consider at a minimum, information provided by the recipient in its request for the waiver (NGOs) and U.S Government security information, where available. The provision concerning Principal Officers’ recommendations to recipients about removal of their own markings has been deleted. Decisions of the Principal Officer can be appealed to that Principal Officer’s cognizant Assistant Administrator in USAID.

Comment: Several comments expressed concern or confusion about the provisions in the proposed rule at §226.91 (j) and (k), providing for disclaimers of a U.S. Government employment status for recipient employees engaging in public speaking, writing or promotional efforts concerning the USAID funded program or project, and disclaimers of U.S. Government employment status for use of the USAID Identity on employee business cards or other personally identifying materials.

Response: §226.91 (j) and (k) in the proposed rule have been deleted from the final rule. Recipients must seek guidance from the Cognizant Technical Officer (CTO) concerning any employee use of the USAID Identity on employee business cards or other personally identifying materials.

Miscellaneous changes to the final rule based on general comments or Agency review:

The non-retroactivity provision has been clarified in the final rule, and an additional presumptive exception has been added to address International Committee of the Red Cross concerns that any required marking not violate international neutrality standards. The final rule also is clarified to state expressly that marking applies to commodities provided under Title II Food Aid; the Food Aid regulations at 22 C.F.R. 211 will be subsequently amended to take into account this final rule. Finally, §226.91 (f) Exceptions and §226.91 (g) Waivers in the proposed rule have been re-lettered §226.91 (h) Exceptions and §226.91 (j) Waivers in the final rule.

B. Comments on Specific Provisions

Comment, §226.2., Definitions: several comments called for USAID to define further terms such as activity, equipment, programs, projects, and supplies.

Response: USAID has amended the definitions section to include definitions of “Activity,” “Programs,” “Projects,” “Principal Officers,” “Subrecipient” and “Technical Assistance” from USAID’s Automated Directive System Glossary. In addition, definitions of “Apparent Successful Applicant,” “Branding Strategy” and “Marking Plan” have been added. “Equipment” and “Supplies” are already defined at 22 C.F.R. §226.2.

Comment, §226.90, Appeals: several comments called for USAID to explicitly provide an appeals process for a USAID Principal Officer’s determination regarding a waiver request.

Response: Agreed. Decisions of the Principal Officer can be appealed to that Principal Officer’s cognizant Assistant Administrator in USAID.

Comment, §226.91 (a), “all programs, projects, activities, public communications and commodities funded by USAID”: several comments were concerned about the breadth of the marking requirement, and requested a ‘de minimis’ exception to marking requirements or further definition of the terms commodities, supplies and the like.

Response: USAID provides an exclusion for vehicles, offices and non-program deliverable, administrative items for recipient’s internal use in the definition of ‘commodities’, see definitions, §226.2, and also a ‘Presumptive Exceptions’ provision for items too small or impracticable to mark, see section §226.91 (h).

Comment, §226.91 (a), applicability to subawards: Several comments asked for clarification or recommended that marking requirements not ‘flow down’ to subawards.

Response: A ‘flow down’ required clause is included in the final rule. Because subrecipients are the final implementing partner for many USAID funded grants and cooperative agreements, the marking requirements would have only limited effect on cooperating country recipients unless the marking requirements flow down to subawards and subrecipients.

Comment, §226.91 (a) (1)-(3): There were many comments questioning the application of the three-tiered ‘percentage of funding’ trigger for marking requirements.

Response: the three-tiered system has been deleted and replaced with a much simpler provision requiring marking with the USAID Identity of a size and prominence equivalent to that of the recipient or other donors for all grants or cooperative agreements or other awards or subawards which USAID is partially or fully funding. USAID reserves the right to require marking of a greater size on a per case basis, when it is the majority donor.

Comment, §226.91 (c): Several comments raised concerns that overzealous USAID marking requirements might compromise or undercut program or project goals or conflict with local practices or laws.

Response: USAID has added a ‘Presumptive Exceptions’ provision that will apply, at the Agreement Officer’s discretion, to obviate marking requirements where marking would interfere with USAID and recipient goals, or marking would be inefficient, ineffective, or in conflict with local norms. There is also an exception if marking would be contrary to international law. Recipients will have a chance to request approval of these or any other applicable Presumptive Exceptions in their Marking Plan. All applicable exceptions will be approved and included in the Marking Plan by the USAID Agreement Officer.

Comment, §226.91(d): There were several requests to define further ‘technical assistance’ and state exactly what must be marked. In addition, specific concern was expressed that the application of marking requirements to election materials and monitoring, independent media programs, public service announcements and other independent radio or television broadcasts, and civil and human rights work might undercut the goals of those programs in fostering a civil society independent from identification with the cooperating country government or other state actors.

Response: USAID has included a definition of “technical assistance” in the final rule at § 226.2. USAID has also included a ‘Presumptive Exceptions’ section in the final rule, see §226.91 (h), which addresses concerns about marking election or democracy materials, independent media products, and other politically sensitive programs, projects, or activities.

Comments, §226.91(f), waivers: There were many comments and questions about application of the waiver provisions. While there was widespread support of the waiver concept, comments differed on its proposed application. USAID was advised to consider waivers of an indeterminate duration; to vest waiver authority in, variously, the Agreement Officer, the CTO, an official whose performance was not tied to desired Agency outcomes in a particular country; or to create a ‘marking’ ombudsman. Several comments expressed concern that Mission Directors or other Principle Officers have not readily exercised other waiver authorities, or would be restrained in their exercise of waiver authority by Ambassadors or other State Department officials.

Response: As noted above in General Comments, changes have been made to the waiver provision based on comments received in the rulemaking process.

Specifically, USAID accepts the comment that the waivers be of longer than six months duration; the waiver term has been changed to provide for a waiver of unlimited duration but one that is subject to Principal Officer review at any time due to changed circumstances. USAID also accepts the suggestion that an appeal process be provided, and allows the Principal Officer’s waiver decision to be appealed to the cognizant Assistant Administrator in USAID.

Despite these changes, the waiver authority remains in the first instance with the USAID Principal Officers at an overseas post. USAID has confidence in its senior officials on the ground, who as a class have been making waiver determinations on marking requirements for contractors and waivers in other sensitive areas, for years. The appeals

process provides for reconsideration of Principal Officer determinations.

Comment. §226.91(g), role of CTOs in monitoring: Several comments expressed concern that the CTO was required to ‘police’ marking requirements.

Response: USAID intends that the marking requirements, like other requirements of the USAID grant or cooperative agreement or other assistance award, be monitored and, if need be, enforced. USAID has simplified and clarified the process: the Marking Plan, once it is approved and incorporated in the award, becomes the basis for CTO monitoring. USAID will be amending its internal ‘CTO Designation Letter’ and providing specific training to CTOs to cover these new responsibilities.

Comment, §226.91(h), materiality of marking requirement: Several comments expressed concern or even intimidation about the designation of the marking requirement as a ‘material’ provision of the grant or cooperative agreement.

Response: The term ‘material’ has been deleted, and the enforcement provisions are the same uniform suspension and termination provisions that apply to all other provisions of the award, see 22 C.F.R. §226.61 and §226.62.

Comment, §226.91(j): There were several comments that pointed out the incorrect reference to the cost principles OMB Circular A-110 in the proposed rule.

Response: The reference has been corrected to the cost principles of OMB Circular A-122.

Comment, §226.91(k): One comment objected to the proposed requirement that recipients of USAID funded grants and cooperative agreements must have an organization policy in turn requiring recipient employees to state they are not representing USAID and their comments do not necessarily reflect the views of USAID, when speaking, writing, teaching or engaging in promotional efforts regarding USAID funded programs or projects.

Response: This proposed provision has been deleted from the final rule, along with the proposed provision concerning the recipient's employee's use of the USAID Identity on employee business cards and other personally identifying material, §226.91 (j). As stated above, recipients should consult with their CTOs concerning any use of the USAID Identity by recipient's employees on personally identifying materials such as business cards.

FINDINGS AND CERTIFICATIONS

Paperwork Reduction Act of 1995

OMB has determined that the requirements for Apparent Successful Applicants to submit a Branding Strategy and Marking Plan are by virtue of inclusion in this regulation

information collections affecting the public within the meaning of the Paperwork Reduction Act. The requirement to submit a Branding Strategy and Marking Plan will not take effect until publication of OMB approval of the collection of information by separate notice in the Federal Register.

This notice initiates the public comment period on the collection of information required by the requirement to submit a Branding Strategy and Marking Plan. The proposed information collection consists of the requirement for Apparent Successful Applicants to Submit a Branding Strategy and Marking Plan, defined in this regulation. No record keeping burden is known to result from the proposed collection of information.

Estimated total annual reporting burden for the period January 2006 – January 2009 that will result from the collections of information is presented below:

Projected Annual Burden Data

Question	Estimated Value
Annual number of expected respondents	500
Frequency of responses	One time
Total number of responses expected	500 annually

Question	Estimated Value
Average response time per respondent, including negotiation	8 hours
Total annual response time for the collection	500 * 8 hour = 4000 hours

Pursuant to 5 C.F.R §1320.8. (d)(1), USAID is seeking comment on the above requirement to submit a Branding Strategy and Marking Plan. Specifically, the public is invite to

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. Written comments should be sent within 60 days of the date of this notice by email to 'markingnprm@usaid.gov' or by

surface mail to John Niemeyer, Assistant General Counsel, Office of the General Counsel, USAID, Rm. 6.06.95, 1300 Pennsylvania Ave., NW., Washington, DC 20523; telephone: (202) 712-4776 (this is not a toll-free number).

Executive Order 12866--Regulatory Planning and Review

Executive Order 12866, Regulatory Planning and Review, requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the EO 12866. As discussed above, the Office of Management and Budget (OMB) reviewed this rule at USAID's request. This rulemaking implements statutory authority and reflects USAID's response to comments received on the proposed rule published on December 20, 2004 in the Federal Register (69 FR 75885-87).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses and other small entities. In accordance with that Act, the USAID Deputy Administrator has reviewed and approved this rule, and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any Federal mandates on any state, local, or tribal governments, or the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. The Agency has determined that these regulations will not have an impact on family well-being as defined in the legislation.

Executive Order 13132

Executive Order 13132, "Federalism," requires that Federal agencies consult with state and local government officials in the development of regulatory policies with federalism implications. The Agency has determined that this rule does not have federalism implications that require special consultations with state and local government officials.

Intergovernmental Review

This Final Rule affects direct grant programs that are subject to Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive Order is to foster an intergovernmental partnership and to promote federalism by relying on processes developed by state and local governments for coordination and review of proposed Federal financial assistance.

The Agency has concluded that this rule will not create or affect any Federal financial assistance to states. However, to the extent this rule falls under the Order, we intend this document to provide early notification of the Agency's specific plans and actions for the affected programs.

Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. Chapter 8.

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List of Subjects

22 CFR Part 226

Foreign aid, Grant programs, Nonprofit organizations.

For the reasons set forth above, 22 CFR part 226 is amended as follows:

PART 226--ADMINISTRATION OF ASSISTANCE AWARDS TO U.S. NON- GOVERNMENTAL ORGANIZATIONS

1. The authority citation for part 226 is revised to read as follows:

Authority: 22 U.S.C. 2381(a) and 2401.

2. Amend §226.2 by adding the following definitions:

§226.2 Definitions

* * * * *

Activity mean a set of actions through which inputs -- such as commodities, technical assistance, training, or resource transfers -- are mobilized to produce specific outputs, such as vaccinations given, schools built, microenterprise loans issued, or policies changed. Activities are undertaken to achieve objectives that have been formally approved and notified to Congress.

* * * * *

Apparent Successful Applicant(s) means the applicant(s) for USAID funding recommended for an award after technical evaluation, but who has not yet been awarded a grant, cooperative agreement or other assistance award by the Agreement Officer. Apparent Successful Applicants will be requested by the Agreement Officer to submit a Branding Strategy and Marking Plan. Apparent Successful Applicant status confers no right and constitutes no USAID commitment to an award, which still must be obligated by the Agreement Officer.

* * * * *

Branding Strategy means a strategy the Apparent Successful Applicant submits at the specific request of a USAID Agreement Officer after technical evaluation of an

application for USAID funding, describing how the program, project, or activity is named and positioned, as well as how it is promoted and communicated to beneficiaries and cooperating country citizens. It identifies all donors and explains how they will be acknowledged. A Branding Strategy is required even if a Presumptive Exception is approved in the Marking Plan.

* * * * *

Commodities mean any material, article, supply, goods or equipment, excluding recipient offices, vehicles, and non-deliverable items for recipient's internal use in administration of the USAID funded grant, cooperative agreement, or other agreement or subagreement.

* * * * *

Marking Plan means a plan that the Apparent Successful Applicant submits at the specific request of a USAID Agreement Officer after technical evaluation of an application for USAID funding, detailing the public communications, commodities, and program materials and other items that will visibly bear the USAID Identity. Recipients may request approval of Presumptive Exceptions to marking requirements in the Marking Plan.

* * * * *

Principal Officers means the most senior officer in a USAID Operating Unit in the field, e.g., USAID Mission Director or USAID Representative. For global programs managed from Washington but executed across many countries such as disaster relief and assistance to internally displaced persons, humanitarian emergencies or immediate post conflict and political crisis response, the cognizant Principal Officer may be an Office

Director, for example, the Directors of USAID/W/Office of Foreign Disaster Assistance and Office of Transition Initiatives. For non-presence countries, the cognizant Principal Officer is the Senior USAID officer in a regional USAID Operating Unit responsible for the non-presence country, or in the absence of such a responsible operating unit, the Principle U.S Diplomatic Officer in the non-presence country exercising delegated authority from USAID.

* * * * *

Programs mean an organized set of activities and allocation of resources directed toward a common purpose, objective, or goal undertaken or proposed by an organization to carry out the responsibilities assigned to it.

* * * * *

Projects include all the marginal costs of inputs (including the proposed investment) technically required to produce a discrete marketable output or a desired result (for example, services from a fully functional water/sewage treatment facility).

* * * * *

Public communications are documents and messages intended for distribution to audiences external to the recipient's organization. They include, but are not limited to, correspondence, publications, studies, reports, audio visual productions, and other informational products; applications, forms, press and promotional materials used in connection with USAID funded programs, projects or activities, including signage and plaques; Web sites/Internet activities; and events such as training courses, conferences, seminars, press conferences and the like.

* * * * *

Subrecipient means any person or government (including cooperating country government) department, agency, establishment, or for profit or nonprofit organization that receives a USAID subaward, as defined in 22 C.F.R. §226.2.

* * * * *

Technical Assistance means the provision of funds, goods, services or other foreign assistance such as loan guarantees or food for work, to developing countries and other USAID recipients, and through such recipients to subrecipients, in direct support of a development objective - as opposed to the internal management of the foreign assistance program. This definition is applicable only to 22 C.F.R §226.91.

* * * * *

USAID Identity (Identity) means the official marking for the United States Agency for International Development (USAID) comprised of the USAID logo or seal and new landmark with the tagline that clearly communicates our assistance is “from the American people.” The USAID Identity is available on the USAID website at www.usaid.gov/branding and is provided without royalty, license or other fee to recipients of USAID funded grants or cooperative agreements or other assistance awards

* * * * *

USAID Partner Co-Branding Guide is a USAID produced publication that is provided free of charge to recipients of USAID funded grants or cooperative agreements or other assistance awards or subawards, that details recommended marking practices and provides examples of USAID funded programs, projects, activities, public communications, and commodities marked with the USAID Identity.

* * * * *

3. Add §226.91 to subpart F, to read as follows:

§226.91 Marking.

(a) USAID policy is that all programs, projects, activities, public communications, and commodities, specified further at paragraph (b)- (e) of this section, partially or fully funded by a USAID grant or cooperative agreement or other assistance award or subaward must be marked appropriately overseas with the USAID Identity, of a size and prominence equivalent to or greater than the recipient's, other donor's or any other third party's identity or logo.

(1) USAID reserves the right to require the USAID Identity to be larger and more prominent if it is the majority donor, or to require that a cooperating country government's identity be larger and more prominent if circumstances warrant; any such requirement will be on a case-by-case basis depending on the audience, program goals and materials produced.

(2) USAID reserves the right to request pre-production review of USAID funded public communications and program materials for compliance with the approved Marking Plan.

(3) USAID reserves the right to require marking with the USAID Identity in the event the recipient does not choose to mark with its own identity or logo.

(4) To ensure that the marking requirements "flow down" to subrecipients of subawards, recipients of USAID funded grants and cooperative agreements or other

assistance awards are required to include a USAID-approved marking provision in any USAID funded subaward, as follows:

As a condition of receipt of this subaward, marking with the USAID Identity of a size and prominence equivalent to or greater than the recipient's, subrecipient's, other donor's or third party's is required. In the event the recipient chooses not to require marking with its own identity or logo by the subrecipient, USAID may, at its discretion, require marking by the subrecipient with the USAID Identity.

(b) Subject to §226.91 (a), (h), and (j), program, project, or activity sites funded by USAID, including visible infrastructure projects (for example, roads, bridges, buildings) or other programs, projects, or activities that are physical in nature (for example, agriculture, forestry, water management), must be marked with the USAID Identity. Temporary signs or plaques should be erected early in the construction or implementation phase. When construction or implementation is complete, a permanent, durable sign, plaque or other marking must be installed.

(c) Subject to §226.91 (a), (h), and (j), technical assistance, studies, reports, papers, publications, audio-visual productions, public service announcements, Web sites/Internet activities and other promotional, informational, media, or communications products funded by USAID must be marked with the USAID Identity.

(1) Any 'public communications' as defined in §226.2, funded by USAID, in which the content has not been approved by USAID, must contain the following disclaimer:

This study/report/audio/visual/other information/media product (specify) is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of [insert recipient name] and do not necessarily reflect the views of USAID or the United States Government.

(2) The recipient shall provide the Cognizant Technical Officer (CTO) or other USAID personnel designated in the grant or cooperative agreement with at least two copies of all program and communications materials produced under the award. In addition, the recipient shall submit one electronic and/or one hard copy of all final documents to USAID's Development Experience Clearinghouse.

(d) Subject to §226.91 (a), (h), and (j), events financed by USAID such as training courses, conferences, seminars, exhibitions, fairs, workshops, press conferences and other public activities, must be marked appropriately with the USAID Identity. Unless directly prohibited and as appropriate to the surroundings, recipients should display additional materials such as signs and banners with the USAID Identity. In circumstances in which the USAID Identity cannot be displayed visually, recipients are encouraged otherwise to acknowledge USAID and the American people's support.

(e) Subject to §226.91 (a), (h), and (j), all commodities financed by USAID, including commodities or equipment provided under humanitarian assistance or disaster relief programs, and all other equipment, supplies and other materials funded by USAID, and their export packaging, must be marked with the USAID Identity.

(f) After technical evaluation of applications for USAID funding, USAID Agreement Officers will request Apparent Successful Applicants to submit a Branding Strategy, defined in §226.2. The proposed Branding Strategy will not be evaluated competitively. The Agreement Officer shall review for adequacy the proposed Branding Strategy, and will negotiate, approve and include the Branding Strategy in the award. Failure to submit or negotiate a Branding Strategy within the time specified by the Agreement Officer will make the Apparent Successful Applicant ineligible for award.

(g) After technical evaluation of applications for USAID funding, USAID Agreement Officers will request Apparent Successful Applicants to submit a Marking Plan, defined in §226.2. The Marking Plan may include requests for approval of Presumptive Exceptions, 22 C.F.R. §226 (h), of this section. All estimated costs associated with branding and marking USAID programs, such as plaques, labels, banners, press events, promotional materials, and the like, must be included in the total cost estimate of the grant or cooperative agreement or other assistance award, and are subject to revision and negotiation with the Agreement Officer upon submission of the Marking Plan. The Marking Plan will not be evaluated competitively. The Agreement Officer shall review for adequacy the proposed Marking Plan, and will negotiate, approve and include the

Marking Plan in the award. Failure to submit or negotiate a Marking Plan within the time specified by the Agreement Officer will make the Apparent Successful Applicant ineligible for award. Agreement Officers have the discretion to suspend the implementation requirements of the Marking Plan if circumstances warrant. Recipients of USAID funded grant or cooperative agreement or other assistance award or subaward should retain copies of any specific marking instructions or waivers in their project, program or activity files. Cognizant Technical Officers will be assigned responsibility to monitor marking requirements on the basis of the approved Marking Plan.

(h) Presumptive exceptions:

(1). The above marking requirements in §226.91 (a) – (e) may not apply if marking would:

(i) Compromise the intrinsic independence or neutrality of a program or materials where independence or neutrality is an inherent aspect of the program and materials, such as election monitoring or ballots, and voter information literature; political party support or public policy advocacy or reform; independent media, such as television and radio broadcasts, newspaper articles and editorials; public service announcements or public opinion polls and surveys.

(ii) Diminish the credibility of audits, reports, analyses, studies, or policy recommendations whose data or findings must be seen as independent.

(iii) Undercut host-country government “ownership” of constitutions, laws, regulations, policies, studies, assessments, reports, publications, surveys or audits, public service announcements, or other communications better positioned as “by” or “from” a cooperating country ministry or government official.

(iv) Impair the functionality of an item, such as sterilized equipment or spare parts.

(v) Incur substantial costs or be impractical, such as items too small or other otherwise unsuited for individual marking, such as food in bulk.

(vi) Offend local cultural or social norms, or be considered inappropriate on such items as condoms, toilets, bed pans, or similar commodities.

(vii) Conflict with international law.

(2) These exceptions are presumptive, not automatic and must be approved by the Agreement Officer. Apparent Successful Applicants may request approval of one or more of the presumptive exceptions, depending on the circumstances, in their Marking Plan. The Agreement Officer will review requests for presumptive exceptions for adequacy, along with the rest of the Marking Plan. When reviewing a request for approval of a presumptive exception, the Agreement Officer may review how program materials will be marked (if at all) if the USAID identity is removed. Exceptions approved will apply to subrecipients unless otherwise provided by USAID.

(i) In cases where the Marking Plan has not been complied with, the Agreement Officer will initiate corrective action. Such action may involve informing the recipient of a USAID grant or cooperative agreement or other assistance award or subaward of instances of noncompliance and requesting that the recipient carry out its responsibilities as set forth in the Marking Plan and award. Major or repeated non-compliance with the Marking Plan will be governed by the uniform suspension and termination procedures set forth at 22 C.F.R. §226.61 and §226.62.

(j) USAID Principal Officers, defined for purposes of this provision at section §226.2, may at any time after award waive in whole or in part the USAID approved Marking Plan, including USAID marking requirements for each USAID funded program, project, activity, public communication or commodity, or in exceptional circumstances may make a waiver by region or country, if the Principal Officer determines that otherwise USAID required marking would pose compelling political, safety, or security concerns, or marking would have an adverse impact in the cooperating country. USAID recipients may request waivers of the Marking Plan in whole or in part, through the Cognizant Technical Officer. No marking is required while a waiver determination is pending. The waiver determination on safety or security grounds must be made in consultation with U.S. Government security personnel if available, and must consider the same information that applies to determinations of the safety and security of U.S. Government employees in the cooperating country, as well as any information supplied by the Cognizant Technical Officer or the recipient for whom the waiver is sought. When reviewing a

request for approval of a waiver, the Principal Officer may review how program materials will be marked (if at all) if the USAID Identity is removed. Approved waivers are not limited in duration but are subject to Principal Officer review at any time due to changed circumstances. Approved waivers “flow down” to recipients of subawards unless specified otherwise. Principal Officers may also authorize the removal of USAID markings already affixed if circumstances warrant. Principal Officers’ determinations regarding waiver requests are subject to appeal to the Principal Officer’s cognizant Assistant Administrator. Recipients may appeal by submitting a written request to reconsider the Principal Officer’s waiver determination to the cognizant Assistant Administrator.

(k) Non-retroactivity: Marking requirements apply to any obligation of USAID funds for new awards as of January 2, 2006. Marking requirements also will apply to new obligations under existing awards, such as incremental funding actions, as of January 2, 2006, when the total estimated cost of the existing award has been increased by USAID or the scope of work is changed to accommodate any costs associated with marking. In the event a waiver is rescinded, the marking requirements shall apply from the date forward that the waiver is rescinded. In the event of the rescinding of a waiver after the date of completion as defined in 22 C.F.R. §226.2 but before closeout as defined in 22 C.F.R. §226.2., the USAID mission or operating unit with initial responsibility to administer the marking requirements shall make a cost benefit analysis as to requiring USAID marking requirements after the date of completion of the affected programs, projects, activities, public communications or commodities.

(l) The USAID Identity, USAID Partner Co-Branding Guide, and other guidance will be provided at no cost or fee to recipients of USAID grants, cooperative agreements or other assistance awards or subawards. Additional costs associated with marking requirements will be met by USAID if reasonable, allowable, and allocable under the cost principles of OMB Cost Circular A-122. The standard cost reimbursement provisions of the grant, cooperative agreement, other assistance award or subaward should be followed when applying for reimbursement of additional marking costs.

(m) This section shall become effective on January 2, 2006.

Dated: _____

Frederick W. Schieck,
Deputy USAID Administrator.

[FR Doc.]

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