WORLD **PRIVACY** FORUM

Comments of the World Privacy Forum

To

US Customs and Border Protection

Regarding 81 FR 40892; Arrival and Departure Record, Nonimmigrant Visa Waiver Arrival/Departure, and Arrival/Departure, and Electronic System for Travel Authorization (ESTA). OMB Number 1651-0111, Form Numbers 1-94 and I-94W.

Via Regulations.gov

US Customs and Border Protection
Attn: Paperwork Reduction Act Officer
Regulations and Rulings
Office of Trade
90 K Street NE, 10th Floor
Washington DC 20229

August 22, 2016

The World Privacy Forum welcomes the opportunity to comment on the Customs and Border Protection Bureau (CBP)'s proposed information collection request for *Arrival and Departure Record (Forms I–94 and I–94W) and Electronic System for Travel Authorization*. The proposal appeared in 81 Federal Register 40892 on June 23, 2016,
https://www.regulations.gov/contentStreamer?documentId=USCBP-2007-0102-0016&disposition=attachment&contentType=pdf.

The World Privacy Forum is a non-profit public interest research and consumer education group. We publish research papers, policy comments, and consumer advice focusing on privacy and security issues. Much of our work explores technology and privacy issues, health, biometrics, consent, data analytics, and many other rapidly evolving areas of privacy. You can see our publications and more information at www.worldprivacyforum.org.

CBP proposes to add the following question to ESTA and to Form I-94W:

> "Please enter information associated with your online presence—
> Provider/Platform—Social media identifier." It will be an optional data field to

request social media identifiers to be used for vetting purposes, as well as applicant contact information.

The proposal suffers from a number of flaws, some of which are significant. Overall, we find the proposal lacking in clarity and failing to meet the requirements and standards imposed by the Paperwork Reduction Act's Information Clearance Process. Our specific comments are below.

I. Definition of Social Media Not Included

The proposal does not include a definition of *social media*, and there is no consensus definition on which to rely. The term will be confusing to many individuals who seek to fill out the form. Facebook and Twitter may be obvious examples of social media. However, many other uses of the Internet might qualify just as well.

An individual who posts product reviews on Amazon.com or other commercial websites might consider those activities to qualify as social media. Restaurant reviews on Yelp.com or elsewhere might also quality, as might feedback left for Ebay.com merchants or customers. Comments posted at newspaper websites might qualify.

There may be thousands, tens of thousands, or even millions of activities that could qualify as social media activities, and this is only a problem that will expand with time. An individual faced with the form is not likely to have any idea what information to provide. This is true today, and will likely become more of an issue in the coming years.

II. No Specified Time Frame for Social Media Activities

The proposal does not state a specific time frame for inclusion social media activities for which CBP asks for identifiers. Should an individual include an identifier from activities undertaken decades ago on ARPANET, from an electronic bulletin board system from the 1980s that may no longer exist, or from a long-abandoned and defunct MySpace page? Should people include information for deleted Twitter or Facebook accounts? How long ago would they have needed to delete their accounts to not consider inclusion? How would any individual know how much to include, or what time frame of social media activities to include?

III. Cost Estimates Substantially Understated

The cost estimate the CBP has given vastly understates the effort involved. For any individual who engaged in activities on the Internet and some of its predecessors over many years or even several decades – and a very large number of individuals around the world meet this description – the effort to find "social media identifiers" would require a considerable research.

For an active Internet user, it could take at least twenty hours merely to find all potentially qualifying social media accounts ever utilized. Finding the actual identifiers for each activity

would take even longer. Many potentially qualifying social media websites no longer exist. Does CBP expect individuals to look at Internet archival sites to find defunct social media accounts?

The PRA rules require that an agency estimate the burden imposed as *the total time, effort, or financial resources expended* by persons to generate, maintain, retain, or disclose or provide information, including:

> (1) Reviewing instructions;
> (2) Developing, acquiring, installing, and utilizing technology and systems for the purpose of collecting, validating, and verifying information;
> (3) Developing, acquiring, installing, and utilizing technology and systems for the purpose of processing and maintaining information;
> (4) Developing, acquiring, installing, and utilizing technology and systems for the purpose of disclosing and providing information;
> (5) Adjusting the existing ways to comply with any previously applicable instructions and requirements;
> (6) Training personnel to be able to respond to a collection of information;
> (7) Searching data sources;
> (8) Completing and reviewing the collection of information; and
> (9) Transmitting or otherwise disclosing the information. 5 C.F.R § 1320.3(b)(1).

We do not see any evidence supporting how CBP established its estimate, and we find no reference to a pilot study. As a result, we cannot criticize the methodology expressly or evaluate how CBP addressed each of these elements.

We ask that CBP make the details of the burden estimate public and then republish the request for public comment. Similarly, we would like a chance to review the pilot study, if one was completed.

It is not clear from the Federal Register notice which of the estimated times for providing the information applies to the social media question. That by itself makes the proposal insufficient to meet the PRA requirements for estimating the burden. However, we submit that the estimated time for at least ten percent of individuals asked the social media question will be ten to forty hours, resulting in an overall estimate that far exceeds any of the estimates that CBP made.

Of course, we do not think that most individuals would undertake the effort required to answer the question. That does not change our estimate, which we believe must consider the time involved to make a good faith attempt to provide a complete answer. Regardless, the time required suggests that the information collection request itself, as we point out below, fails to meet the least burdensome standard or the practical utility standard.

IV. Failure to Prove "Every Reasonable Step"

The CPB has failed to show that the agency has taken "every reasonable step" to ensure that the proposed collection:

(1) is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives,
(2) is not duplicative of information otherwise accessible to the agency, and
(3) has practical utility. 5 C.F.R § 1320.5(d)(1).

We see no evidence in the Federal Register publication why the proposed collection is the least burdensome approach. We observe that the ESTA form already asks applicants if they seek "to engage in terrorist activity." If that question elicits any useful information, then the information obtained via social media will be largely superfluous.

We also observe that if the already required terrorism question fails to elicit useful information, then the *voluntary* disclosure of social media information is also highly likely to fail. As a result, we conclude that the new request will not fulfill its purpose, and therefore it fails to be the least burdensome approach. The existing question is already the least burdensome approach.

The social media question also is duplicative because it will elicit useful information already obtained from the terrorism question on the existing form. As a duplicate question, it fails to meet the standards of the PRA.

We also submit that the question has no practical utility. Anyone who wishes to hide his or her social media activities can refuse to answer the question without any penalty because the question is voluntary. Only those who have nothing to fear by making it easy for CBP to find and review their social media activities will answer the question.

If CBP actually has the time and resources to review social media accounts, then it will only waste the effort because it is a near certainty that no one will provide leads that are detrimental to their personal interests. Thus, CBP will expend resources without any significant return, and the practical utility of the whole endeavor is near zero.

There is insufficient justification for the collection request. Further, the question is sure to result in a large number of false positives, adding burden not only to US visitors but to CBP itself as it tracks down worthless leads and then evaluates visitors by more expensive methods. In the end, the request is much more likely to waste agency resources than to accomplish any legitimate purpose.

V. Burden of Multi-Lingual Review

We suggest that asking the new social media question will place CBP in an untenable position. If we assume that individuals will reply to the request honestly, then we doubt that CBP will have the resources to follow up on all leads. Social media sites exist in many languages, and it would take considerable resources to have the capability of reviewing all sites and all languages in real time. Some sites may not be accessible to CBP.

If there is no review or if the review is incomplete or fails to find links to terrorism that are present, then critics will blame CBP for any decisions that it makes on ESTA applications if it turns out that CBP grants a visa to an individual who engages in terrorist acts that might have been found through a diligent review of a social media account. It will be all the worse if CBP failed to follow the leads it requested for lack of resources.

VI. Negative Global Precedent

We think that the request for social media identifiers is a terrible precedent. It is likely to result in other nations making similar requests of Americans who seek to travel abroad. We foresee escalation, with voluntary requests replaced by mandatory requests, and with requests for identifiers eventually replaced by requests for passwords. People traveling to countries with challenging political situations could face very difficult choices if this question becomes the global norm.

We have particular concerns about journalists and human rights workers. If requests for social media identifiers escalates, these individuals face increased safety issues.

The end of this slippery slope leads to a non-functional Internet on which individuals do not feel free to participate for lawful activities, lest those activities be used as a basis for denying rights, benefits, or privileges. The potential chilling effect on speech is tremendous.

We request that CBP withdraw the proposal. In the alternative, we request that CBP republish the notice for public comment after it makes all relevant PRA document available for public inspection.

The public should have the opportunity to comment at this stage rather than the next public comment opportunity. It will be in CBP's own interest to hear public comments on its PRA methodology at a time when it can respond rather than have those comments go directly to OMB.

Thank you for the opportunity to submit these comments. We would be pleased to discuss any questions you may have, or provide clarifications.

Respectfully submitted,

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