WASHINGTON
LEGISLATIVE OFFICE

August 22, 2016

U. S. Customs and Border Protection
Attn: Paperwork Reduction Act Officer
Regulations and Rulings
Office of Trade
90 K Street, NE, 10th Floor
Washington, DC 20229-1177

RE: **Agency Information Collection Activities: Arrival and Departure Record (Forms I-94 and I-94W) and Electronic System for Travel Authorization**

OMB Number 1651-0111

Dear Sir or Madam:

The American Civil Liberties Union ("ACLU") submits these comments in response to the U. S. Customs and Border Protection's ("CBP's" or "Agency's") notice of revision of an existing collection of information, concerning the inclusion of an additional question on the standard questionnaire used in the visa waiver program ("VWP") which would seek social media identifiers from all applicants. The proposed expansion of the existing questionnaire would significantly increase the invasiveness of the information collected – not only about foreign travelers, but also about their U. S. citizen social media contacts, and have a chilling effect on their communications. It would also increase the complexity of the visa waiver decision-making process. Accordingly, noticing this proposal as a mere revision of an existing form to be reviewed under the Paperwork Reduction Act ("PRA") mischaracterizes the seriousness of the change. We urge the Agency to withdraw the 60-Day Notice ("Notice") and, if appropriate after further development, re-initiate the process as a significant change to an existing regulation.

Established decades ago, the VWP facilitates international tourism, trade, and business among 38 countries. In 2014, more than 20 million travelers arrived here through the VWP, including more than 13 million from Europe.[1] While here, these travelers "generated $190 billion in economic output and supported nearly one million American jobs," according to the U. S. Travel Association.[2]

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[1] The Hill, What the Visa Waiver Program Means to Europe (Dec. 14, 2015) (opinion piece of European ambassadors to the U. S.) *available at* http://thehill.com/blogs/congress-blog/foreign-policy/262999-what-the-visa-waiver-program-means-to-europe (accessed Aug. 21, 2016).
[2] *See* U. S. Travel Ass'n, Visa Waiver Program *available at* https://www.ustravel.org/issues/visa-waiver-program (accessed Aug. 21, 2016).

As a preliminary and critical matter, we question whether the collection, retention, and sharing of information derived from the social media identifiers to be provided by VWP applicants is within the scope of the visa waiver program. The sole authorization granted to the Department under the VWP statute was to devise a program under which normal visa processing requirements could be waived.[3] Congress intended the Department to identify certain countries that were deemed relatively safe – and apply an expedited, time-saving process which would exempt many non-immigrant travelers from the burden of a cumbersome visa application process otherwise handled on a case-by-case basis by U. S. embassies around the world.

In short, the VWP isn't a national security screening tool. It's a travel program designed to promote international business, trade, and tourism. And Americans benefit from the VWP tremendously, as reciprocity principles permit U. S. citizens to travel visa-free to 23 European states, 5 Asian states, Australia, New Zealand, Chile, and elsewhere. Yet the current proposal proposed to change the very core of the VWP examination process from one designed to expedite beneficial travel to the United States to a system for collecting personal information on millions of foreign travelers and their millions of U. S.-based contacts. This is well beyond what Congress intended when it created the VWP and, curiously, of all the recent changes adopted to the VWP regulations, this is the one time the Agency has initiated such a change in the absence of a legislative predicate.

Courts have extended great deference to federal agencies in carrying out the programs created by Congress. While different tests control depending on whether Congress has spoken directly to the issue to be regulated, even where Congress is silent, the question is whether the agency's rulemaking is based on a permissible construction of the statute in question.[4] While assessing an applicant's suitability for entry into the country is at the heart of the VWP application process, there is no evidence to demonstrate that accessing voluminous social media interactions and communications will serve the goals of the program – to expedite and waive complicated visa processes for a select group of travelers. Even more importantly, however, nowhere in the authorizing statute is the Department authorized to collect, retain, and share personally identifying information on American citizens and residents – as this process inevitably involves. Indeed, such a system of data collection is wholly outside the scope of the VWP, which is strictly limited to determining which non-immigrant travelers should be exempted from the normal visa process due to an absence of threatening indicia. Accordingly, we urge the Agency to withdraw this Notice, to reformulate this proposal in such a way that it does not implicate the speech and privacy rights of millions of Americans, and, if warranted, re-initiate the public notice process through a formal rulemaking in which the public may play a greater role in ensuring the Department acts within its authority.

- **The proposed information request inherently changes the VWP approval process from a routine procedural data crosscheck to a subjective assessment of unreliable and circumstantial information.**

One mission of the Department of Homeland Security ("DHS" or "Department") is to screen foreign visitors to the United States for risks to national security. In making the change set forth

[3] 8 U.S.C. s. 1187 (a).
[4] Chevron USA, Inc. v. NRDC, 467 US 837, 843 (1984).

in the Notice, the Agency acknowledges that the purpose of the change arises out of this national security mission. The Notice states that the "collection of social media data will enhance the existing investigative process and provide DHS greater clarity and visibility to possible nefarious activity and connections . . . ."[5] Accordingly, the Agency is collecting the additional data for the express purpose of enhancing its national security assessment of the applicant and his/her "connections".

The existing VWP process runs a check of personally identifying information gleaned from objective answers against existing databases and lists. While the content of those databases and lists remains largely secret, the VWP process is relatively straightforward. If the name generates a "hit", the application is kicked out of the system and the normal visa process ensues.[6] With this change, however, not only will the databases remain closed to public accountability, the decision-making itself will become far cloudier because it will involve a wide array of social media information about the applicant and others (many of whom are likely to be U. S. citizens or legal residents). Instead of deciding whether an applicant poses a potential national security threat based on a crosscheck of databases, the agency will now access additional information using the social media identifiers provided on the revised application form, and in some way analyze and assess that information and decide on the applicant's suitability for admission under the VWP. Moreover, the information so derived from the identifiers will be maintained and shared among other governmental agencies.

We have long objected to the use of intelligence and law enforcement watch lists and databases for which there is no accountability,[7] but we do not rely on those ongoing objections in offering these comments. Instead, we object to this newly expanded, newly subjective decision-making process which would offer even less opportunity to learn the basis for a denial and would provide no feedback about the information being collected on both the foreign applicants and their US-based social media counterparts. The proposal would change a routine procedural check into a complex, wide-ranging, capricious, politically-charged, and highly subjective assessment without providing detail or standards on how the assessments will be carried out. We urge the Agency to provide such details and standards by withdrawing the current Notice and seeking expanded public comment via a rule change to the existing regulations governing the VWP.

- **The proposed change would collect social media identifiers from millions of individuals deemed least likely to have terrorist connections and would result in the collection of personal information on the tens of millions of social media contacts of those individuals, many of whom would be U. S. citizens or residents.**

[5] *See* Notice (Abstract/Background).
[6] *See* Visa Waiver Program Security Enhancements, Testimony of R. Gil Kerlikowske, Commissioner, U. S. Customs and Border Protection, Before the House Committee on Oversight and Government Reform, Subcommittees on National Security and Government Operations (Feb. 10, 2016) (hereinafter "Kerlikowske Testimony").
[7] *See* ACLU Files First Nationwide Challenge to No-Fly List (Apr. 6, 2004) available at https://www.aclu.org/news/aclu-files-first-nationwide-challenge-no-fly-list-saying-government-list-violates-passengers (accessed Aug. 14, 2016); *see also* ACLU, The Surveillance Industrial Complex (August 2004) available at https://www.aclu.org/files/FilesPDFs/surveillance_report.pdf (accessed Aug. 14, 2016).

The VWP is a statutorily authorized program designed to streamline processing the millions of applications for entry to the U. S. Under the program, the Agency provides an expedited review process for visa applicants from certain designated countries. The government has designated those countries for a variety of reasons, including that those intending to commit terrorist acts are less likely to come from those countries.[8] While we disagree that country of origin alone should serve as an indicator of propensity to engage in terrorism, that is the nature of the program created by statute and implemented by formal rulemaking.

For years, the Agency has found it adequate to make a national security determination for VWP applicants – a population deemed less likely to include terrorists – based on a crosscheck of names against terrorist databases and watch lists.[9] Now, the Agency proposes to use the social media identifiers requested under this proposal to collect a massive amount of personal communications from a huge cohort of individuals who have been deemed to be less of a threat than the millions of others who seek visas from other countries. In addition, the Agency will derive data on tens of millions of contacts – many of them Americans – who happen to be connected by social media to this group of less threatening individuals.[10] The illogic of the proposal is stunning: of all the populations from which to begin to collect social media data on a systematized basis, the Agency has chosen one population that is both extremely large and has been identified by virtue of its connection to countries deemed least likely to be the location of those likely to engage in terrorism.[11] With respect to the U. S. population that will be impacted by this collection, there is not even the illusion of reasonable suspicion that would normally be required of government collecting, retaining, and sharing such data.

The Notice contains no justification to explain why this population in particular should be asked to provide the identifiers that would be used to generate such a wealth of data – about themselves and others – when the only reason they are applying for VWP is due to their country's prior designation as being a comparatively safe origin country. At the very least, the agency should address this apparent conflict in rationales and seek comprehensive public comment on the speech and privacy implications of such a change, which will only occur if this Notice is withdrawn and the agency re-submits using a formal rulemaking procedure.

- **The proposed change was not prompted by congressional action.**

The Department has modified its VWP rule from time to time, with substantial regulatory modifications in 1997, 2005, 2010, and earlier this year in 2016. But in those cases, the

[8] *See* Kerlikowske Testimony.
[9] *Id.*
[10] *See* Notice (Abstract/Background and Proposed Changes). In the Notice, the Agency states that the Form I-94W and the ESTA automated system impact over 900,000 and over 23,000,000 people respectively. Surprisingly, the Agency also suggests that requiring individuals to provide their social media identifiers and other evidence of their online presence will take no additional time. *Id*.
[11] Curiously, the form used for visa approval in other circumstances – presumably from countries deemed less of a threat than VWP countries – contains no question seeking social media identifiers. *See* DS-160 (sample) available at http://www.immihelp.com/visas/sample-ds-160-form-us-visa-application.pdf (accessed Aug. 14, 2016). Admittedly, such other forms of visa processing often involved an interview when there would be an opportunity to ask about social media contacts and the Department of State has begun pilot programs incorporating social media review. *See* Written Statement of Michele Thoren Bond, Ass't Sec'y for Consular Affairs, Dep't of State, Before the House Committee on Homeland Security (Feb. 3, 2016) (hereinafter "Bond Testimony").

regulatory modification was prompted by congressional enactment of a new statute.[12] Because this Notice is styled merely as a change to an information collection system under the PRA, the agency has offered no justification for altering the VWP application process in such a substantial way without congressional prompting.

The most recent update occurred last winter in response to a bill limiting VWP eligibility for those who had certain ancestral connections to countries perceived as dangerous.[13] Previously, it adjusted references to authorization dates and pilot projects to correspond to legislation. It amended the rules with respect to automation requirements following congressional approval. This new question has no origin in new congressional authorization, yet complicates the decision-making and record-keeping obligations of the agency in ways that dwarf the impacts created by prior congressional legislation.

To be sure, Congress has considered modifications to the visa waiver system – having held hearings on several occasions. Several bills have been introduced. Significantly, however, Congress has passed no bill for the President's signature – which is at least some evidence that the current VWP is viewed with approval by a majority.[14] Yet, without congressional prompting, the Department has issued this Notice that would result in a vast expansion of the personal information collected by the government about millions of visa applicants and tens of millions of their social media contacts, many of whom are U. S. citizens and residents. To cloak such a massive adjustment of the VWP under a PRA notice is a disservice to the goal of open government and a threat to the privacy and speech rights of all Americans who happen to have foreign social media contacts.

The Agency should withdraw the Notice and, if deemed appropriate following further examination of the impacts of its proposal, re-issue a Notice under formal rulemaking procedures which seeks public comment on the due process, speech, and privacy impacts of the proposal.

The Paperwork Reduction Act was intended to reduce government-mandated paperwork for overburdened Americans and ensure maximum benefit from any such paperwork required of Americans. There is no question that this proposed change should undergo such a review. But the proposal is so much more than the mere addition of a question to a questionnaire. As noted, it changes a routine procedural crosscheck into a complex subjective assessment involving millions of visa applications. It implicates the privacy rights of tens of millions of Americans who might fall among the social media contacts of one or more of the millions of applicants. It could have a potentially chilling effect on those Americans who will be concerned that their social media posts will be collected and retained by government agencies. And all of these

[12] 8 CFR Part 217 (Visa Waiver Program); *see also* 8 U.S.C. s. 1187.

[13] More precisely, the 2015 changes stripped VWP eligibility from dual nationals of Iran, Iraq, Sudan, Syria. ACLU objected to the 2015 VWP law based on the discriminatory provision targeting dual nationals on the basis of ancestry and parentage. *See* Letter to House from ACLU re: H. R. 158 (Dec. 7 2015) *available at* https://www.aclu.org/letter/aclu-letter-house-re-visa-waiver-program-improvement-and-terrorist-travel-prevention-act-2015 (accessed Aug. 21, 2016); ACLU Washington Markup, Looking Forward to International Visits (Lin, J.) (Dec. 18, 2015) *available at* https://www.aclu.org/blog/washington-markup/looking-forward-international-visits-friends-and-family-2016-better-hope (accessed Aug. 21, 2016).

[14] *See, e.g.*, Kerlikowske Testimony; Bond Testimony; S. 1507, Visa Waiver Enhanced Security and Reform Act.

impacts will occur in the dark as the Agency keeps its decision-making process cloaked – even as it fails to define many of the key terms referenced in the Notice.

If the Agency is determined to go forward with this proposal, it should withdraw the Notice in favor of a significant change to an existing regulation designed to consider these and other legal and policy issues triggered by this massive collection of data. Among other things, the Agency should provide programmatic detail or clarity about and seek public comment on the following issues:

- **Chilling impact on prospective VWP applicants and on American citizens and residents**

Individuals decide to travel to the U. S. for many different reasons. They could have business in the country – or might be looking to do business in the country. Family might reside here. Certainly tourism is one of the leading draws of foreign visitors and a leading economic driver in many parts of the country. Each such visit has a discrete and tangible economic and cultural benefit – both to the country and often to the visitor as well.[15] Any action that would make such visits less attractive to the traveler or less likely to occur is one that should be discouraged. By asking all visitors otherwise eligible for the VWP – millions of individuals from countries deemed generally to be safe – to reveal their social media identifiers, with the understanding that the U. S. government will be examining their online activity and contacts, we are making our country less hospitable and we are making our visitors more likely to be secretive, even if their activities pose no threat to our country.

Even more importantly, such actions encourage Americans to be more circumspect in connecting with those outside the U. S.[16] To the extent an individual can control to whom he or she is connected online, anyone who is concerned about personal privacy or anyone who is reluctant to share personal beliefs or comments with government investigators will be less likely to engage online. Even if only to some small degree, it will cause law-abiding Americans to consider restricting their online activity. And those who are actually engaged in terrorism will simply take additional steps to hide their communications. There will be relatively little to gain from such a process – and a massive impact on a population deemed generally to be from relatively safer parts of the world (and the American contacts of such people).

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[15] Xiaochu Hu, *Economic Benefits Associated With the Visa Waiver Program – A Difference-In-Difference Approach*, 7 Global Journal of Business Research 81, 81-89 (2013). U. S. Travel Association, Visa Waiver *Works:* Expanding the U. S. Visa Waiver Program Brightens the American Economy and Safeguards Security Republic of Korea Case Study (2014), *available at* https://www.ustravel.org/sites/default/files/Media%20Root/04092014_Visa_Waiver_Works.pdf (accessed Aug. 16, 2016).

[16] *See* PEN America, Chilling Effects: NSA Surveillance Drives U. S. Writers to Self-Censor (Nov. 12, 2013); Karen Turner, *Mass Surveillance Silences Minority Opinions, According to Study*, Wash. Post, (Mar. 28, 2016), *available at* https://www.washingtonpost.com/news/the-switch/wp/2016/03/28/mass-surveillance-silences-minority-opinions-according-to-study/ (accessed Aug. 16, 2016).

Importantly, the prospect of excluding individuals is not a new one. We and others have long objected to and highlighted the practice of ideological exclusion.[17] It is not at all difficult to imagine that a process that is entirely devoid of transparency could be used to keep people out of the country due solely to their political views. It is even easier to imagine that people around the world – and Americans here at home – would come to believe that an ideological test is being applied – whether it is in fact or not. Such a result would tend to encourage silence by those who are seeking to change the world for the better and it would tend to isolate the United States. At a bare minimum, the Agency must provide assurances that this hidden assessment of social media activity will not be abused in such a way.

We urge the Agency to seek public comment on the anticipated impacts of the proposal on the speech and associative practices of Americans, how the chilling effect of the proposal might harm American business, tourism, and cultural institutions, and how it could make it more difficult to identify those actually engaged online in support of terrorism.

- **The standards applied in assessing the collected data to determine an individual's eligibility for the VWP**

The existing VWP system is opaque in that there is no accountability or transparency in the databases and watch lists against which VWP applicant information is crosschecked. The new proposal adds yet another layer of density. The Agency could exclude an applicant from VWP based on information gleaned from his or her social media contacts and the applicant will have no knowledge whether that information is correct or not. Moreover, the Agency has provided no guidance on the kind of data that will result in someone's exclusion from VWP participation. It has offered no information about whether it will assess an individual's social media comments, his or her contacts, evidence of his or her travel or studies or professional achievements or failures. Will a direct contact with a terrorist suspect be required to lose VWP eligibility? Or will it be sufficient if there is a terrorism suspect several degrees removed from the applicant? In other words, how will one's online associations be assessed? Just as importantly, how will one's online speech be assessed? Must someone espouse violence in the name of international terrorism to lose access to the VWP program? Or will it be sufficient if he or she has shared links to sites associated with a radical but non-violent ideology? Taken from a different view, will the social media contacts be subject to closer scrutiny depending on the outcome of the VWP application? If the applicant has connections to terrorism, will all social media contacts then also be subjected to government scrutiny? Will they be subject to scrutiny under other circumstances? If so, what are those circumstances?

Without such guidance, we are left to imagine the worst where someone could be excluded even if he or she is unaware of an indirect connection to terrorism and where a wholly innocent American could be subject to intense government scrutiny without reasonable suspicion and, indeed, without having taken any action whatsoever. This is a wholly different decision-making process than now exists and is deserving of public clarification.

[17] *See* Letter to Secretary Hillary Rodham Clinton (Jul. 13, 2010) *available at* https://www.aaup.org/NR/rdonlyres/60752BA6-B308-4989-9798-8D7A32D08D28/0/Morrisletterfinal.pdf (accessed Aug. 21, 2016).

- **Algorithmic decision-making**

    - The Agency will use automated, algorithmic decision-making tools for at least an initial vetting of travelers' social media accounts.[18] The whole point of the VWP is to automate as much decision-making as possible within a subset of countries whose populations are deemed to be low-risk, and that the request for travelers' social media handles comes on a form made up largely of easily digitized yes/no questions. And given the volume of travelers involved, human scrutiny of social media streams would be an enormously time-consuming and resource-intensive undertaking. If CBP does engage in the automated analysis of travelers' social media communications, that raises additional civil liberties issues.

    - Automated algorithms are a highly unreliable means of assessing human beings, including their "potential risks to national security", in the words of CBP's proposal. Artificial agents are simply not sophisticated enough in their understanding of the subtleties of human life and language to reliably connect a person's communications to any rational assessment of risk. Language that sounds threatening used in informal conversations and communications almost always consists of satire, sarcasm, irony, hyperbole, mock boasting, quotations of others, references to works of fiction, or other innocuous things – yet algorithms are terrible at understanding such contexts. Even humans have trouble, as in the case of a British couple hoping to vacation in the United States. Exuberant about his visit and using British slang for partying, he tweeted to his friends that he was going to "destroy America," and in a reference to a joke in the TV show "Family Guy" tweeted that in LA he was planning on "diggin' Marilyn Monroe up."[19] Upon landing at LAX officials interrogated them for 5 hours and held them in a cell for 12 hours before ordering them back to London. Border officials also searched their luggage for shovels.[20]

    - But even that level of literal-minded thoughtlessness is regularly outdone by computers. The most likely result of computerized scrutiny of travelers' social media feeds is an enormous and distracting flow of false alarms and bogus leads to analysts, even while that scrutiny brings corrosive chilling effects as travelers –

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[18] *See* Ron Nixon, *U. S. to Further Scour Social Media Use of Visa and Asylum Seekers*, N.Y. Times, Feb. 23, 2016, *available at* http://www.nytimes.com/2016/02/24/us/politics/homeland-security-social-media-refugees.html?_r=0; Office of Personnel Management (accessed Aug. 16, 2016), *Publicly Available Electronic Information (PAEI) Pilot – OPM-FIS RFI*¸Federal Business Opportunities (2016), *available at* https://www.fbo.gov/?s=opportunity&mode=form&id=6c480c2488859128bb91251ed8cd4513&tab=core&_cview=0 (accessed Aug. 16, 2016); Letter from Lisa J. Sotto, Chair, DHS Data Privacy and Integrity Advisory Committee, to The Honorable Jeh Johnson, Secretary of the U. S. Department of Homeland Security and Ms. Karen L. Neuman, Chief Privacy Officer of the U. S. Department of Homeland Security (Feb. 17, 2016), *available at* https://www.dhs.gov/sites/default/files/publications/dpiac-report-2016-01-algorithmic-analytics_0.pdf (accessed Aug. 16, 2016).

[19] BBC News, *Caution on Twitter urged as tourists barred from US*, BBC News, Mar. 8, 2012, *available at* http://www.bbc.com/news/technology-16810312 (accessed Aug. 16, 2016).

[20] Richard Hartley-Parkinson, *British pair arrested in U. S. on terror charges over Twitter jokes*, Daily Mail, Jan. 31, 2012, *available at* http://www.dailymail.co.uk/news/article-2093796/Emily-Bunting-Leigh-Van-Bryan-UK-tourists-arrested-destroy-America-Twitter-jokes.html (accessed Aug. 16, 2016).

and perhaps their friends and contacts, including Americans – inevitably come to learn that certain kinds of conversations are liable to trigger increased scrutiny when those conversations have been misunderstood by a computer.

- Assuming that CBP does not make the relevant algorithms public, the situation will be worse because there will be no way for experts and the public at large to scrutinize that computer logic and its validity, or detect its potentially discriminatory effects.[21] In general, open scrutiny of any algorithm that is used to make important decisions about people's lives is especially vital because of the vast uncertainties that surround this brand new area.

The algorithmic processes are completely hidden. Given that they will determine whether the assessments are done fairly or not, discriminatorily or not, accurately or not, they are deserving of a public airing through a notice and comment process.

- **The treatment of collected information relating to U. S. citizens and residents**

The Agency has acknowledged that it seeks to collect information on the connections of VWP applicants.[22] It will necessarily involve using the social media identifiers provided by applicants to search the internet for such connections. Given that there are millions of applicants, there are likely to be tens of millions of U. S.-based connections, the vast majority of whom have done nothing to cause the government to scrutinize their actions and communications and all of whom will have done nothing to evidence their consent to the collection of their personal information.[23] It is unreasonable even to collect this information in the first place in the absence of reasonable suspicion and the Agency has offered no justification for doing so. Assuming the collected information will be treated the same as other VWP information, the data will also be shared with other agencies within the government.[24] Given that this information is so voluminous and potentially far-reaching and given that the data regarding social media connections is not part of the VWP application, but rather derived using the VWP application data, there is no assurance that social media data will be purged in the same way as VWP application data – especially if that broader set of information has been shared with other elements of the government. The proposal should address how the data derived from social media identifiers will be collected, disseminated, and retained, and the public should have an opportunity to comment.

- **Due process protections for applicants and American citizens and residents impacted by the new decision-making process**

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[21] Claire Cain Miller, *When Algorithms Discriminate*, N.Y. Times, July 9, 2015, available at http://www.nytimes.com/2015/07/10/upshot/when-algorithms-discriminate.html?_r=0 (accessed Aug. 16, 2016); Executive Office of the President, Big Data: Seizing Opportunities, Preserving Values 51-53 (2014), *available at* https://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf (accessed Aug. 16, 2016).

[22] *See* Notice (Abstract/Proposed Changes).

[23] *See* Congressional Research Service, Visa Waiver Program (Siskin, A.) (Dec. 11, 2015) *available at* https://www.fas.org/sgp/crs/homesec/RL32221.pdf (accessed Aug. 21, 2016).

[24] *See, e.g.*, DHS Privacy Impact Assessment for the Automated Targeting System (Sept. 16, 2014); DHS Privacy Impact Assessment for LeadTrac System (July 22, 2016)

There are two classes of people likely to be impacted directly by the collection of social media identifiers and information derived from those identifiers – VWP applicants and those whose names and activities are brought to the attention of government investigators through research using the identifiers. VWP applicants, if not approved for waiver, still have the opportunity to seek a visa through normal channels using U. S. embassies abroad, since the VWP is merely a program to determine if the normal visa process should be waived.[25] If such a denial occurs due to information gleaned from the identifiers, it remains unclear if the applicant will have an opportunity to correct any erroneous, misleading, or unsubstantiated information derived from the identifiers that generated the denial. Aside from the personal or business impact on the applicant's travel plans, the retention of any such corrupted information within any databases maintained by the Agency or other governmental entities could cause similar or other incorrect decision making in other circumstances. Having a meaningful opportunity to correct the record will benefit not only the applicant, but also the reliability of the information on which the government depends in carrying out its mission.

It will be even more difficult for Americans caught up in this data collection to make sure the government isn't drawing incorrect conclusions about their contacts and activities. The Notice makes no reference to its intended plans for the information derived from researching the social media identifiers. The Agency should provide that plan and offer an opportunity for public comment. If the Agency or another department identifies any U. S. citizen or resident through the use of social media identifiers provided on a VWP application, it should take no steps against that person in the absence of reasonable suspicion and it should purge any record of that person otherwise. If the government is going to maintain any such record for any reason whatsoever, the person should have the opportunity to make sure that the information retained is accurate – especially if the record could be used against that person. To provide such an opportunity would be a massive and daunting task to undertake – but to fail to do so would infringe on the privacy of wholly innocent Americans while contributing to the maintenance of corrupted information on which the government would be relying.

The Agency should provide detail on its plan to allow applicants to correct information derived from using social media identifiers and on its plans to retain and share information on American citizens and residents and offer an opportunity for public comment.

- **Use of social media identifiers and derived data following VWP approval**

Under the current system of non-immigrant tracking, the government's goal is to achieve a perfect record of entries and exits and to identify those who have overstayed their permitted travel time.[26] The current VWP system helps to achieve that through automation and through the use of interviews at border crossings, yet the system is not yet perfect in the absence of a perfect traveler identification system. With the collection of social media identifiers and the collection of information derived from those identifiers, there will be an opportunity to match up the activities of the visitor following his or her entry into the United States. Such tracking would

[25] 8 U.S.C. s. 1187(a).
[26] DHS Release Entry/Exit Overstay Report for Fiscal Year 2015 (Jan. 19, 2016) available at https://www.dhs.gov/news/2016/01/19/dhs-releases-entryexit-overstay-report-fiscal-year-2015 (accessed Aug. 14, 2016).

certainly impact others within the country with whom the applicant might come in contact during his or her stay. In addition to the other concerns expressed regarding use of data derived from the social media identifiers, the Agency should disclose any intention to track approved VWP applicants using such data and provide an opportunity for public comment.

- **Voluntariness of the information provided**

The Notice says that the new question on the VWP application will be 'optional'. But there is no indication whether a decision to omit an answer will impact one's eligibility for the VWP process. If an omitted answer to that question is disqualifying or even merely derogatory, it is misleading to characterize it as optional. The Agency should disclose the impact of omitting an answer to the social media identifier question and, if there is a negative impact, it should offer the public an opportunity to comment.

- **Reciprocity**

A hallmark of the VWP is reciprocity for all participating 38 nations. For example, most European citizens can enter the U. S. on the VWP, and in exchange U. S. citizens travel to Europe visa-free. There is already an open question as to whether VWP states will impose reciprocal restrictions on U. S. dual nationals of Iran, Iraq, Sudan, Syria, based on the changes to the law in late 2015. While the issue remains under negotiation between the United States and, in Europe's case the European Union, this proposal raises new reciprocity issues. Will VWP nations now require U. S. travelers to provide social media information as a condition of traveling visa-free? How will that impact the trade and tourism connections of the countries involved? The Notice fails to consider such impacts and we urge a revised notice of rulemaking that would solicit comments on such impacts.

- **Definitional ambiguity**

The Notice uses a number of terms which should be defined more precisely so that an applicant better understands how to answer correctly and so that the public better understands the scope of information to be collected and analyzed by the government. The new VWP application would have the following question: "Please enter information associated with your online presence – Provider/Platform – Social media identifier."

The Notice offers no clarification for the terms "online presence", "provider", "platform", "social media", or "identifier". Each can be interpreted broadly or narrowly and the Agency should provide guidance as to the meaning it intends to convey. "Online presence", standing alone, could be an extremely broad term and our view is that the subsequent terms narrow the intended meaning.

"Provider" itself is susceptible of different meanings. A brief search of "internet provider" generates a list of entities such as Comcast, Verizon, and other major providers and their smaller regional counterparts. "Online provider" generates a more varied list of online health insurers, financial institutions, and other business entities doing business with the public. The Agency should state how it intends to define the possible universe of answers.

One online site defines "online platform" as an "online marketplace that places one party in touch with another, such as buyers and sellers".[27] It cites eBay, Amazon, and Uber as examples. Does the Agency expect an accurate answer to the question to include connections to all of one's online commercial activity as well as other more traditional forms of social media?

"Social media" itself is a broad term, but one that could be interpreted more narrowly than the prior terms. The question isn't clear, however, that its use of this phrase suggests a narrowing of the earlier and broader phrases. Does the Agency expect a correct answer to include just the obvious Twitter and Facebook handles, or does it also expect usernames for the broader platforms and providers? Regardless, how broad a view does the Agency take of "social media"? Does it expect an applicant to provide the name he or she uses in writing letters to the editor or playing games online? What about dating sites? Answers to these questions will demonstrate to what degree the public should be concerned about government looking into personal habits that will reflect upon their interests, activities, and beliefs and is critical to understanding the scope of the data to be examined.

Even the term "identifiers" requires clarification. Does the Agency expect an applicant to provide just his or her username – or the relevant password as well? The proposed change takes on a completely different look if the Agency seeks the latter. There is a very high expectation of privacy for information that is password-protected – not just for the applicant, but for those whose information would be revealed using such identifying information.

Most importantly, the Agency offers no definition for "nefarious intent", even though determining the existence of that state of being is at the crux of the decision-making process that will result in a visa waiver or the absence of a visa waiver. The term is not on the new form, but it appears in the Notice where it describes the aims of the new question.[28] It is most probable that reasonable minds will disagree on what evidence is sufficient to demonstrate that one's social media communications evinces nefarious intent. It is especially important for the public to understand how government will approach making this determination – and a definition to this particular term is especially critical to that understanding. In the absence of such a definition, all of the problems noted herein – about a chilling effect on speech, invasion of privacy, algorithmic opacity, an absence of predictability – are exacerbated and rendered unsolvable.

For each of these terms, the Agency should provide more particular information – preferably by defining the terms in an amended set of proposed regulations – and seek public comment on the implications of such definitions.

Conclusion

The proposed additional question, together with the research derived from the social media identifiers, would bring a wealth of new information into the system. The Agency would make assessments about nefarious intent from potentially thousands of bits of inherently unreliable and

[27] Your Dictionary, *Online Platform*, *available at* http://www.yourdictionary.com/online-platform (accessed Aug. 15, 2016).
[28] *See* Notice (Abstract/Proposed Changes).

circumstantial information. While the Agency has always had the responsibility for determining that a particular non-immigrant poses no serious threat to the country and is eligible for the VWP, it has for many years made such determinations on a largely objective basis – checking identifying information against existing databases. Now the Agency has decided to access a vast array of personal communications from applicants who are, as a whole, deemed a less threatening population than others seeking to enter the country – even while not systematically collecting that same information from those seeking to come to the U. S. from countries not deemed as comparatively safe as VWP countries.

The collection of this information poses a host of questions, none of which are answered – or even acknowledged to exist – in the published Notice. What will be done with the information? How much information will be accessed using the social media identifiers? What will be the standard for disqualifying someone based on accessed information? What about the impacts on others whose names are linked to the applicant's? These and other questions implicate an array of due process, privacy and speech rights – and yet there is nothing in the published notice to draw comment and allow for Agency consideration of such factors. Instead, the Notice limits itself to considering such austere and far less consequential factors as the cost of recordkeeping and the amount of time needed to complete the newly changed form.

This single new question is of such importance to the privacy and speech rights of millions of Americans who may be connected through social media to VWP applicants that a mere notice of collection of information is inadequate to the task. The Agency must conduct a deeper examination of the proposed change, refine and explain the content of its Notice, and if warranted proceed with the process for a significant change to an existing regulation to provide a framework for the proposed change. We urge the Agency to withdraw its Notice and reconsider how it wishes to proceed in the collection of such voluminous material going well beyond the intended reach of the visa waiver program.

Contact Washington Legislative Office Chief of Staff Michael Macleod-Ball at 202-675-2309 or at mmacleod@aclu.org with questions or comments regarding this submission.

Sincerely,

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