COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS—2011—0094]

Notice of Privacy Act System of Records

December 23, 2011

By notice published on November 23, 2011, the Department of Homeland Security ("DHS") has proposed to revise a current DHS system of records entitled, "Department of Homeland Security/ALL—017 General Legal Records System of Records."[1] The new system of records will be effective the same date that public comments are due—December 23, 2011.[2]

The Electronic Privacy Information Center ("EPIC") opposes many of the proposed system of records provisions and the lack of meaningful opportunity for DHS to review public comments. The system of records notice ("SORN") greatly expands permissible "routine use" disclosures of personal information in DHS' possession. Additionally, because the system of records applies literally to every person—"members of the public"[3]— the expansion of "routine use" would significantly undermine privacy

[1] Privacy Act of 1974; Department of Homeland Security/ALL—017 General Legal Records System of Records, 76 Fed. Reg. 72428 (proposed Nov. 23, 2011).
[2] *Id.*
[3] *Id.* at 72429.

safeguards set out in the Privacy Act and would unnecessarily increase privacy risks for individuals whose records are maintained by the federal government. Pursuant to the SORN listed in the Federal Register, EPIC submits these comments to address the substantial privacy risks that the agency's proposals raise.

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC has a particular interest in preserving privacy safeguards established by Congress, including the Privacy Act of 1974, and routinely comments in public rulemakings on agency proposals that would diminish the privacy rights and agency obligations set out in the federal Privacy Act.[4]

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[4] *See, e.g.,* Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records, DHS-2011-0082 (Nov. 28, 2011), *available* at http://epic.org/privacy/1974act/EPIC-DHS-2011-0082.pdf; Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records, DHS-2011-0030 (June 8, 2011), *available at* http://epic.org/privacy/EPIC%20E-Verify%20Comments%20Final%2006.08.11.pdf; Comments of the Electronic Privacy Information Center to the Office of the Director of National Intelligence, Notice of Privacy Act System of Records (May 12, 2010), *available at* http://epic.org/privacy/ODNI_Comments_2010-05-12.pdf; Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records: U.S. Customs and Border Protection, Automated Targeting System, System of Records and Notice of Proposed Rulemaking: Implementation of Exemptions; Automated Targeting System(Sept. 5, 2007), *available at* http://epic.org/privacy/travel/ats/epic_090507.pdf; Comments of the Electronic Privacy Information Center to the Department of Homeland Security United States Customs and Border Protection, Docket No. DHS-2005-0053, Notice of Revision to and Expansion of Privacy Act System of Records (May 22, 2006), *available at* http://epic.org/privacy/airtravel/ges052206.pdf; Thirty Organizations and 16 Experts in Privacy and Technology, Comments Urging the Department of Homeland Security To (A) Suspend the "Automated Targeting System" As Applied To Individuals, Or In the Alternative, (B) Fully Apply All Privacy Act Safeguards To Any Person Subject To the Automated Targeting System (Dec. 4, 2006), *available at* http://epic.org/privacy/pdf/ats_comments.pdf; Comments of the Electronic Privacy Information Center to the Department of Homeland Security: Bureau of Immigration and

The Scope of the System of Records

DHS' SORN "proposes to update and reissue a Department-wide system of records notice titled, 'Department of Homeland Security/ALL—017 General Legal Records System of Records.'"[5] This system went into effect on November 24, 2008.[6] The final rule codifying certain Privacy Act exemptions for this system of records was published on October 1, 2009.[7]

The SORN details the categories of individuals covered by the system and categories of records in the system.[8] The SORN also details other provisions within the Department of Homeland Security/ALL—017 General Legal Records System of Records, including the system's purposes and routine uses of records maintained in the system.[9] Categories of individuals covered by DHS' system of records include

> DHS employees and former employees, other federal agency employees and former employees, members of the public, individuals involved in litigation with DHS or involving DHS, individuals who either file administrative complaints with DHS or are the subjects of administrative complaints initiated by DHS, individuals who are named parties in cases in which DHS believes it will or may become involved, matters within the jurisdiction of the Department either as plaintiffs or as defendants in both civil and criminal matters, witnesses, and to the extent not covered by any other system, tort and property claimants who have filed claims against the Government and individuals who are subject of an action requiring approval or action by a DHS official, such as appeals, actions, training, awards, foreign travel, promotions, selections, grievances and delegations,

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Customs Enforcement and Bureau of Customs and Border Protection, Docket No. DHS/ICE-CBP-001, Notice of Privacy Act System of Records (Jan. 12, 2004), *available at* http://epic.org/privacy/us-visit/ADIS_comments.pdf.

[5] 76 Fed. Reg. 72428.

[6] Privacy Act of 1974; Department of Homeland Security General Legal Records System of Records, 73 Fed. Reg. 63176 (proposed Oct. 23, 2008).

[7] Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/ALL—017 General Legal Records System of Records, 74 Fed. Reg. 50903 (proposed Oct. 23, 2008) (codified at 6 C.F.R. pt. 5).

[8] 76 Fed. Reg. 72429.

[9] *Id*. at 72429-30.

> OGC attorneys to whom cases are assigned, and attorneys and authorized representatives for whom DHS has received complaints regarding their practices before DHS and/or the Executive Office for Immigration Review (EOIR).[10]

The 017—General Legal Records System of Records contains twenty-eight categories of records in the system which, pursuant to the Privacy Act, DHS is permitted to disclose outside of the agency.[11] DHS' purposes for which the information will be used are

> to assist DHS attorneys in providing legal advice to DHS personnel on a wide variety of legal issues; to collect the information of any individual who is, or will be, in litigation with the Department, as well as the attorneys representing the plaintiff(s) and defendant(s) response to claims by employees, former employees, and other individuals; to assist in the settlement of claims against the government; to represent DHS during litigation, and to maintain internal statistics.[12]

DHS proposes five routine uses—Routine Use N, Routine Use O, Routine Use P, Routine Use R, and Routine Use S—and amends Routine Use J.[13] DHS seeks to disclose the twenty-eight categories of records outside of the agency pursuant to these proposed routine uses. The five proposed routine uses are in additional to the fourteen routine uses for which the agency is already permitted to disclose information outside of the agency.[14]

EPIC objects to the agency's lack of meaningful opportunity to review public comments, and several of the system of records proposals as indicated below. Furthermore, the system of records' purpose and proposed routine uses undermine the Privacy Act, are contrary to law, and exceed the authority of the agency.

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[10] *Id.* at 72429.
[11] *Id.*; The Privacy Act of 1974, 5 U.S.C. § 552a(b) (2010).
[12] 76 Fed. Reg. 72429.
[13] *Id.* at 72430.
[14] 73 Fed. Reg. 63176-63178.

I. DHS' Lack of Opportunity to Review Public Comment Violates the Administrative Procedure Act and Therefore the Proposed Routine Uses Should Not Be Implemented Without Public Comment Review

A. DHS' Proposed Routine Uses Would Have a Substantial Effect on Members of the Public and Therefore Require Notice and Comment

The Privacy Act requires each agency to "at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provided an opportunity for interested persons to submit written data, views, or arguments to the agency."[15] Paragraph (4)(D) of the subsection refers to "each routine use of the records contained in the system, including the categories of users and the purposes of such use."[16]

In addition to the Privacy Act's Federal Register public notice requirement, DHS is also obligated under the Administrative Procedure Act ("APA") to provide notice and comment on the proposed updates to the system of records because the system of records' "substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA."[17] The substantive effect of the proposed routine uses within DHS' system of records is "sufficiently grave" because they "impose directly and significantly upon so many members of the public."[18] DHS' system of records applies to a broad category of individuals, including "members of the public,"[19] and significantly impacts with whom their personal information will be shared. Three out

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[15] 5 U.S.C. § 552a(e)(11).
[16] *Id.* at (e)(4)(D).
[17] *Electronic Privacy Information Center v. U.S. Dep't. of Homeland Sec.,* 653 F.3d 1, 5-6 (D.C.Cir. 2011) (rehearing *en banc* denied)(quoting *Lamoille Valley R.R.Co. v. ICC*, 711 F.2d 295, 328 (D.C.ir.1983)); The Administrative Procedure Act, 5 U.S.C.§ 553 (b)-(c)(2011).
[18] *Electronic Privacy Information Center v. U.S. Dep't. of Homeland Sec.,* 653 F.3d at 6.
[19] 76 Fed. Reg. 72429.

of the five proposed routine uses would permit DHS to disclose information to foreign or international agencies, as well as third party individuals who are not subject to "the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees" or contractors.[20] The proposed routine uses create "sufficiently grave" privacy risks to members of the public, and accordingly require notice and comment.

B. DHS Must Consider the Public Comments It Receives Before Implementing the Proposed Routine Uses

The APA notice and comment requirement does not exist in a vacuum. Following the required notice and comment period, the APA states that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."[21] Indeed, the "essential purpose of those [notice and comment] provisions is the generation of comments that will permit the agency to improve its tentative rule"[22] and to give the agency "the opportunity 'to educate itself on the full range of interests the rule affects'." [23] Additionally, it is well established that agencies must provide rationale for their decision-making processes by "responding to those comments that are relevant and significant."[24]

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[20] *Id.* at 72430.
[21] 5 U.S.C.§ 553(c).
[22] *Am. Fed'n of Labor & Cong. of Indus. Organizations v. Donovan*, 757 F.2d 330, 337 (D.C. Cir. 1985) (quoting *Am. Fed'n of Labor & Cong. of Indus. Organizations v. Donovan*, 582 F. Supp. 1015, 1024 (D.D.C. 1984)).
[23] *Louis v. U.S. Dept. of Labor*, 419 F.3d 970, 976-77 (9th Cir. 2005) (quoting *Alcaraz v. Block*, 746 F.2d 593, 611 (9th Cir. 1984)).
[24] *Grand Canyon* Air *Tour Coal v. FAA*, 154 F.3d 455, 468 (D.C.Cir. 1998); *Cement Kiln Recycling Coalition v. E.P.A.*, 493 F.3d 207, 225 (D.C. Cir. 2007); *Interstate Natural Gas Ass'n of America v. F.E.R.C.*, 494 F.3d 1092, 1096 (D.C.Cir. 2007); *Int'l Fabricare Inst. V. U.S. EPA*, 972 F.2d 384, 389 (D.C.Cir. 1992).

The DHS SORN invites the public to "submit comments on or before December 23, 2011," which is also the same day the new system of records goes into effect.[25] By not considering the public comments it receives in response to the substantial privacy risks the proposed routine uses present, DHS violates the APA requirement that agencies consider "the relevant matter presented."[26]

C. DHS' Proposed Routine Uses Must Fall on Procedural Grounds Due to DHS' Inadequate Public Comment Review

Courts have consistently held that "[i]f the agency fails to provide this notice and opportunity to comment or the notice and comment period are inadequate, the 'regulation must fall on procedural grounds, and the substantive validity of the change accordingly need not be analyzed.' "[27]

DHS' notice and comment concerning the proposed routine uses is inadequate because the agency does not afford itself opportunity to review the public comments it receives. Therefore the proposed routine uses must fall on procedural grounds and should not be implemented without the agency reviewing and considering public comment. Additionally, although the SORN states that a "new Notice of Proposed Rulemaking (NPRM) has been published" regarding the system of records, as of December 20, 2011, there is not one listed in the Federal Register.[28] The SORN further states that "[u]ntil a new Final Rule is published, the Final Rule published on October 1,

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[25] 76 Fed. Reg. 72428.
[26] 5 U.S.C.§ 553(c).
[27] *Public Citizen, Inc. v. Mineta*, 427 F.Supp.2d 7, 12 (D.D.C. 2006) (quoting *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C.Cir. 1985)). *See also Stainback v. Mabus*, 671 F. Supp.2d 126, 135 (D.D.C. 2009); *Steinhorst Associates v. Preston*, 572 F.Supp.2d 112, 124 n. 13 (D.D.C. 2008); *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 453 F. Supp. 2d 116, 123 (D.D.C. 2006).
[28] 76 Fed. Reg. 72428.

2009 remains active and in place."[29] Because DHS seeks to issue a new rule governing the 017 General Legal Records System of Records, which would add five routine uses to system of records, it is required to provide notice and the opportunity for public comment as discussed above.

II. DHS' Proposed Routine Uses Contravene the Intent of the Privacy Act and Exceed the Authority of the Agency

The definition of "routine use" is precisely tailored, and has been narrowly prescribed in the Privacy Act's statutory language, legislative history, and relevant case law. The 017 General Legal Records System of Records contains information pertaining to both a broad category of individuals and a broad category of personally identifiable information. By having an overly broad purpose for which the system of records is maintained, DHS proposes to significant increase its power to disclose records in its possession that is inconsistent with the reasons for which the information was originally gathered and without the consent of the individual concerned.

When it enacted the Privacy Act in 1974, Congress sought to restrict the amount of personal information that federal agencies could collect and required agencies to be transparent in their information practices.[30] Congress found that "the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies," and recognized that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States."[31]

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[29] *Id.*
[30] S. Rep. No. 93-1183 at 1 (1974).
[31] Pub. L. No. 93-579 (1974).

Accordingly, the Privacy Act prohibits federal agencies from disclosing records they maintain "to any person, or to another agency" without the written request or consent of the "individual to whom the record pertains."[32] The Privacy Act also provides specific exemptions that permit agencies to disclose records without obtaining consent.[33] One of these exemptions is "routine use."[34] The SORN states that "all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3)."[35] That section of the Privacy Act defines "routine use" to mean "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected."[36]

The Privacy Act's legislative history and a subsequent report on the Act indicate that the routine use for disclosing records must be specifically tailored for a defined purpose for which the records are collected. The legislative history states that:

> [t]he [routine use] definition should serve as a caution to agencies to think out in advance what uses it will make of information. This Act is not intended to impose undue burdens on the transfer of information . . . or other such housekeeping measures and necessarily frequent interagency or intra-agency transfers of information. It is, however, intended to discourage the unnecessary exchange of information to another person or to agencies who may not be as sensitive to the collecting agency's reasons for using and interpreting the material.[37]

The Privacy Act Guidelines of 1975—a commentary report on implementing the Privacy Act— interpreted the above Congressional explanation of routine use to

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[32] 5 U.S.C. § 552a(b).
[33] *Id*. § 552a(b)(1) – (12).
[34] *Id*. § 552a(b)(3).
[35] 76 Fed. Reg. 72429.
[36] 5 U.S.C. § 552a(b)(3) referencing § 552a(a)(7).
[37] *Legislative History of the Privacy Act of 1974 S, 3418 (Public Law 93-579): Source Book on Privacy*, 1031 (1976).

mean that a " 'routine use' must be not only compatible with, but related to, the purpose for which the record is maintained."[38]

Subsequent Privacy Act case law interprets the Act's legislative history to limit routine use disclosure based upon a precisely defined system of records purpose. In *United States Postal Service v. National Association of Letter Carriers, AFL-CIO*, the Court of Appeals for the D.C. Circuit relied on the Privacy Act's legislative history to determine that "the term 'compatible' in the routine use definitions contained in [the Privacy Act] was added in order to limit interagency transfers of information."[39] The Court of Appeals went on to quote the Third Circuit as it agreed that "[t]here must be a more concrete relationship or similarity, some meaningful degree of convergence, between the disclosing agency's purpose in gathering the information and in its disclosure."[40]

One of the DHS' SORN's stated purposes for which the 017 General Legal Records System of Records is maintained is "to collect the information of any individual who is, or will be, in litigation with the Department, as well as the attorneys representing the plaintiff(s) and defendant(s) response to claims by employees, former employees, and

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[38] *Id*.

[39] *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 9 F.3d 138, 144 (D.C. Cir. 1993).

[40] *Id*. at 145 (quoting *Britt v. Natal Investigative Serv*., 886 F.2d 544, 549-50 (3d. Cir. 1989). *See also Doe v. U.S. Dept. of Justice*, 660 F.Supp.2d 31, 48 (D.D.C. 2009) (DOJ's disclosure of former AUSA's termination letter to Unemployment Commission was compatible with routine use because the routine use for collecting the personnel file was to disclose to income administrative agencies); *Alexander v. F.B.I*, 691 F. Supp.2d 182, 191 (D.D.C. 2010) (FBI's routine use disclosure of background reports was compatible with the law enforcement purpose for which the reports were collected).

other individuals."[41] In a tautological fashion, DHS' purpose for maintaining and collecting records is to collect records. DHS plans to use this broad-based purpose to justify disclosing records outside of the agency as a routine use—including the five proposed routine uses. In order for DHS to have the authority to disclose records pursuant to a routine use, DHS would need to narrowly tailor this system of records purpose to establish a clear nexus between DHS' gathering information and DHS disclosing information. Accordingly, DHS would act outside of its authority if it were to disclose records as a routine use based upon the aforementioned purpose.

III. Proposed Routine Uses J and N Remove Privacy Act Safeguards by Disclosing Records to Foreign and International Agencies That are Not Subject to the Privacy Act

Proposed Routine Use J would amend the system's current Routine J to permit the agency to disclose information:

> [t]o a federal, state, local, tribal, foreign, or international agency, where such agency has requested information relevant or necessary for the hiring or retention of an individual, or the issuance of a security clearance, license, contract, grant, or other benefit, or if necessary to obtain information relevant to a DHS decision concerning the hiring or retention of an individual, the issuance of a security clearance, license, contract, grant, or other benefit.[42]

Proposed Routine Use N would permit disclosure:

> [t]o the appropriate federal, state, local, tribal, territorial, foreign, or international agency, regarding individuals who pose or are suspected of posing a risk to transportation or national security.[43]

The provisions in Routine Uses J and N that would permit the DHS to disclose information to foreign or international agencies should be removed. The Privacy Act

[41] 76 Fed. Reg. 72429.
[42] *Id.* at 72430.
[43] *Id.*

only applies to records maintained by government agencies.[44] Government agencies include "any executive department, military department, Government corporation, *Government controlled corporation,* or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."[45] Releasing information to foreign or international agencies does not protect individuals covered by this system of records from Privacy Act violations. Moreover, because this provision permits disclosure to foreign and international agencies, the DHS cannot represent that these entities would be subject to U.S. Privacy Act requirements and limitations as it does in Routine Use F. The DHS does not have jurisdiction over foreign agents. Therefore, the provisions in Routine Uses J and N that would permit DHS to disclose information to foreign and international agencies should be removed.

Additionally, proposed Routine Use N should not become a part of the system of records. A December 2010 FBI guidance memorandum obtained by EPIC through a Freedom of Information Act request reveals that individuals who were once "reasonably suspected" of terrorism [46] may remain on the Terrorist Screening Database (TSDB) terrorist watch list even if they are acquitted or charges against them are dropped.[47]

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[44] 5 U.S.C. § 552a(b).
[45] *Ehm v. Nat'l R.R. Passenger Corp*., 732 F.2d 1250, 1252 (5th Cir. 1984).
[46] Terrorist Screening Center Frequently Asked Questions, http://www.fbi.gov/about-us/nsb/tsc/tsc_faqs (last visited Dec, 21, 2011).
[47] EPIC: EPIC FOIA-FBI Watchlist Documents, *available at* http://epic.org/privacy/airtravel/EPIC_DOJ_FOIA_NoFlyList_09_13_11.pdf (last visited Dec. 21, 2011). *See also* Tim Mak, *Report: Acquitted Stay on FBI Watch List*, POLITICO, Sept. 28, 2011, http://www.politico.com/news/stories/0911/64595.html; *FBI Memo Gives Info On Terror Watch List*, UPI NEWS, Sept. 23, 2011, http://www.upi.com/Top_News/US/2011/09/28/FBI-memo-gives-info-on-terror-watch-list/UPI-24011317186694/; *Report: Cleared People Can Stay on Terror List*,

Routine Use N would permit DHS to disclose personal information of individuals "who pose or are suspected of posing a risk to transportation or national security" to other agencies despite the fact above that once on a watch list, it is nearly impossible to be removed from the list. Once placed on a suspected terrorist list, individuals face many hardships pertaining to the right to travel and other civil liberties. For this reason, proposed Routine Use N should not be added to the system of records.

IV. Proposed Routine Uses O and S Remove Privacy Act Safeguards by Disclosing Records to Former DHS Employees and Third Parties Who are Not Subject to the Privacy Act

Proposed Routine Use O permits disclosure to:

> a former employee of DHS, in accordance with applicable regulations, for purposes of responding to an official inquiry by a federal, state, or local government entity or professional licensing authority; or facilitating communications with a former employee that may be necessary for personnel—related or other official purposes where the Department requires information or consultation assistances from the former employee regarding a matter within that person's former area of responsibility.[48]

Proposed Routine Use S permits disclosure as a routine use to:

> [t]hird parties about individuals who are their employees, job applicants, contractors, or any other individual who is issued credentials or granted clearance by third party to secured areas when relevant to such employment, application, contract, or issuance of the credential or clearance.[49]

CBS NEWS, Sept. 28, 2011, http://www.cbsnews.com/stories/2011/09/27/national/main20112572.shtml; *FBI Terror Watch List Can Include Those Cleared of Charges, Report Says*, FOX NEWS, Sept. 28, 2011, http://www.foxnews.com/politics/2011/09/28/fbi-terror-watch-list-can-include-those-cleared-charges-report-says/; Charlie Savage, *Even Those Cleared of Crimes Can Stay on F.B.I.'s Watch List*, THE NEW YORK TIMES, Sept. 27, 2011, http://www.nytimes.com/2011/09/28/us/even-those-cleared-of-crimes-can-stay-on-fbis-terrorist-watch-list.html?hp .

[48] *Id.* at 72430.

[49] *Id.* at 72430.

These routine uses should not be adopted because the former DHS employees and third parties are not subject to Privacy Act safeguards against privacy abuse.

As is, the proposed routine uses would permit DHS to disclose private information to individuals and entities that are not subject to the Privacy Act or its civil remedies and criminal penalties. Although the Routine Use O permits disclosure to former DHS employees "in accordance with applicable regulations," DHS needs to clarify exactly which regulations the former employees must adhere to.[50] Otherwise, DHS is disclosing very sensitive information to non-DHS employees who are not regulated. If DHS adopts Routine Uses O and S, the routine uses should contain a provision that makes clear the obligation of third parties who obtain information under this SORN to comply with the obligations of the Privacy Act. DHS should use the following language from the system's Routine Use F to ensure that the private third parties to whom information is disclosed are subject to the Privacy Act: "Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees."[51]

Conclusion

For the foregoing reasons, EPIC urges the Department of Homeland Security to withdraw the proposed rule to provide a meaningful opportunity for public comment or, in the alternative, to clearly define the purpose of the 017 General Legal Records System of Records system and remove or amend proposed Routine Uses J, N, O, and S. The agency's proposal, if left unchanged, undermines the central purpose of the Privacy Act,

[50] *Id.*
[51] 76 Fed. Reg. 72430.

is contrary to law, and exceeds the authority of the agency. Additionally, the EPIC urges the agency to adhere to the Administrative Procedure Act requirement of properly reviewing public comments received concerning the agency's proposals.

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