Via Email to: M.OAA.RuleMaking@usaid.gov

September 30, 2013

Michael Gushue, M/0AA/P
USAID /Washington
1300 Pennsylvania Ave NW
Washington, DC 20523

Re: Notice of Proposed Rulemaking RIN 0412-AA71 Partner Vetting in USAID Assistance (78 Fed. Reg. No. 168, page 53375)

Dear Sir,

The Charity & Security Network (CSN) submits these comments on behalf of our membership, a diverse network of nonprofit stakeholders that have serious concerns about the harmful effects of the proposed Partner Vetting System (PVS), as conceived in the proposed rule. CSN's mission is to protect civil society's ability to carry out effective peacebuilding, humanitarian aid, development and other public benefit work in a manner consistent with democratic values and human rights principles. Our members include international non-governmental organizations (NGOs), grantmakers, peacebuilding groups, civil liberties and human rights organizations and religious groups.

As explained below, in addition to creating problems for USAID applicants, the PVS pilot has the potential to erode the overall operating environment for international programs of all kinds. We question the need for PVS, and believe there are simpler and more effective says to achieve its stated goal of protecting U.S. foreign assistance resources from being diverted to or benefitting terrorists.

The proposed PVS rule reflects structural flaws, including a wasteful and inefficient requirement to vet all *applicants*, not just awardees. Key terms remain undefined and vague, such as what is considered an "affiliation" or "linkage" with terrorists. Vetting against secret government lists is also a concern. In addition, PVS creates serious privacy concerns and will lead to the perception in the field that U.S. organizations are engaged in intelligence gathering, undermining the independence and neutrality so necessary to the safe operation of NGO staff and programs. Fundamental due process for those that fail vetting is lacking, a concern heightened by use of classified lists that are known to have high error rates.

Overall, as currently proposed, the pilot PVS is counterproductive to stated U.S. foreign policy goals of positive engagement with local communities receiving foreign assistance. It will deter applications from qualified organizations with concerns for the privacy and safety of their staff and leadership. It also vastly underestimates the administrative burden and cost that PVS will impose on NGOs. Finally, the rule does not set forth an adequate process to ensure a competent and impartial evaluation of the pilot results. We have included a number of suggestions to address this issue.

We propose that USAID hold a public forum to engage concerned stakeholders on the issues and questions contained in the comments it receives, prior to issuing a final rule.

Our concerns are described in detail below:

Questionable Need for PVS

There is no evidence that USAID funds are flowing to terrorist organizations through USAID funded programs. Since PVS was first proposed in 2007 there have been no reports of diversion of USAID resources to terrorist organizations, and only three isolated instances of support to awardees with indirect associational ties.[1] The USAID Office of the Inspector General found no such diversion in exercising its oversight of programs in USAID's sensitive West Bank/Gaza portfolio for 2006 and 2007, when PVS was proposed. According to the Inspector General, "OIG oversight activities during this period did not identify any instances where terrorist organizations received USAID funds."[2] This raises questions about the need for the program.

Rather than establish a massive data gathering program it would be more effective for the U.S. government to simply publish a list of organizations and individuals with terrorist associations that are barred from being USAID sub-awardees or partners.

NGOs can and do conduct due diligence and vetting of their personnel and leadership, including but not limited to checking official, published government terrorist lists. They have developed thorough due diligence procedures that are based on deep knowledge of the communities in which they work as well as thorough financial accounting, program assessment and evaluation. PVS substitutes computer data searches for these proven methods of due diligence. As a representative of InterAction told an audience at a National Press Club event in March 2009, "It's almost silly to think that an FBI analyst here in the United States, sitting at a computer looking at a list, is going to be more effective in screening a potential employee than an NGO would be that has years of experience working in a particular community."[3]

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[1] "Audit of Adequacy of USAID's Antiterrorism Vetting Procedures" USAID Office of the Inspector General, Audit Report No. 9-000-08-001-P November 6, 2007 Available online at http://transition.usaid.gov/about/foia/9-000-08-001-p.pdf
[2] USAID Office of Inspector General Semiannual Report to the Congress, October 1 2006 – March 31, 2007, Available online at http://www.usaid.gov/oig/public/semiann/sarc0307.pdf [page 18]
[3] http://www.charityandsecurity.org/news/March_panel_discussion_Friend_Not_Foe

Structure of the PVS pilot has inherent flaws

    1.) Problems With Using Secret Lists

We oppose vetting against secret lists. If a group or person is known to the U.S. government to be so dangerous that he or she cannot participate in a USAID funded program then that group or person should be on the public list of terrorists so that all persons will be forewarned. PVS calls the effectiveness of published lists into question.

    2.) Vague Criteria

The vetting criteria are vague and overbroad, extending to those "affiliated" with or with "linkages" to terrorists. These terms are not defined. Linkage could be interpreted so broadly that a person could fail vetting on the basis of activities s/he does not support or control, such as that of a family member, former employer or neighbor. This can lead to discrimination or profiling based on factors such as race, religious affiliation, nationality or freedom of expression (political opinion).

In addition, the definition of key individuals is overbroad, as it applies to the entire organization when it can be limited to people involved in USAID funded activities.

    3.) The Pool of Individuals to be Vetted Exceeds What is Necessary to Achieve the Goals of PVS

The PVS pilot is overbroad by requiring vetting at the applicant stage. This vastly increases the administrative burden on NGOs and the invasion of privacy of key individuals in the applicant organizations. It is beyond what is necessary to administer PVS or achieve its stated goal, which includes minimizing the impact on NGOs. Vetting, if undertaken at all, should only apply once an awardee has been selected. The award can be contingent on passing vetting. The overall negative impacts of vetting all applicants far outweigh the any benefits.

    4.) Undue Invasion of Privacy: PVS as Surveillance and Intelligence Gathering

The proposal goes well beyond what is practically necessary by requiring vetting of key individuals of all applicants, as opposed to awardees. The result will be vast amounts of private personal information gathered that is never needed for grantmaking purposes, as there will be many more applicants than awardees. It is not clear what will happen to this information and how it will be treated when vetting is completed. This over breadth moves PVS away from its purpose and towards becoming a surveillance program. Given the public revelations about massive surveillance data gathering on U.S. citizens and foreign person, there is serious concern that PVS data will end up being used for intelligence purposes.

The justification of PVS is that it will enable federal agencies to use the Terrorist Screening Center (TSC) to see if names match unpublished, secret intelligence databases. This raises three key problems:

There is significant concern about the accuracy of the TSC lists.

A May 2009 audit[4] by the Department of Justice's Office of Inspector General (OIG) documented the high error rate and dysfunction of the government's central terrorist watchlist. Terrorist Screening Center (TSC) is charged with compiling federal, state and local law enforcement agencies' lists of potential terrorists. According to the audit, the watch list (as of December 2008) contained over 1.1 million names, with some people listed multiple times under different spellings. On Sept. 9, 2008, the screening center estimated there were only 400,000 individuals on the list.

The audit revealed a process so disorganized that "the actual number of individuals the FBI nominated to the terrorist watchlist since its inception is unknown." It found that "Inaccuracies were rampant Entries were incomplete Watch list records are not consistently updated or purged. Many entries contained information "unrelated to terrorism."

Using the TSC list is likely to lead to a high number of false positives, disrupting programs and unnecessarily increasing the administrative burden on both USAID and applicants.

The proposed rule is not clear enough about how the privacy of the data submitted will be treated and protected.

The fact that the vetting process will be separated from the award selection process does not address these concerns. The PVS pilot should clearly explain what the security protections for the personal information will be. The following questions need to be answered:

1.) How will personal private data be stored and shared?

2.) Who will have access to the data: will this include other agencies and foreign governments, particularly when there is a potential positive match? USAID has said only information on a match will be shared outside USAID, but this does not specify what will happen in such cases. There do not appear to be any restrictions or standards on how USAID will release the information.

3.) How long will the information will be stored?

4.) Will the TSC database retain copies of information entered, or will data be scrubbed? If so, under what criteria and timeline?

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[4] "The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices," U.S. Department of Justice, Office of the Inspector General Audit Division
Audit Report 09-25 May 2009

Applicants must be given information on why the information is being collected and what will happen to it. As the Senate State Foreign Operations FY14 appropriations report of July 2013 states:

> "All individuals and organizations being vetted should be provided with full disclosure of how information will be stored and used by the U.S. Government, including how information regarding a ''positive match'' will be handled and how to appeal such a match."

5.) Operational Problems

Exception needed for humanitarian disasters and threats to safety

The proposed rule has no exception for humanitarian emergencies or situations where collection of PVS information would threaten the safety of personnel in the field. This is essential to avoid negative consequences from PVS, and should be added to the final rule. Such an exemption is supported by the Senate Foreign Operations FY14 report, which says "There should also be provision for waiving the vetting requirements to prevent delaying responding to humanitarian crises."

Areas where clarification is needed

The proposed rule leaves many issues open and questions unanswered. Clarification is needed in the following areas:

- State that program beneficiaries will not be vetted. This will prevent confusion and make implementation more consistent. It will also avoid negative public reaction among the population to be served.

- The definition of sub-award needs clarification, particularly on how it how differs from vendors.

- The announcement must clarify that prime awardees are not required to notify sub-awardees of the results of vetting or deal with potential false positives of sub-awardees. It should be transparent that PVS is a U.S. government information collection program.

- Describe how the information flow from sub-awardees will work. All communications regarding vetting should be directly between them and USAID.

- The process for dealing with a possible positive match is not spelled out. How will it be checked with the applicant to ensure it is not a false positive? Is there a requirement that it be checked, or can the applicant fail vetting based on a potential false positive? What happens to the information if the hit turns out to be a false positive?

- Does the applicant get an opportunity to cure or challenge a match prior to a decision on vetting? Are any distinctions made on these different levels of potential ties to terrorism? (published terrorist list, unpublished terrorist list, affiliated with, or "linked to")

- Foreign laws: How will USAID handle situations where law in country where program being carried out prohibits collections of such information by a foreign government or others?

- Are foreign NGOs that apply to be prime awardees covered by the proposed rule?

The Risk Based Analysis lacks adequate structure and definitions

The Risk Based Analysis (RBA) concept is not adequately defined and developed. While it provides some general key factors to be considered, there are no standards. Instead, it says the details will be "dictated by specific circumstances." This is an excessive delegation of authority to individual USAID staff, and can result in inconsistent application and potentially discriminatory or other inappropriate criteria.

For example, the announcement says the RBA review will consider the likelihood that individuals "linked" to terrorists may "benefit" from the program. Under these criteria, a baby could be denied medical or food assistance because s/he is "linked" to someone "affiliated" with terrorism. This would violate the fundamental humanitarian principle that assistance be based on need alone.

The heavy emphasis of the RBA requires that there be a consistent policy and procedure for how it will be implemented.

Logistical issues

It is not realistic to require vetting of sub-awardees at the application stage, since NGOs often are not yet able to identify them prior to a decision on the grant application. In addition, it is not clear what happens when a new key individual comes on board, such as with staff turnover, whether or not the NGO has to wait for vetting results or can move forward. Waiting could cause program delay and implementation problems.

6.) Fundamental Due Process is Lacking

The process for challenging an adverse finding from vetting is insufficient, as the applicant will not necessarily be given reasons or enough information to make a meaningful response. Adequate notice of reasons and meaningful opportunity to respond are at the core of due process protections and are lacking here.

There is too much discretion left open USAID employees to determine how much information an applicant may get about an adverse finding. This can prevent an applicant from making an

adequate response and lead to inconsistent implementation, uneven results and over-caution by USAID employees. Definitions and clear guidance are needed.

There is no process of a key individual to challenge an adverse finding. These individuals can lose their livelihood and have other problems as a result of an adverse finding, and should have some method of redress.

Cost Benefit Analysis

1.) Counterproductive Policy Impacts

PVS is contrary to the U.S. goal of making allies. For example, U.S. policy, as articulated in USAID's Country Development Cooperation Strategy,[5] seeks to cultivate positive relationships with local communities it serves. PVS will undercut this goal by creating the perception of using USAID programs for intelligence gathering, undermining the political neutrality of its partners.

PVS will have unintended consequences on program effectiveness. For example, in programs that address underlying grievances that cause instability and conflict or that promote peaceful political transitions, facilitate reconciliation and similar goals, people that are necessary participants may be excluded by PVS if deemed to have "linkage" to terrorism or meet one of the other undefined criteria. Groups engaged in research and conflict management programs on the ground need the very people that vetting may prohibit from participation to be successful.

2.) PVS will Deter Applications from Qualified NGOs

The notice states that PVS will deter terrorists and their affiliates from applying for USAID funds. Unfortunately, systems such as PVS tend to create barriers to effective delivery of aid programs and will discourage NGOs from applying for grants and alienate international partners without effectively addressing national security concerns. The pool of effective partner organizations is likely to shrink due to their objections to turning over detailed personal information to be shared with law enforcement and intelligence agencies. In the case of local staff, the request amounts to a collection of their identifying information by a foreign government, an intrusion into privacy that many are likely to object to.

Many highly qualified, internationally respected NGOs have legal and/or principled objections to turning over detailed personal identifying information on their staff and board members to a governmental entity. For example, the former head of the United Nations Office for the Coordination of Humanitarian Affairs (2003 to 2006) and current Secretary General of the Norwegian Refugee Council, Jan Egeland, said the following in a September 2013 interview with the Global Observatory:

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[5] http://www.usaid.gov/documents/cdcs/guidance/

"My own organization is today having to turn away money we really need for water and sanitation projects in the biggest refugee camp on earth, which is the Dadaab camp for Somali refugees in Kenya, because we've been asked by a donor—which is a very good donor, in general—to do something bad, which is to hand over bio data on all of the staff involved in this project, and all of our partners and contacts in this project, so that they, this western donor, can vet these people. That is prohibited by our board; we cannot do that. We have to avoid being seen as an instrument for any political or other actor in this world, and especially in a sensitive place like the Somali refugee programs."[6]

3.) PVS Undermines the Independence and Neutrality of NGOs, Creating Threats to Safety

Independence and political neutrality are central principles that humanitarian organizations adhere too. These principles have both a moral and practical basis. They ensure that aid is used solely to relieve human suffering and not to further political or military agendas. They also ensure that aid organizations can operate effectively in crises. As Nan Buzard, Executive Director of the International Council of Voluntary Agencies said in a letter to the UN this year, "Only when we safeguard our neutrality are we able to obtain consent and acceptance for our work, reach all affected populations and ensure that our assistance is provided impartially."[7]

The requirement that nongovernmental organizations (NGOs) and their sub-awardees turn over personal identifying information on key leaders and staff to the U.S. government for vetting against intelligence databases is a fundamental violation of the principles of independence and neutrality. It aligns NGOs with U.S. intelligence gathering objectives, violating the neutral status that is fundamental to their ability to operate safely and effectively. It is likely to be seen in affected communities as NGO complicity in intelligence gathering by the U.S. government. As a result, the local population will become suspicious of all NGOs, not just those that participate in PVS. In some cases outright hostility can break out.

The data shows that this is a real, not theoretical, concern. With more than 800 humanitarians killed during the last decade, the threat faced by the men and women working to support communities hit by natural and man-made disasters is on the rise. In fact, 2011 saw the third highest number of aid worker incidents since 1997, with 151 recorded incidents including deaths, kidnappings and injuries. The Aid Worker Security Database (AWSD), which has been tracking major incidents of violence against aid workers since 1997, says protection of aid workers is

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[6] Available online at http://www.theglobalobservatory.org/interviews/583-counterterrorism-laws-bring-unintended-suffering-interview-with-humanitarian-jan-egeland.html

[7] https://www.interaction.org/sites/default/files/3526/03.11.2013%20Somalia%20-%20Final.pdf

integral to ensuring reliable and effective assistance for the 60 million people who need humanitarian assistance world-wide.[8]

Government action that intrudes into the operations of nongovernment organizations has contributed to the problem, according to experts. Studies conducted by various aid watchdog groups and interviews with aid workers in the conflict zones reveal the dangers facing relief workers are increasing and the violence is overwhelmingly premeditated.

Patronus Analytical,[9] a group measuring the security risks of places receiving humanitarian aid, finds that 90 percent of deaths of relief workers is non-accidental. According to their findings, the second leading cause of aid worker deaths is "political/conflict" with deaths occurring in politically turbulent areas. An April 2009 policy brief from the Overseas Development Institute's (ODI) Humanitarian Policy Group details the recent escalating violence toward aid workers.[10] Speaking with NGO workers and security personnel in the field, ODI determined that a significant explanation for the surge in violence toward aid workers is the perception (or actual partnerships with government actors) that NGOs are an extension of a greater military agenda. According to the report, "the danger of association with certain governments or armed forces has a particular salience with aid workers, most of whom endeavor to be seen as separate and distinct from political actors and activities." Calling the disassociation between humanitarian groups and political and military actors "sensible and necessary steps," the report concludes that "If the greater portion of international humanitarian aid organizations were able to achieve independence and project an image of neutrality this would surely enhance operational security and benefit humanitarian action as a whole." The same principles apply to intelligence gathering, not just the military.

To reverse this trend, it is imperative that aid workers are perceived to be independent of military or political influence. When local populations perceive an NGO as working too closely with the government, the loss of credibility is difficult to restore. That is why PVS needs restructuring.

4.) The Proposed Regulation Vastly Underestimates Administrative Burden on NGO Applicants

The total time, effort, or financial resources necessary to collect, safely store, maintain, retain, and disclose the information will be substantial, far exceeding the projection in the proposed rule. It will require new collection procedures, training personnel to handle it, creating

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[8] "Inhospitable Conditions: How Host Governments Help Make or Break Humanitarian Operational Security" https://aidworkersecurity.org/sites/default/files/AWSDReport2012Preview.pdf
[9] http://www.patronusanalytical.com/aid%20worker%20fatalities/fatalities%20main%20page.html
[10] "Providing Aid in Insecure Environments: 2009 Updates" Overseas Development Institute Available online at http://www.humanitarianoutcomes.org/sites/default/files/resources/ProvidingAidinInsecureEnvironments20091.pdf

technology systems that can store and protect the information. Then the information must be transmitted to USAID and, presumably, false positives followed up on.[11]

Given this, the administrative burden and cost estimates in the notice are unrealistically low. It estimates that NGOs will only need 15 minutes per application to complete the PVS requirement. It will involve much more than one transaction per award and require experienced personnel that are paid at a higher level than implied by USAID's low cost estimate.

It is not usual or customary for NGOs to collect private, personal identifying information on board members or all staff. To do so, NGOs will need to invest in technology, including software to protect the information from hacking, as the details required are those most often used in identity theft.

There is disruption in programs when long-term staff may not pass vetting or are hit with a false positive. Unexplained results, based on unknown criteria, about known staff can have a negative impact on the organization overall.

NGO experience in Gaza and the West Bank shows that the burden will be higher than estimated. An InterAction press release notes that the West Bank/Gaza PVS program "resulted in delays of up to five months for local procurement of goods and services for American NGOs. Even purchasing simple goods, such as fax machines, takes weeks or months, as local sellers are vetted."[12]

Grant applicants can conduct their own vetting using publicly available government and commercial lists, and where potential matches arise, use their connections in local communities to investigate whether there is an actual risk of diversion of funds.

Pilot Evaluation, Criteria and Questions Need Explanation and Clarification

At a September 2011 briefing USAID said it would release details about the pilot for public comment. However, the proposed rule does not describe the pilot process. It should state what USAID hopes to learn, how the program design will be evaluated, whether that evaluation will be performed by an independent and qualified evaluator, what questions are being asked, the what criteria will be used to measure key factors and what data will be gathered to make those measurements.

This is necessary in order for USAID to make a decision at the end of the pilot about whether to end PVS, substantially alter it, or expand it. The evaluation of the pilot should be based on quantifiable information, including the need for PVS.

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[11] See 5 CRF 1320(b)

[12] http://www.interaction.org/files.cgi/6124_PVS_press_release_4.11.08.pdf

Starting from the stated purpose of PVS - to prevent USAID resources from going to terrorists while minimizing the impact of programs and partners – how will the pilot determine whether or not the PVS process described in the rule is successful, somewhat successful or fails to achieve that goal?

In order to evaluate the pilot the program the following questions should be asked:

- What is the baseline of diversion of resources that PVS is designed to reduce/prevent? Is it the three incidents cited in the IG report? How will results of PVS be measured against the baseline? This is important to know because if there is no change or impact then the costs and burdens of PVS cannot be justified.

- How will USAID gather data and measure the impact of PVS on potential applicants? For example, how will USAID determine how many qualified NGOs decide not to apply due to legal/principled objections to turning over the personal information about their key individuals for screening against intelligence databases?

- Will USAID track the hours its employees spend collecting and vetting information? Will it ask applicants to do the same?

- Will there be a control group? (Will USAID compare non-pilot countries vetting results against pilot countries?)

- Will USAID monitor public opinion reaction to PVS in pilot countries?

- Will USAID track attacks and threats to its partners in PVS countries and non-pilot countries to compare?

- Will USAID collect the total number people vetted and the number of false positives and positive matches, divided into categories of terrorists, their supporters, those affiliated with terrorists, and those with linkages?

- Will USAID coordinate with State Dept. RAM parallel process and compare findings?

The pilot evaluation should inform USAID, the Congress and the public about the following:

- The actual administrative burden, in terms of cost, staff time, technology investment, etc.

- Program delays related to vetting: how long and the impacts of those delays

- The total number of matches from vetting and the percentage of those that are false positives

- The total number of matches in each vetting category: terrorist, associated with, linkages

- The number of programs selected for vetting compared to the number where vetting is not required and what explains how vetted programs were selected, broken down by program type

- The criteria used for the Risk Based Analysis

- Changes in the security environment for NGOs

Conclusion

More work is needed to design a pilot vetting program that can prevent diversion of USAID resources to terrorists, minimize the administrative burden on NGOs and protect the safety and privacy of people associated with NGOs seeking USAID funds. A well designed and impartial evaluation of the pilot is also critical to making a wise decision on the future of PVS.

Yours truly,

Kay Guinane, Director