

COUNTERTERRORISM AND HUMANITARIAN ENGAGEMENT PROJECT

Partner Vetting in Humanitarian Assistance: An Overview of Pilot USAID and State Department Programs

Research and Policy Paper

November 2013

Published under a Creative Commons Attribution 3.0 Unported (CC BY 3.0) license.

Suggested citation:

Counterterrorism and Humanitarian Engagement Project, "Partner Vetting in Humanitarian Assistance: An Overview of Pilot USAID and State Department Programs," *Research and Policy Paper*, November 2013.

I. INTRODUCTION¹

The United States Government (“U.S.G.”) is the largest donor of humanitarian-assistance funding, contributing \$4.3 billion (US) in 2011.² In the coming months, the U.S.G. will implement two pilot programs that require humanitarian organizations and contractors that receive government funds to collect and report identifying information on their staff, local partners, vendors, and select beneficiaries. The United States Agency for International Development (“USAID”) and the U.S. Department of State (“State Department”) will implement the programs, which aim to ensure that U.S. funds do not inadvertently benefit individuals or organizations aligned or involved with terrorism.³ The U.S.G. will check the identifying information against classified intelligence databases. If the pilots prove successful, the U.S.G. plans to expand the programs broadly.

For years, humanitarian organizations have administered their own internal efforts to prevent U.S.G. funds from supporting acts of terrorism, and they likewise comply with U.S.G. regulations designed to accomplish the same goal. The soon-to-be-implemented vetting programs are the first, however, to contemplate a global program that would require humanitarian organizations to collect and report identifying information on their partners to Government officials, who would then run that information against secret government intelligence databases.

In the eyes of many humanitarian actors and policy experts, the scope, nature, and perceived intrusiveness of these new vetting programs set them apart from existing counterterrorism efforts. Many fear that these programs ask humanitarian organizations to compromise principles central to their work. Core humanitarian principles of impartiality, neutrality, and independence require that humanitarian organizations act autonomously from government donors’ political and military objectives.⁴ A fundamental concern among these organizations is that the vetting programs would require them to actively involve themselves on an ongoing basis in the process of information-gathering for the U.S.G., and that therefore local populations and armed groups may see the organizations as information-gatherers for the U.S.G. These concerns are heightened because humanitarian organizations would be required to collect this information for the purpose of vetting through classified intelligence databases, with limited assurances as to the U.S.G.’s ultimate use of the information.

Humanitarian principles are central not only to humanitarian organizations’ access to affected populations but also to ensuring the safety of humanitarian personnel.⁵ For many humanitarian actors, the vetting programs create the real possibility that local communities and partners will perceive international non-governmental organizations’ (“INGOs”) and United Nations’ (“UN”) aid efforts as aligned with U.S. intelligence and security services. This perception, whether real or imagined, may

1. This publication is part of a research and policy project and reflects academic research and consultations carried out by the commissioned author. This publication does not constitute legal or professional advice or legal services, and should not be used for decision-making purposes. Organizations and individuals should consult their own counsel prior to making decisions regarding compliance with the law and responses to regulatory requirements.

2. Global Humanitarian Assistance, *Country Profiles: Overview*, <http://www.globalhumanitarianassistance.org/country-profiles> (last visited Sept. 22, 2013).

3. USAID and U.S. Department of State, *Status Report: Partner Vetting System (PVS) Pilot Program* (2011). *See also*, 74 Fed. Reg. 30494 (June 6, 2009).

4. *See, e.g.*, United Nations Office for the Coordination of Humanitarian Affairs, *OCHA on Message: Humanitarian Principles* (April, 2010).

5. *Id.*; David Lloyd Roberts, *Staying Alive: Safety and security guidelines for humanitarian volunteers in conflict areas*, International Committee of the Red Cross, Geneva, 2005 (revised edition).

substantially undermine humanitarian operations in insecure environments where these organizations rely on community acceptance to safely access affected populations.⁶ In addition to raising concerns over access and safety, these vetting programs may also burden humanitarian organizations with administrative obligations that delay program implementation, and may also run counter to European Union privacy and data-protection laws.

The State Department and USAID modeled the pilot-vetting programs on existing, but limited, vetting programs established in Afghanistan and the West Bank/Gaza Strip. Both agencies already vet non-U.S. recipients of aid in these regions. While these programs differ in many respects from the pilot programs about to be implemented, the earlier programs inform the ongoing debate over vetting and provide certain initial evidence to support many of the concerns raised by humanitarian organizations.

To date, very limited public debate has occurred on this topic, perhaps in part due to the complexity of the underlying regulatory framework and to the lack of available information. Most of the discussions around proposed partner vetting programs and their potential impact have taken place between U.S.-based INGOs and government actors, with relatively little reflection within the broader humanitarian community. As existing programs in Afghanistan and West Bank/Gaza—programs that vet only non-U.S. parties—continue (with the Afghanistan program expanding in scope) and with the prospect of implementation of the new vetting programs on the horizon, these issues are of increasing concern to the broader humanitarian community. Also, unlike many other counterterrorism measures, partner vetting and other partner vetting-type information-gathering programs have implications for the humanitarian community as a whole. Once these vetting measures are made public in a particular field context, it may matter very little (if at all) whether a given organization is actually involved in the program, as even non-vetting organizations may be “tainted” by the perception, whether real or imagined, among local populations that all humanitarian organizations are intelligence-gatherers for the U.S.G.

The vetting measures may thereby raise the complex question of so-called “red lines”: At what point may a given vetting measure so compromise humanitarian principles that implementing the measure would (irreparably) contravene those principles? The answer to that question is significant for it is likely to shape whether humanitarian organizations may forgo hundreds of millions, if not billions, of dollars of U.S.G. humanitarian-aid funding tied to partner-vetting requirements.

This briefing paper aims to provide clarity to the discussion. It describes what the USAID and State Department programs are, what those programs seek to accomplish, and how those programs may function, while also highlighting the primary concerns that humanitarian organizations may raise regarding implementation of these programs, especially in high-risk conflict environments. The paper aims to contribute to the debate on these important topics by describing some of the most important elements of these programs and by illuminating the legal frameworks in which they operate. This briefing paper, and the Harvard Law School-Brookings Project on Counterterrorism and Humanitarian Engagement in general, take no position on the propriety or desirability of these vetting programs, and do not seek to provide prescriptive guidance as to how any organization or entity may or should respond to these programs.

6. *Id.*

Against that backdrop, part II provides a detailed overview of USAID’s Partner Vetting System and the State Department’s Risk Analysis and Management pilot programs. Part III explores existing vetting programs in Afghanistan and the Palestinian territories. Finally, Part IV examines several potential concerns about these programs.

Administrative Law Framework

The pilot-vetting programs are creations of U.S. administrative law, and that body of law forms the framework within which these programs continue to evolve. Because of the important role administrative law plays, this section provides an overview of those aspects of U.S. administrative law relevant to a discussion of partner-vetting programs.

Federal agencies promulgate rules and regulations in accordance with the authority delegated to them by Congress or the President. These rules and regulations aim to implement broad Congressional and Executive mandates, and they are published in the Code of Federal Regulations (“CFR”). USAID and the State Department promulgate the rules that govern the pilot vetting programs, citing counterterrorism laws and executive orders as the source of their authority, as well as general authority granted to agencies to administer acquisitions and assistance programs.⁷

As part of this process, the State Department and USAID promulgated the rules governing the pilot vetting programs pursuant to notice and comment rulemaking procedures—that is, the procedures governing how the government provides the public with information about a potential rule and how the public may meaningfully respond to that proposed rule. Notice and comment rulemaking proceeds in three stages.⁸ First, an agency provides public notice of a proposed rule. The notice must contain, at a minimum, the legal authority under which the agency proposes the rule and a detailed description of the major issues addressed in the proposed rule. Second, the agency provides an opportunity for interested persons to participate in the rulemaking through submissions of written data, opinions, and arguments. Finally, an agency provides a concise statement justifying the final rule and addressing major concerns raised during the comment period.⁹ Notice of a proposed rulemaking, as well as the final rule, appear in the Federal Register and the final rule has the force and effect of law.¹⁰ If properly issued, a final rule may be challenged only if a court determines that the agency acted arbitrarily and capriciously when issuing it—a high burden for those taking exception to a rule.¹¹

The following discussion draws heavily from the information contained in the nearly twenty Federal Register entries pertaining to partner vetting. In doing so, this paper pulls from these discrete entries to paint a broader picture intended to clarify the programs’ details and to focus the ongoing conversation surrounding these programs.

7. See, e.g., Privacy Act System of Record Notice, Altered, 77 Fed. Reg. 72319 (Dec. 5, 2012).

8. Section 553 of the Administrative Procedures Act outlines the requisite procedures. 5 U.S.C. § 553

9. See generally, 5 U.S.C. § 553; *U.S. v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2nd Cir. 1997).

10. See *OMB Watch, Background on the Rulemaking Process*, <http://www.foreffectivegov.org/files/regs/rcenter/backgroundpdfs/I.-V..pdf> (last visited Sept. 22, 2013).

11. A challenger must prove, for instance, that the agency considered factors it is expressly prohibited by statute from considering, that it acted with false certainty about uncertain facts, or that it acted for purely political reasons. *FCC v. Fox Television Station*, 129 S.Ct. 1800 (2009); *Motor Vehicles Manufacturers Assoc. v. State Farm Mutual*, 463 U.S. 29, 43 (1983).

II. USAID AND STATE DEPARTMENT VETTING PROGRAMS

The State Department and USAID will soon begin to implement parallel pilot programs to vet recipients of State Department and USAID funds in five countries. These vetting programs aim to ensure that U.S.G. funds do not inadvertently benefit individuals or organizations who are “terrorists,” supporters of terrorism, or affiliated with “terrorists.”¹² Congress authorized funding for these programs, but did not mandate them, in the Consolidated Appropriations Act of 2010,¹³ and that authorization was carried forward (effectively renewed) in fiscal years 2011 and 2012 under Continuing Resolutions.¹⁴

Both programs contemplate the collection of identifying information from organizations and their leadership prior to receiving USAID and State Department funds under a contract, grant, or sub-agreement. These collection activities are in addition to existing due diligence obligations and other compliance processes carried out by humanitarian organizations, for example, those undertaken to comport with U.S. laws criminalizing the provision of “material support or resources” to “terrorists” and designated Foreign Terrorist Organizations or of funds to “Specially Designated Global Terrorists” designated by the Office of Foreign Asset Control of the Department of the Treasury. As planned, direct recipients of USAID and State Department funds (“prime awardees”),¹⁵ including humanitarian organizations, would collect and provide this identifying information back to the funding agency. The relevant agency would use the information to search classified intelligence and law enforcement databases for “derogatory”—that is, adverse or negative—information on the organization or its key personnel. USAID created the Partner Vetting System to assist in this process. USAID describes the PVS as a “worldwide electronic database system” that stores information in a “system of records for vetting purposes” using the Federal Bureau of Investigation’s Terrorist Screening Center.¹⁶

USAID and the State Department have taken substantial steps to implement their respective pilot-vetting programs. USAID established a system of records for storing both classified and sensitive information on vetted individuals, and it amended its acquisition regulations to accommodate the vetting program. The Agency published its proposed changes to regulations governing assistance awards, and the public comment period recently closed, then was reopened for 15 days due to a technical error, suggesting that USAID will issue a final rule shortly.¹⁷ The State Department also appears to be in the process of finalizing the rules governing its vetting program.¹⁸

12. USAID and U.S. Department of State, *Status Report: Partner Vetting System (PVS) Pilot Program* (2011). See also, 74 Fed. Reg. 30494 (June 6, 2009).

13. Section 7304(o) of the Consolidated Appropriations Act of 2010, Pub. Law 111-117. The Act reads in relevant part: “... funds appropriated by this Act may be used to implement a [partner vetting system (“PVS”)] pilot program, including necessary rulemaking; Provided further, That any such PVS pilot program shall apply equally to the programs and activities of the Department of State and USAID; Provided further, That the Secretary of State and the USAID Administrator shall jointly consult with the Committees on Appropriations not later than 90 days after enactment of this Act and prior to the implementation of such a PVS pilot program....”

14. Department of State, *Supporting Statement for Paperwork Reduction Act Submission — Risk Analysis and Management: OMB Number 1405-XXXX* (2012). The FY 2012 Continuing Resolution directed that the pilot commence no later than September 30, 2012. *Id.*

15. Prime awardees receive program funds directly from the U.S.G., while subawardees and subcontractors receive U.S.G. funds from a prime awardee.

16. USAID Office of Inspector General, *Audit of the Adequacy of USAID’s Antiterrorism Vetting Procedures*, Audit Report No. 9-000-08-001-P, p. 15 (Nov. 6, 2007).

17. Partner Vetting in USAID Assistance, Notice of Proposed Rulemaking, 78 Fed. Reg. 53375 (Aug. 29, 2013); Partner Vetting in USAID Assistance; Correction, Proposed Rules, 78 Fed. Reg. 69802 (Nov. 21, 2013).

18. See, e.g., 30-Day Notice of Proposed Information Collection: DS-4164 OMB Control #1405-XXXX, 77 Fed. Reg. 2601 (Jan. 18,

The following sections provide a granular look at USAID’s pilot Partner Vetting System and the State Department’s pilot Risk Analysis and Management program.

USAID Partner Vetting System

USAID’s pilot Partner Vetting System (“PVS”) vets the key individuals of non-governmental organizations (“NGOs”) and for-profit contractors who apply for USAID contracts, grants, cooperative agreements, and other funding, as well as those applying for registration with USAID as a Private and Voluntary Organization.¹⁹ The pilot PVS program also vets all subcontractors and sub-grantees subject to USAID consent as well as vendors and beneficiaries designated in the solicitation.²⁰ The rules, as promulgated in their final form, do not provide an express exception for public international organizations.²¹ Both USAID and the State Department plan to implement their respective pilot programs in five countries: Guatemala, Kenya, Lebanon, the Philippines, and Ukraine.²² If the programs are successful, the agencies may implement them in additional countries.

USAID frames the pilot PVS program as an additional due diligence measure, necessitated by the Agency’s activities in areas marked by higher concerns of terrorist activities and designed to ensure that U.S.G. funds and resources do not inadvertently benefit “terrorists” or their supporters.²³ The PVS program would join an array of existing measures aimed at preventing the diversion of U.S.G. funds into hands of “terrorists.” For instance, USAID already requires humanitarian organizations to vet sub-awardees and subcontractors through public lists of designated groups and individuals (including organizations and individuals designated as “terrorists”).²⁴ In addition, USAID requires recipients to certify that they will take “all reasonable steps” to ensure that U.S.G. funds are not diverted to “terrorists” or their supporters, and the Agency also requires that humanitarian organizations include clauses acknowledging their responsibility to prevent the diversion of U.S.G. funds in all subcontracts and subawards.²⁵ The PVS program differs from existing measures by, among other things, requiring humanitarian organizations to provide this information to the U.S.G. for vetting through classified terrorist databases.

The Partner Vetting System vets key individuals of prime awardees as well as select sub-contractors, sub-awardees, vendors, and beneficiaries. “Key individuals” include principal officers of the organization’s governing body;²⁶ principal officers and deputy principal officers of the organization;²⁷ the program manager or chief of party; and anyone else with significant responsibilities for administering the

2012). The State Department’s online portal for submitting vetting information is accessible at <https://ramportal.state.gov/rai>.

19. Partner Vetting in USAID Acquisitions, Proposed Rule, 74 Fed. Reg. 30494 (June 26, 2009).

20. *See, e.g.*, Partner Vetting in USAID Assistance, Notice of Proposed Rulemaking, 78 Fed. Reg. 53375 (Aug. 29, 2013); Privacy Act of 1974, Implementation of Exemptions, 74 Fed. Reg. 9 (Jan. 2, 2009).

21. It is not immediately clear whether USAID would apply vetting to public international organizations. However, as discussed in part III, existing vetting programs in the West Bank/Gaza and Afghanistan both specifically exempt public international organizations from vetting requirements.

22. USAID and U.S. Department of State, *Status Report: Partner Vetting System (PVS) Pilot Program* (2011).

23. *Id.*

24. *See, e.g.*, Federal Acquisition Regulation 52.225-13; USAID ADS Chapter 302.3.6.13; USAID Certifications, Assurances, Other Statements of the Recipient and Solicitation Standard Provisions: A Mandatory Reference for ADS Chapter 303.

25. USAID Certifications, Assurances, Other Statements of the Recipient and Solicitation Standard Provisions: A Mandatory Reference for ADS Chapter 303

26. Including the chairman, vice-chairman, treasurer, and secretary of board.

27. Such as the executive director and deputy executive director.

USAID-financed activities or resources.²⁸ (See *Appendix C.*) Vetting is required for all subcontracts and subawards that require USAID’s consent,²⁹ as well as vendors under assistance awards in high-risk situations and particular classes of high-risk items.³⁰

USAID states that it will conduct a risk-based assessment prior to applying vetting to a particular award. The risk-based assessment helps USAID determine the likelihood that project funds may inadvertently benefit “terrorists” or those who support them. In conducting this assessment, USAID will consider, among other things, the nature of the program, the type of entity implementing the activity (including whether the entity is based in the U.S.), the geographic location of the activity, the available safeguards, and the ease with which funds may be diverted or misused.³¹

The vetting process occurs in several stages. First, USAID requires prime awardees to collect and submit information on its key individuals as well as the key individuals of select subcontractors, subgrantees, vendors, and certain beneficiaries designated in the solicitation. NGOs and contractors submit this information directly to the local mission’s vetting officer—a U.S.G. employee not involved in the selection process—or through an online PVS Portal.³² Typically, USAID requires that NGOs and contractors submit the identifying information for all required key individuals at the same time they submit their applications.³³ Once she receives this information, the vetting officer submits the identifying information to USAID’s Office of Security (“SEC”). The SEC then uses both public and classified intelligence and law-enforcement databases to search for “derogatory” information before making its vetting determination.³⁴ After USAID makes a vetting determination, the vetting officer informs the organization of the result; the vetting officer also informs the USAID agreement officer responsible for the award of the result so that she may proceed with the award. An organization that does not pass the vetting process may request reconsideration within seven days of receiving notice from the vetting officer, and submit supporting documentation. The Agency will review requests within seven days, and make a final determination.³⁵

The SEC is located in USAID’s offices in Washington, D.C.³⁶ There, USAID personnel with security clearance vet key employees using, among other databases, the Federal Bureau of Investigation’s Terrorist Screening Center (“TSC”), a multi-agency organization administered by the Federal Bureau

28. Privacy Act of 1974, Implementation of Exemptions, 74 Fed. Reg. 9 (Jan. 2, 2009); Partner Vetting in USAID Assistance, Notice of Proposed Rulemaking, 78 Fed. Reg. 53375 (Aug. 29, 2013).

29. A fairly large class of sub-awards and subcontracts are subject to USAID consent. Precise definitions appear at FAR Section 52.244-2 and 22 CFR 226.25(c)(8) and requirements vary by type of recipient. For instance, recipients without an “approved purchasing system” must seek USAID consent for all cost-reimbursements, time-and-material contracts, labor-hour contracts, and fixed-price contracts that exceed 5% of the estimated cost of the contract. *FAR 52.244-2(c)*.

30. Partner Vetting in USAID Assistance, Notice of Proposed Rulemaking, 78 Fed. Reg. 53375 (Aug. 29, 2013) (amending 22 CFR 226); Partner Vetting in USAID Acquisitions, Final Rule, 77 Fed. Reg. 8166 (Feb. 14, 2012).

31. *See generally*, Partner Vetting in USAID Assistance, Notice of Proposed Rulemaking, 78 Fed. Reg. 53375 (Aug. 29, 2013).

32. It is unclear whether USAID will require NGOs and contractors to submit this information directly to the Partner Vetting Portal – a secure online submission website designed for the vetting program – or directly to the vetting officer. *Cf.* 78 Fed. Reg. 53375 (Aug. 29, 2013) and 77 Fed. Reg. 234 (Dec. 5, 2012). The State Department has stated that it will accept paper submissions during its one-year pilot program, but plans to move to an online-only submission process thereafter. U.S. Department of State, Risk Analysis and Management (RAM) Privacy Impact Assessment (2011).

33. The regulations permit the contracting or agreement officer flexibility in requiring the information at a later stage.

34. Partner Vetting in USAID Acquisitions, Proposed Rule, 74 Fed. Reg. 30494 (June 26, 2009).

35. Partner Vetting in USAID Acquisitions, Final Rule, 77 Fed. Reg. 8166 (Feb. 14, 2012).

36. Partner Vetting in USAID Acquisitions, Proposed Rule, 74 Fed. Reg. 30494 (June 26, 2009).

of Investigations that houses the United States Terrorist Watchlist.³⁷ Department of Defense reports indicate that USAID has employees detailed to the TSC with access to that database.³⁸ Moreover, USAID notes that the pilot program will employ four dedicated vetting personnel to the Office of Security.³⁹

In public statements, USAID makes limited assurances as to how it will use the information it receives as part of the pilot PVS. The Agency states that the “[i]ntelligence community systems will not retain information on individuals where there is no match.”⁴⁰ This assurance does not appear, however, in any regulations USAID has promulgated as part of its PVS program. USAID provides no details with respect to the information retained when a match is found.

USAID requires organizations to collect the identifying information using the Partner Information Form.⁴¹ This form requires that organizations submit the name, pseudonyms, date of birth, government-issued photo identification number, place of birth, gender, occupation, address, citizenship, and employment information for each key individual.⁴² USAID also requires the NGO or contractor submitting the form—the prime contractor or grantee—to certify that it has taken reasonable steps, in accordance with sound business practices, to verify the information contained on each form.⁴³ USAID estimates that the identifying information will require fifteen minutes to collect, premising this estimate on the fact that “NGOs are already providing the majority of this information used for screening.”⁴⁴ The Agency describes the collection of this information as a “clerical” task.⁴⁵

The Agency frames its vetting program as a condition of eligibility to receive USAID funds. Approvals are valid for one year.⁴⁶ Organizations that change their key individuals must notify the vetting officer and the new officer must be vetted.⁴⁷

USAID established a records system in order to support the vetting of “key” individuals.⁴⁸ To store information on U.S. citizens in the Partner Vetting System, USAID was required to initiate a notice and rulemaking process to exempt it from portions of the Privacy Act of 1974.⁴⁹ USAID states that it requires these exemptions in order, among other things, to preclude subjects of investigations from frustrating the investigative process; to avoid disclosure of investigative techniques; to ensure the

37. Special Inspector General for Afghanistan Reconstruction, *Contracting with the Enemy: State and USAID Need Stronger Authority to Contract When Enemy Affiliations are Identified*, p. 3 (July 2013).

38. *Id.*

39. Partner Vetting in USAID Assistance, Notice of Proposed Rulemaking, 78 Fed. Reg. 53375 (Aug. 29, 2013).

40. Privacy Act of 1974, Implementation of Exemptions, Final Rule, 74 Fed. Reg. 9 (Jan. 2, 2009).

41. Partner Vetting in USAID Acquisitions, Final Rule, 77 Fed. Reg. 8166 (Feb. 14, 2012).

42. See Appendix C for USAID Partner Information Form (Form 500-13).

43. Partner Information Form (USAID Form 500-13).

44. Partner Vetting in USAID Assistance, Notice of Proposed Rulemaking, 78 Fed. Reg. 53375 (Aug. 29, 2013).

45. *Id.*

46. *See generally*, Partner Vetting in USAID Acquisitions, Proposed Rule, 74 Fed. Reg. 30494 (June 26, 2009); Partner Vetting in USAID Acquisitions, Final Rule, 77 Fed. Reg. 8166 (Feb. 14, 2012); Partner Vetting in USAID Assistance, Notice of Proposed Rulemaking, 78 Fed. Reg. 53375 (Aug. 29, 2013).

47. *Id.*

48. Privacy Act of 1974, Implementation of Exemptions, Final Rule, 74 Fed. Reg. 9 (Jan. 2, 2009); Recent proposed regulations also contemplate the creation of a PVS Portal that will provide NGOs with a secure online platform with which to submit identifying information on key individuals. *See*, Privacy Act of 1974; System of Records, Privacy Act System of Records Notice—Altered, 77 Fed. Reg. 234 (Dec. 5, 2012).

49. Privacy Act of 1974, Implementation of Exemptions, Final Rule, 74 Fed. Reg. 9 (Jan. 2, 2009).

ability of USAID’s Office of Security to obtain information from third parties and other sources; and to protect classified information.⁵⁰

The system contains classified, sensitive, and unclassified information, and it is maintained at USAID’s office in Washington, D.C. There, on a classified computer network USAID stores intelligence and law-enforcement information related to national security and vetting and terrorism screening information, as well as vetting results. The Agency stores sensitive but unclassified information on a separate server.⁵¹ These records are retained according to the records schedule approved by the National Archives and Records Administration, and these records are disclosed in accordance with USAID’s Statement of General Routine Uses.⁵²

State Department Risk Analysis and Management Program

The State Department began its efforts to implement its Risk Analysis and Management (“RAM”) program in 2011.⁵³ For FY 2014, several Bureau of Population, Refugees and Migration solicitations in pilot countries incorporate vetting requirements as a condition of award.⁵⁴ RAM is designed to vet “key individuals” of applicants for State Department contracts, grants, cooperative agreements, and other funding.⁵⁵ The pilot program spans one year, and the State Department expects the pilot to provide the data needed to determine the appropriateness (or not) of a broader vetting program.⁵⁶

RAM and PVS bear strong similarities, in large part because the State Department explicitly modeled RAM on USAID’s vetting program.⁵⁷ Like USAID’s PVS, the State Department will pilot the RAM program in Guatemala, Kenya, Lebanon, the Philippines, and Ukraine.⁵⁸ Also similar to USAID’s pilot PVS, the State Department frames its pilot vetting program as an effort to “formalize its ‘due diligence’ efforts to ensure that State funds do not inadvertently benefit terrorists or their supporters.”⁵⁹

Like USAID, the State Department requires potential recipients of State Department contracts, grants, cooperative agreements, and other funds within the competitive range to submit identifying information on the organization and its key employees.⁶⁰ The State Department vets this information

50. *Id.*

51. Privacy Act of 1974; System of Records, Privacy Act System of Records Notice—Altered, 77 Fed. Reg. 72319 (Dec. 5, 2012). Sensitive but unclassified information consists primarily of the information submitted by humanitarian organizations on their Partner Information Form.

52. *Id.*

53. *See, e.g.*, Privacy Statement; Notice of Proposed Rulemaking: State-78, Risk Analysis and Management Records, 76 Fed. Reg. 234 (Dec. 6, 2011).

54. *See, e.g.*, Department of State Bureau of Population, Refugee and Migration, FY2014 Funding Opportunities Announce for Proposal for the Regional Resettlement Support Center (RSC) in Africa, part XI, <http://www.state.gov/j/prm/funding/fy2014/206263.htm> (last visited Sept. 22, 2013).

55. *Id.*

56. U.S. Department of State, *Supporting Statement for Paperwork Reduction Act Submission, Risk Analysis and Management: OMB Number 1405-XXXX* (2011).

57. Department of State, Risk Analysis and Management (RAM) Privacy Impact Assessment (2011).

58. USAID and U.S. Department of State, *Status Report: Partner Vetting System (PVS) Pilot Program* (2011).

59. U.S. Department of State, *Supporting Statement for Paperwork Reduction Act Submission, Risk Analysis and Management: OMB Number 1405-XXXX* (2011).

60. Privacy Statement; Notice of Proposed Rulemaking: State-78, Risk Analysis and Management Records, 76 Fed. Reg. 234 (Dec. 6, 2011).

through both public and classified intelligence and law-enforcement databases for “derogatory” information. Organizations without “material” and “sufficiently serious” derogatory information are eligible to receive State Department funds under the award for one year.⁶¹ The organization must notify the Department of any changes to their key individuals so that the State Department may vet the new individuals.⁶²

The State Department uses USAID’s PVS database to collect and store information on partner organizations and their key individuals.⁶³ Applicant organizations submit this information either in paper format (using the Risk Analysis Information Form) or through the online RAM Portal.⁶⁴ Similar to USAID’s PVS program, with RAM each organization must certify that it has taken reasonable steps, in accordance with sound business practices, to verify the information contained on each form.⁶⁵ Despite making use of USAID’s PVS database, the State Department segregates information submitted for its programs using firewalls and restricts access to this information to State Department employees.⁶⁶

Reportedly, the intelligence community will not retain information on key individuals in the State Department’s systems unless “those individuals were already identified in [their] data holdings.”⁶⁷ The State Department provides no further details on the type of information that may be retained in the case of a match, and this restriction does not appear in any of the regulations promulgated as part of RAM.

While similar in many respects, the PVS and RAM programs differ in several others. For instance, the State Department’s definition of “key individuals”—permitting vetting of a broad group described as “other individuals employed by the organization with a role in the State Department-financed program”⁶⁸—appears broader than the one employed by USAID. Moreover, the State Department has provided fewer details on its program, including whether it will subject sub-recipients, vendors, and beneficiaries of State Department funds to vetting. Finally, the Risk Analysis Information Form provided by the State Department requests additional information of Afghan organizations and citizens not contained in USAID’s Partner Information Form.⁶⁹

III. USAID AND STATE DEPARTMENT VETTING PROGRAMS IN WEST BANK/GAZA AND AFGHANISTAN

USAID and the State Department have both operated limited vetting programs for several years.

61. U.S. Department of State, *Supporting Statement for Paperwork Reduction Act Submission, Risk Analysis and Management: OMB Number 1405-XXXX* (2011).

62. *Id.*

63. Department of State, *Risk Analysis and Management (RAM) Privacy Impact Assessment* (2011).

64. *Id.* The State Department’s online portal for submitting vetting information is accessible at <https://ramportal.state.gov/rai> (last visited Sept. 6, 2013).

65. Risk Analysis Form (Department of State Form DS-4184).

66. U.S. Department of State, *Supporting Statement for Paperwork Reduction Act Submission, Risk Analysis and Management: OMB Number 1405-XXXX* (2011); Department of State, *Risk Analysis and Management (RAM) Privacy Impact Assessment* (2011).

67. Department of State, *Supporting Statement for Paperwork Reduction Act Submission — Risk Analysis and Management: OMB Number 1405-XXXX* (2012).

68. Privacy Statement; Notice of Proposed Rulemaking: State-78, Risk Analysis and Management Records, 76 Fed. Reg. 234 (Dec. 6, 2011).

69. *Cf.* USAID’s Partner Information Form (USAID Form 500-13), and the State Department’s Risk Analysis Information Form (DS-4184).

USAID began vetting non-U.S. awardees of contracts and aid instruments in the West Bank and Gaza in 2006,⁷⁰ and both agencies have established programs for vetting non-U.S. awardees in Afghanistan.

These existing vetting programs resemble—and, in certain respects, may be seen as precursors to—the pilot PVS and RAM programs discussed above. Given this resemblance, the following section provides an overview of each program in an attempt to better understand what the vetting systems may look like in practice.

USAID West Bank and Gaza Vetting Program

USAID apparently first contemplated independent vetting procedures for its West Bank and Gaza Mission in 2001.⁷¹ In March of 2006, USAID formalized these vetting procedures in Mission Order 21.⁷² While similar in many respects to the USAID PVS and State Department RAM pilot programs, the West Bank and Gaza vetting program does not vet U.S. organizations due to U.S. privacy law concerns.⁷³

In general, the Order requires the prime recipients of USAID’s West Bank and Gaza Mission funds to supply the Mission with identifying information on key individuals of non-U.S. organizations that may receive U.S. funds under an award. This identifying information is sent to USAID offices in Washington, D.C., where USAID personnel check it against classified intelligence and law-enforcement databases to determine whether “derogatory” information exists. The results of these searches are retained in the Partner Vetting System.⁷⁴ In addition, the U.S. Consulate in Jerusalem independently vets potential recipients. The presence of “derogatory” information may result in USAID disapproving the award or sub-award—a decision made at the discretion of USAID.⁷⁵

There are several broad categories subject to mandatory vetting under Mission Order 21. USAID requires vetting of all non-U.S. contractors and first-tier subcontractors who receive awards in excess of \$25,000⁷⁶ and all non-U.S. grant and cooperative agreement recipients and their sub-grantees regardless of award amount.⁷⁷ In addition, the USAID mission vets non-U.S. recipients of USAID-financed trainings lasting longer than five days, and other direct recipients of cash or in-kind assistance.⁷⁸ Public International Organizations are exempted, as are most vendors, persons who receive jobs under employment-generating activities, children under the age of sixteen, and ultimate beneficiaries who

70. Some reports suggest that USAID has vetted non-U.S. recipients since 2003. See, USAID Office of Inspector General, *Audit of the Adequacy of USAID’s Antiterrorism Vetting Procedures*, Audit Report No. 9-000-08-001-P, p. 26 (Nov. 6, 2007).

71. USAID Mission Notice No. 2007-WBG-26 (Oct. 5, 2007). USAID was motivated by a variety of counterterrorism legislation, particularly Section 559 of the Foreign Appropriations Act of 2003, which requires “the Secretary of State [to] take all appropriate steps to ensure that such assistance is not provided to or through individuals, private or government entity, or educational institution that the Secretary knows or has reason to believe advocates, plans, sponsors, engages in, or has engaged in, terrorist activities.” *Id.* Similar language appears in subsequent iterations of the Act as well as Section 7093(b) of the Consolidated Appropriations Act, 2012.

72. *Id.*

73. United State Government Accountability Office, *Foreign Assistance: Measure to Prevent Inadvertent Payments to Terrorists Under Palestinian Aid Programs Have Been Strengthened, but Some Weaknesses Remain*, GAO-09-622, p. 11 (May, 2009); USAID Office of Inspector General, *Audit of the Adequacy of USAID’s Antiterrorism Vetting Procedures*, Audit Report No. 9-000-08-001-P, p. 13 (Nov. 6, 2007).

74. See, *supra* Part II.A.

75. See generally, Revised Mission Order 21, available as an attachment to USAID Mission Notice No. 2007-WBG-26 (Oct. 5, 2007).

76. The \$25,000 is cumulative for multiple awards to the same firm or individual within a 12-month period. Revised *Id.* at Part V.A.1.

77. Regardless of the value of the sub-grant. *Id.*

78. *Id.* at Part V.A.

receive assistance below a specific threshold.⁷⁹ However, USAID may choose to vet beneficiaries and vendors whenever the Mission has reason to believe that they engage in, assist, facilitate, advocate, or attempt to commit a terrorist act, or did so in the past.⁸⁰

Similar to USAID's pilot PVS program, the prime recipient of USAID funds must provide USAID's West Bank and Gaza Mission with identifying information for each "key individual" subject to vetting. The information USAID requires of key individuals under the West Bank and Gaza vetting program is identical to that required under the pilot PVS program.⁸¹ The Agency defines "key individuals" identically in both the West Bank and Gaza program and the pilot PVS program.⁸²

USAID vets both organizations and their "key individuals" through a USAID-maintained Vetting Center located in USAID's Offices in Washington, D.C., as well as through the U.S. Consulate in Jerusalem.⁸³ USAID's SEC operates the Vetting Center. There, the Office accesses classified law-enforcement and intelligence databases to vet potential awardees.⁸⁴ USAID has reportedly increased its reliance on these intelligence databases in recent years.⁸⁵ Reports also suggest that USAID has placed U.S. citizens with security clearance in charge of the vetting system, enabling the Agency to share sensitive derogatory information on potential awardees with the West Bank and Gaza mission.⁸⁶ USAID retains information on key individuals in its PVS records system.

If the vetting process reveals information linking the organization or a "key individual" to terrorism, the Deputy Mission Director and the Mission's Technical Representative determine whether to disapprove the award, request additional information from the potential awardee to rule out a potential "false positives," or submit the matter to the U.S. Consulate General in Jerusalem for further review.⁸⁷ If approved, an organization may also receive additional USAID awards during the following 12-month period without undergoing additional vetting.⁸⁸ However, an organization must notify USAID if there is a change to the non-U.S. organization's "key individuals."⁸⁹

While comprehensive data remain elusive, reports suggest that the program vets thousands of individuals annually. For instance, the U.S. Government Accountability Office reports that the USAID mission in

79. *Id.* at Part V.A.5. Individuals who receive less than \$1,000 in assistance, organizations that receive more than \$2,500 in assistance, and households that receive less than \$5,000 in micro-enterprise loans or assistance need not be vetted. *Id.*

80. *Id.* at Part V.A.6.

81. *Cf.* USAID Mission Notice No. 2007-WBG-26, Attachment A (Partner Vetting Form) and USAID Partner Information Form (USAID Form 500-13).

82. Revised Mission Order 21, *supra* note 57, at Part V.C.

83. *Id.* at Part V.E; U.S. Government Accountability Office, *Foreign Assistance: U.S. Programs Involving the Palestine Investment Fund*, GAO-13-537, p. 21-22 (July, 2013).

84. Revised Mission Order 21, *supra* note 57, at Part V.E (effective Oct. 3, 2007); U.S. Government Accountability Office, *Foreign Assistance: U.S. Programs Involving the Palestine Investment Fund*, GAO-13-537, p. 21-22 (July, 2013).

85. Jeremy Sharp, Congressional Research Service, *U.S. Foreign Assistance to the Middle East: Historical Background, Recent Trends, and the FY2010 Request*, p. 18 (July, 2009). The agency did so after its own assessment that it could not "reasonably ensure" that its money did not wind up in the hands of terrorists. *Id.*

86. United State Government Accountability Office, *Foreign Assistance: Measure to Prevent Inadvertent Payments to Terrorists Under Palestinian Aid Programs Have Been Strengthened, but Some Weaknesses Remain*, GAO-09-622, p. 11 (May, 2009).

87. Revised Mission Order 21, *supra* note 57, at Part V.E.

88. *Id.* at Part V.G.

89. *Id.*

West Bank and Gaza vetted all 32 new prime awardees and their “key individuals” in 2008.⁹⁰ The report also found that the Mission vetted substantially all sub-awardees subject to vetting⁹¹ as well as 1,239 recipients of scholarships, microenterprise loans, and direct cash assistance that same year.⁹² USAID has stated that its “West Bank/Gaza program possesses the most comprehensive partner-vetting system for foreign assistance throughout the U.S. Government.”⁹³ It bears emphasis that these figures do not take into account organizations that chose not to accept USAID funds once the vetting requirements were imposed.

USAID Afghanistan Vetting Program

In 2011, USAID implemented a separate vetting program in Afghanistan.⁹⁴ A report issued by the Special Investigator General for Afghanistan Reconstruction (“SIGAR”) suggests that USAID modeled this vetting program on its West Bank and Gaza program.⁹⁵ The report also notes that USAID began to implement a vetting system after receiving reports from intelligence services that USAID dollars were being funneled to insurgent groups in certain Afghan provinces.⁹⁶

Mission Order 201.05 establishes the procedures for vetting in Afghanistan.⁹⁷ It resembles the West Bank and Gaza program in many respects but differs from it in important ways. For instance, the Order expands its definition of “key individuals” to include any person exercising effective control over the organization as well as any person receiving significant commissions or similar earnings from an award.⁹⁸ In addition, the Order reserves the right to vet U.S. persons who are key individuals when USAID has reason to believe that the person may be a “prohibited party.”⁹⁹

The Order defines “prohibited parties” in broad terms. Any individual or organization that USAID knows or has reasonable grounds to suspect of supporting or engaging in terrorism, as well as those that have supported or have engaged in terrorism, are prohibited. The Order likewise prohibits individuals and organizations that pose a significant risk of committing terrorist activities in the future. In one particularly sweeping provision, the Order defines as “prohibited” under the Mission Order any individual or organizations that USAID knows or has reasonable grounds to suspect “is or has been engaged in other activities which are contrary to the national security and foreign policy interests of the United States.”¹⁰⁰

The Afghan vetting program also requires that prime awardees collect markedly more information

90. United State Government Accountability Office, *Foreign Assistance: Measure to Prevent Inadvertent Payments to Terrorists Under Palestinian Aid Programs Have Been Strengthened, but Some Weaknesses Remain*, GAO-09-622 (May, 2009).

91. *Id.*

92. *Id.* at 15.

93. Jim Zanotti, Congressional Research Service, *U.S. Foreign Aid to Palestinians*, p. 11 (Jan. 2013).

94. United State Government Accountability Office, *Afghanistan: U.S. Efforts to Vet Non-U.S. Vendors Needs Improvement*, GAO-11-355, p. 19 (June 2011).

95. *Id.*

96. Special Inspector General for Afghanistan Reconstruction, *Contracting with the Enemy: State and USAID Need Stronger Authority to Contract When Enemy Affiliations are Identified*, p. 3 (July 2013).

97. USAID Afghanistan Mission Order 201.05, Appendix A (effective July 8, 2013).

98. *Id.*

99. *Id.*

100. *Id.*

on key individuals. Notably, Afghan respondents must provide their tribal affiliation as well as their father's and grandfathers' names in addition to copies of government-issued photo ID. All others, including U.S. citizens and legal permanent residents who qualify as "key individuals," must provide copies of their passport.

Finally, the Order differs from the West Bank and Gaza Mission Order on a technical level. For instance, the Afghanistan Mission Order establishes a blanket threshold of \$25,000 for vetting, including sub-awardees at any tier.¹⁰¹ The Mission recently lowered this threshold from \$150,000, a move that one humanitarian organization interviewed for this paper suggests drastically increased the number of contracts subject to vetting.¹⁰² USAID also reserves the right to vet all direct assistance to the Afghan government at its discretion, and the Agency vets all private security service providers regardless of award amount.¹⁰³

The Mission Order also jettisons the exceptions found in the West Bank and Gaza program. Instead, the Afghanistan vetting program expressly excepts from its reach only ultimate beneficiaries, providers of water and electricity, and the Afghan Public Protection Force (as the sole pay-for-service security requirements mandated under Presidential Decree 62). The Order also makes clear that, while it does not require vetting of Public International Organizations, it does require vetting of non-U.S. recipients of PIO sub-awards.¹⁰⁴

The vetting process is nearly identical to the process established in the West Bank and Gaza. As with the West Bank and Gaza program, the Office of Security forwards any "derogatory" information to the Afghanistan Mission, where the Senior Deputy Mission Director makes the final determination on eligibility.¹⁰⁵ However, unlike the West Bank and Gaza program, it appears that USAID's Mission in Afghanistan does not simultaneously vet key individuals through its Afghan Embassy.

As of June 20, 2013, USAID had reviewed 1,639 vetting requests in connection with the Afghan vetting program.¹⁰⁶ The Agency determined that 30 of those requests, representing 20 organizations, were ineligible.¹⁰⁷

State Department Afghanistan Vetting Program

The U.S. Department of State began vetting non-U.S. contractors in Afghanistan beginning October 2012.¹⁰⁸ The State Department vets all non-U.S. contractors within the competitive range for a contract and conducts this screening as part of their risk-based approach to vetting.¹⁰⁹

101. The threshold is similarly cumulative for all USAID funds received within a twelve-month period. Mission Order 201.05, Appendix A. Moreover, this threshold was lowered in July of 2013, from \$150,000. *See*, USAID Afghanistan Mission Order 201.04 (effective May 9, 2011).

102. *Cf.* Mission Order 201.04 (replaced in its entirety by Mission Order 201.05).

103. *See generally*, Mission Order 201.05, Appendix A.

104. *See id.*

105. Special Inspector General for Afghanistan Reconstruction, *Contracting with the Enemy: State and USAID Need Stronger Authority to Contract When Enemy Affiliations are Identified*, p. 4 (July 2013).

106. *Id.*

107. *Id.*

108. United State Government Accountability Office, *Afghanistan: U.S. Efforts to Vet Non-U.S. Vendors Needs Improvement*, GAO-11-355 (June 2011).

109. Special Inspector General for Afghanistan Reconstruction, *Contracting with the Enemy: State and USAID Need Stronger Authority to Contract When Enemy Affiliations are Identified*, p. 3 (July 2013).

Similar to the vetting programs discussed above, the State Department requires each contractor to provide information on the company as well as key individuals within the organization, including their tribal affiliation. The State Department checks this information against various databases to determine whether derogatory information exists. If the search reveals derogatory information, it is forwarded to the Assistant Secretary of the bureau funding the activity, who makes the final determination on whether to disapprove the contractor's application. If deemed eligible, the contractor retains that status for one year. The State Department also re-vets non-U.S. contractors whenever a new key individual joins the organization.¹¹⁰

As of May 2013, the State Department vetted 219 non-U.S. individuals in Afghanistan. It deemed all but two eligible to receive State Department funds.

Publicly available documents provide little additional insight into the State Department's vetting program in Afghanistan. While it carries the same name as the pilot program discussed above, that pilot does not include Afghanistan among the pilot countries. This seems to suggest that the State Department's vetting program in Afghanistan differs from the pilot RAM program. The extent of these differences, however, remains unclear.

IV. CONCERNS RAISED BY IMPLEMENTING PARTNERS

From the perspectives of INGOs and UN agencies involved in principled humanitarian action that provided information and feedback for this brief, at least four concerns regarding USAID's Partner Vetting System and the State Department's Risk Analysis and Management program may be identified.

Restrictions on Principled Access and Safety of Humanitarian Personnel

Principled humanitarian action is based on a set of core principles: humanity, independence, impartiality, and neutrality. These principles are essential to establishing and maintaining access to affected populations as well as ensuring the safety of humanitarian personnel.¹¹¹ Humanitarian organizations may be concerned that the vetting programs could undermine humanitarian organizations' independence and neutrality by requiring them to collect and provide the U.S.G. with detailed information on their partners. This is in part because the U.S.G. asks humanitarian organizations to provide information for vetting through classified intelligence databases while providing only limited assurances as to the U.S.G.'s ultimate use of the information.

For humanitarian organizations, two sets of related concerns may arise in this connection. First, vetting programs may raise matters of principle. An effective humanitarian space requires a humanitarian community that closely guards the principles that guide their actions and provide them legitimacy. The vetting programs appear to ask—and, according to some, require—humanitarian organizations to potentially compromise some of those principles.

Second, not adhering to humanitarian principles may impact the life-saving work of humanitarian

110. *See id.*

111. *See, e.g.,* United Nations Office for the Coordination of Humanitarian Affairs, *OCHA on Message: Humanitarian Principles* (April, 2010).

organizations and the safety of their personnel. Unlike many for-profit contractors and others that make regular use of private security forces, humanitarian organizations rely on community acceptance in order to safely access civilian populations in need of assistance in insecure environments. Their work requires that local populations trust that they adhere to humanitarian principles. Some humanitarian organizations may worry that by complying with U.S. vetting requirements, they may create the perception that they collect information for U.S. intelligence services—whether or not that is, in fact, the case—and thereby potentially threaten local populations’ willingness to allow them access to civilian populations.¹¹² This, in turn, may jeopardize humanitarian organizations’ ability to access affected communities and endanger their personnel.

The recent experience of the Global Polio Eradication Initiative’s efforts in Pakistan illustrates some of these concerns. Taliban forces in rural Afghanistan—especially those in insecure border regions—expelled legitimate polio vaccinators after confirming reports that the U.S. Central Intelligence Agency sent in a team of hepatitis B vaccinators to gather information and DNA samples from the Bin Laden compound.¹¹³ The Taliban now targets polio vaccine efforts, and they have attacked and killed several workers.¹¹⁴ This extreme response on the part of the Taliban highlights the fragile nature and importance of humanitarian principles to humanitarian operations—a single incident can restrict access to entire populations as well as threaten the security of humanitarian personnel.

USAID responded to this concern in their comments to the final rule establishing the Partner Vetting System. The Agency encouraged humanitarian organizations to view its vetting program as an additional mechanism for determining the eligibility of organizations applying for U.S.G. funds. Specifically, the agency states that “PVS is not, and should not be characterized as, a system in which USAID implementing partners will be acting as agents for U.S. law enforcement or intelligence activities.”¹¹⁵ The Agency goes on to note that they designed the program to ensure that vetted individuals are not associated with terrorism, which “can only improve safety and reduce the risk of kidnappings, assassinations or injury.”¹¹⁶

Whether or not they adopt USAID’s recommendation as to how to view these activities, humanitarian organizations must collect identifying information from select subcontractors, sub-awardees, vendors, and beneficiaries with limited assurances that U.S.G. intelligence services will not retain this information. If asked, an honest humanitarian organization would need to explain to its partners that USAID will vet this information through intelligence databases, and if this search results in a match, the intelligence services may retain and make use of that information.¹¹⁷ This set of requirements very well may create the perception that certain humanitarian organizations regularly collect information for the U.S. intelligence services. Indeed, the State Department states that it “cannot ... control the

112. See generally, Khaled Mansour, *Unshackle Aid Workers*, AHARAM ONLINE, Aug. 29, 2013; Kate Mckintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (July, 2013) (published by OCHA and the Norwegian Refugee Council).

113. Donald G. McNeil Jr., *C.I.A. Vaccine Ruse May Have Harmed the War on Polio*, NEW YORK TIMES, July 9, 2012.

114. Polio-vaccination Team Targeted in Pakistan, AL JAZEERA AMERICA, Oct. 7, 2013.

115. Privacy Act of 1974, Implementation of Exemptions, Final Rule, 74 Fed. Reg. 9 (Jan. 2, 2009).

116. *Id.*

117. While both USAID and the State Department state that they will not retain identifying information in intelligence databases when a vetting inquiry does not result in a match, they make no such assurances when the inquiry results in a match.

perceptions of other parties about US government activities and must acknowledge the possibility.”¹¹⁸

Programmatic Costs

In addition to principled concerns regarding partner-vetting programs, these programs may frustrate practical components of humanitarian programming. Many humanitarian organizations expressed this concern in response to partner vetting.¹¹⁹

Recent audits of the West Bank and Gaza vetting program suggest that vetting decisions often take substantial time to turn around. A 2013 audit of one project notes that the “lengthy vetting process” required, on average, thirty days to complete.¹²⁰ Other reports suggest that response times ranged between one week and nine months.¹²¹

These same reports also suggest that these delays hinder programming. In one audit, Mission officials note that the delays caused a program to “lose momentum.”¹²² Mission officials point to delays related to vetting, as well as Congressional delays in releasing funding, as a cause for the Mission canceling 23 of 49 planned project activities.¹²³ A second audit found that vetting delays “slowed implementation of activities across all sectors,” noting one instance in which vetting delayed project implementation for two months.¹²⁴

USAID has not responded directly to these findings. However, in a public response to similar concerns issued before these audits were released, the Agency states that it will monitor the program in its early phases to calibrate for potential delays.¹²⁵

Privacy and Data Protection

Humanitarian organizations also may be concerned about whether the vetting programs comport with European Union data-protection and privacy laws, including whether the vetting programs adhere to provisions of the EU Privacy Directive 95/46/EC on Data Privacy (“Data Privacy Directive”). This Directive establishes guidelines for the lawful processing of personal data.¹²⁶

For instance, Article 25 of the Data Privacy Directive prohibits transferring personal information

118. Department of State, *Supporting Statement for Paperwork Reduction Act Submission — Risk Analysis and Management: OMB Number 1405-XXXX*, p. 1 (2012).

119. See, e.g., Privacy Act of 1974, Implementation of Exemptions, Final Rule, 74 Fed. Reg. 9 (Jan. 2, 2009).

120. USAID Office of Inspector General, *Audit of USAID/West Bank And Gaza’s Complete Project*, Audit Report No. 6-294-13-012-P, p. 5 (May, 2013).

121. United State Government Accountability Office, *Foreign Assistance: Measure to Prevent Inadvertent Payments to Terrorists Under Palestinian Aid Programs Have Been Strengthened, but Some Weaknesses Remain*, GAO-09-622, p. 11 (May, 2009).

122. USAID Office of Inspector General, *Audit of US.AID/West Bank And Gaza’s Complete Project*, Audit Report No. 6-294-13-012-P, p. 5 (May, 2013) (the delays were attributed to both the “lengthy vetting program” as well as Congressional delays in releasing funds).

123. *Id.*

124. USAID Office of Inspector General, *Audit of US.AID/West Bank and Gaza Palestinian Community Assistance Program*, Audit Report No. 6-294-13-006-P (Feb. 2013); See also Kate Mckintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, p. 101 (July, 2013) (published by OCHA and the Norwegian Refugee Council).

125. Privacy Act of 1974, Implementation of Exemptions, Final Rule, 74 Fed. Reg. 9 (Jan. 2, 2009).

126. Europea, *Summaries of EU Legislation: Protection of Personal Data*, http://europa.eu/legislation_summaries/information_society/data_protection/114012_en.htm (last visited Sept. 8, 2013).

to non-EU countries except under limited circumstances.¹²⁷ While the Directive permits transfer of personal information when “the third country in question ensures an adequate level of protection,” in practice few countries provide the requisite level of protection.¹²⁸ The Directive delegates the power to determine the adequacy of procedures to the European Commission, and, to date, it has not addressed the compatibility of the United States’ vetting programs with EU privacy standards.¹²⁹

In USAID’s response to submissions from NGOs about the proposed vetting program, it states that its preliminary legal review indicates that the vetting program does not violate the EU Directive, nor does it ask humanitarian organizations to violate it. Specifically, USAID states that the vetting program provides an “adequate level of protection” as required by the Directive.¹³⁰

While this brief does not aim to provide a definitive answer to these questions, it is worth noting that other complex legal issues have required political solutions in the past. For instance, when the United States announced in 2003 that international airlines must provide the U.S.G. with full electronic access to detailed airline passenger data contained on the airlines computers, the European Commission determined that that requirement violated the Data Privacy Directive.¹³¹ This led to a lengthy political compromise resulting in a 2011 agreement on the use of passenger records.¹³²

Humanitarian organizations may also be concerned about the security of the identifying information maintained by USAID. U.S. General Accountability Office audits of the West Bank and Gaza vetting program indicate that the USAID West Bank and Gaza Mission made weak efforts to secure the vetting management database in its early stages.¹³³ The weaknesses resulted in vetting records detailing key individuals’ links to terrorism being stored in unlocked filing cabinets, thereby providing Foreign Service nationals and others unrestricted access to this information.¹³⁴

The Need for Vetting

Given the host of existing counterterrorism requirements placed on humanitarian organizations, those organizations’ extant internal risk-mitigation and due diligence systems to vet their partners, and the concerns raised in this brief, some have voiced concern about whether the benefits of partner-vetting programs justify the costs. Humanitarian organizations note, and USAID does not dispute, that there are few documented cases in which U.S.G. funds were diverted by individuals or organizations aligned with terrorism.¹³⁵ Instead, USAID appears motivated by allegations that appear in the media, as well as

127. European Parliament and Council Directive 95/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Article 25 (1995).

128. Harvey Kaplan, et al., *A Primer on Data-Protection Principles of the European Union* (2009).

129. European Commission, *Commission Decisions on the Adequacy of the Protection of Personal Data in Third Countries*, http://ec.europa.eu/justice/data-protection/document/international-transfers/adequacy/index_en.htm (last visited Sept. 8, 2013).

130. Privacy Act of 1974, Implementation of Exemptions, Final Rule, 74 Fed. Reg. 9 (Jan. 2, 2009).

131. David Lawsky & Sabina Zawadzki, *Giving Airlines Data to US Illegal: EU Court*, REUTERS, Nov. 22, 2005.

132. See, Council Decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, Document 2011/0382 (NLE) (Nov. 23, 2011).

133. GAO, *Foreign Assistance: Recent Improvements Made, but USAID Should Do More to Help Ensure Aid Is Not Provided for Terrorist Activities in West Bank and Gaza*, GAO-06-1062R, p. 17 (Sept. 2006).

134. *Id.*

135. Privacy Act of 1974, Implementation of Exemptions, Final Rule, 74 Fed. Reg. 9 (Jan. 2, 2009).

concerns expressed by the Executive and Legislative Branches. USAID has noted there is an inherent risk of diversion in certain high-risk areas, and has stated that it “does not believe that it should wait for hard proof that our funds are actually flowing to terrorists before implementing additional safeguards.”¹³⁶

V. CONCLUSION

The USAID and State Department pilot partner-vetting programs aim to ensure that U.S. taxpayer funds do not reach listed terrorists. These programs join a series of existing due diligence and risk-mitigation measures already undertaken by humanitarian organizations to prevent the diversion of U.S.G. funds to terrorists and their supporters. The proposed implementation of the pilot partner-vetting programs seems to represent a government concern that current internal due diligence and risk-mitigation practices by humanitarians are inadequate or, at least, not well understood by government actors.

These vetting programs may raise several concerns for humanitarian organizations. One key element that distinguishes the partner-vetting programs from internal mechanisms within humanitarian organizations is that the vetting programs require humanitarian organizations to provide identifying information on local partners, and in some cases beneficiaries, for the express purpose of vetting those people through classified U.S.G. intelligence and law-enforcement databases. In doing so, the programs may be perceived as asking humanitarian organizations to compromise their fundamental principles of impartiality, neutrality, and independence. In addition, the partner-vetting programs may raise pragmatic concerns. The programs may taint local populations’ perceptions of humanitarian organizations and their personnel—causing them to appear as intelligence-gatherers—which may compromise the safety of humanitarian personnel and their access to affected populations. Moreover, USAID’s experience in West Bank/Gaza, suggests that partner-vetting programs may significantly delay programming in those areas. Finally, the programs may raise concerns about their compatibility with European privacy and data-protection laws.

136. *Id.*

APPENDIX A: GLOSSARY OF TERMS

Code of Federal Regulations (CFR):

The codification of the general and permanent rules published in the Federal Register by the departments and agencies of the U.S. Federal Government.

Federal Acquisition Regulations (FAR):

The codification of the general and permanent rules regarding the acquisition process published in the federal register by the departments and agencies of the U.S. Federal Government.

International Humanitarian Law (IHL):

A legal framework applicable in situations of armed conflict that seeks, for humanitarian reasons, to limit the effects of armed conflict by protecting persons who are not, or no longer, participating in hostilities and by restricting the means and methods of warfare.

Mission Order 201.5:

An order issued by USAID's Afghan Mission that establishes the procedures for USAID's partner vetting in Afghanistan.

Mission Order 21:

An order issued by USAID's West Bank/Gaza Mission that establishes the procedures for USAID's partner vetting in West Bank/Gaza.

Partner Vetting System (PVS):

The name given to USAID's pilot partner-vetting program that is currently planned for five countries: Guatemala, Kenya, Lebanon, the Philippines, and Ukraine. The term also refers to the database established by USAID to store and process the identifying information received as part of the pilot program.

Prime Awardee or Prime Recipient:

A recipient of U.S. Government funds who receives those funds directly from the U.S. Government.

Public International Organizations (PIO):

An international organization composed principally of countries as well as any other organization that USAID's Office of General Council or Bureau of Food and Security designate as a Public International Organization.

Risk Analysis and Management (RAM):

The name given to the U.S. Department of State's pilot partner-vetting program currently planned for five countries: Guatemala, Kenya, Lebanon, the Philippines, and Ukraine.

Office of Security (SEC):

The USAID office responsible for receiving and reviewing the information submitted to USAID by NGOs and for-profit contractors. The SEC is responsible for vetting this information through both public and classified intelligence and law enforcement databases.

Special Investigator General for Afghanistan Reconstruction (SIGAR):

An independent oversight entity created by the U.S. Congress and responsible for auditing and investigating Afghan reconstruction efforts for the U.S.G.

Subcontractor or Subawardee:

A recipient of U.S.G. funds who receives those funds under an agreement with a prime awardee, and not directly from the U.S.G.

Terrorist Screening Center (TSC):

A multi-agency organization administered by the U.S. Federal Bureau of Investigations that houses the consolidated U.S. Terrorist Watchlist.

APPENDIX B: PARTNER VETTING PROGRAMS AT A GLANCE

Program Name:	Agency	Date Implemented	Type	Situation	U.S. Citizens	Entities and Organizations that Require Vetting			
						Sub-Recipients	PIOs	Vendors	Beneficiaries
Partner Vetting Program (PVS)	USAID	Ongoing	Pilot	Guatemala, Kenya, Lebanon, Philippines, and Ukraine	Yes	In many circumstances	No Explicit Exception	In certain circumstances	In certain circumstances
Risk Analysis and Management (RAM)	U.S. State Department	Ongoing	Pilot	Guatemala, Kenya, Lebanon, Philippines, and Ukraine	Yes	In many circumstances	Unknown	Unknown	Unknown
Mission Order 21	USAID's West Bank/ Gaza Mission	2003	Permanent	West Bank/ Gaza	No	1st-tier subcontracts in excess of \$25,000 and all subgrantees	No	In certain circumstances	In certain circumstances
Mission Order 201.5	USAID's Afghanistan Mission	2011	Permanent	Afghanistan	No	All awards in excess of \$25,000	No	In many circumstances	In certain circumstances
State Department Vetting in Afghanistan	U.S. State Department in Afghanistan	2012	Permanent	Afghanistan	No	Unknown	Unknown	Unknown	Unknown

APPENDIX C: USAID PARTNER VETTING INFORMATION FORM (USAID FORM 500-13)



OMB 0412-0577
EXPIRATION DATE: 08/31/2011

PARTNER INFORMATION FORM (See Burden and Privacy Act Statements on Page 3)

Part I: Information About Proposed Activities		
1. Name of the prime contractor, grantee or recipient proposing the award or other assistance		
2. Type of proposed award or other assistance (check one): <input type="checkbox"/> Contract or Subcontract <input type="checkbox"/> Grant or Subgrant <input type="checkbox"/> Training <input type="checkbox"/> Equipment <input type="checkbox"/> Other		
3. US\$ amount and estimated start/end date of proposed award or assistance: Dollar amount: \$ Start: End:		
4. Purpose of proposed award or assistance:		
5. Organization proposed to receive award or other assistance:		
a. Name:		
b. Address:		
c. Telephone:	d. Fax:	e. Email:
6. Information on key individuals associated with the organization named in 5 above, or, if no organization is listed, information on each individual to receive cash or in-kind assistance (including technical assistance). Use continuation sheets as necessary.		
** = mandatory information.		
A. Name (As in passport or other government-issued photo ID):**	Government-issued photo ID number, type of ID and country of issuance:**	
Place of birth:**	Date of birth:** (mm/dd/yyyy)	Rank or title in organization listed in #5 (if "key individual"):**
Other names used (may include nicknames, pseudonyms not listed under "Name"):**	Gender:	
Current employer and job title:	Occupation:	
Address of residence:	Citizenship(s):	
Email:	Is the individual a U.S. citizen or legal permanent resident?** Yes <input type="checkbox"/> No <input type="checkbox"/>	
Part II: Contractor/Grantee/Recipient Certification:		
Contractor/Grantee/Recipient certifies in submitting this form that it has taken reasonable steps (in accordance with sound business practices) to verify the information contained in this form. Contractor/Grantee/Recipient understands that the U.S. Government may rely on the accuracy of such information in processing this vetting request.		
Name:	Signature:	
Title/Organization:	Date:	
Part III: Submission details (to be completed by USG vetting official)		
Vetting request number		
Staff member who initiated request		
Project name		
Date submitted for screening		

**Partner Information Form Continuation Sheet for Part I, Section 6: List of Individuals
(Use additional continuation sheets as necessary):**

B. Name (As in passport or other government-issued photo ID):**		Government-issued photo ID number, type of ID and country of issuance:**
Place of birth:**	Date of birth:** (mm/dd/yyyy)	Rank or title in organization listed in #5 (if "key individual"):**
Other names used (may include nicknames, pseudonyms not listed under "Name"):**		Gender:
Current employer and job title:		Occupation:
Address of residence:		Citizenship(s):
Email:	Is the individual a U.S. citizen or legal permanent resident?** Yes <input type="checkbox"/> No <input type="checkbox"/>	
C. Name (As in passport or other government-issued photo ID):**		Government-issued photo ID number, type of ID and country of issuance:**
Place of birth:**	Date of birth:** (mm/dd/yyyy)	Rank or title in organization listed in #5 (if "key individual"):**
Other names used (may include nicknames, pseudonyms not listed under "Name"):**		Gender:
Current employer and job title:		Occupation:
Address of residence:		Citizenship(s):
Email:	Is the individual a U.S. citizen or legal permanent resident?** Yes <input type="checkbox"/> No <input type="checkbox"/>	
D. Name (As in passport or other government-issued photo ID):**		Government-issued photo ID number, type of ID and country of issuance:**
Place of birth:**	Date of birth:** (mm/dd/yyyy)	Rank or title in organization listed in #5 (if "key individual"):**
Other names used (may include nicknames, pseudonyms not listed under "Name"):**		Gender:
Current employer and job title:		Occupation:
Address of residence:		Citizenship(s):
Email:	Is the individual a U.S. citizen or legal permanent resident?** Yes <input type="checkbox"/> No <input type="checkbox"/>	
E. Name (As in passport or other government-issued photo ID):**		Government-issued photo ID number, type of ID and country of issuance:**
Place of birth:**	Date of birth:** (mm/dd/yyyy)	Rank or title in organization listed in #5 (if "key individual"):**
Other names used (may include nicknames, pseudonyms not listed under "Name"):**		Gender:
Current employer and job title:		Occupation:
Address of residence:		Citizenship(s):
Email:	Is the individual a U.S. citizen or legal permanent resident?** Yes <input type="checkbox"/> No <input type="checkbox"/>	

** Indicates mandatory information

APPENDIX D: U.S. DEPARTMENT OF STATE'S RISK ANALYSIS INFORMATION FORM (DS-4184)



U.S. Department of State

OMB APPROVAL NO. 1405-0204
EXPIRES: 4/30/2015
ESTIMATED BURDEN: 75 Minutes*

RISK ANALYSIS INFORMATION

PART 1: INFORMATION ABOUT CONTRACT/GRANT/COOPERATIVE AGREEMENT			
Name of Prospective Contractor/Grantee		Type (<i>Contract, Grant, Other</i>): <input type="checkbox"/> Contract <input type="checkbox"/> Grant <input type="checkbox"/> Other _____	
US Dollar Value of Contract/Grant (<i>All Years</i>)	Contract/Grant Start Date (<i>mm-dd-yyyy</i>)	Contract/Grant End Date (<i>mm-dd-yyyy</i>)	Solicitation Number
Purpose of Contract/Grant			
Address of Prospective Contractor/Grantee			
Phone Number	Cell Phone Number	Fax Number	E-mail Address
PART 2: AFGHANISTAN			
Please provide the following information if proposed contract or grant work will be in Afghanistan.			
Afghanistan Business License Number		Joint Contingency Contract System (<i>JCCS</i>) Number	
PART 3: CERTIFICATION			
I certify that I have taken reasonable steps (<i>in accordance with sound business practices</i>) to verify the information contained in this form. I understand that the U.S. Government may rely on the accuracy of such information in processing this request.			
Authorizing Official's Name (<i>Last, First, MI</i>)		Title/Organization	
Signature _____		Date (<i>mm-dd-yyyy</i>) _____	
PART 4: SUBMISSION DETAILS (<i>GOVERNMENT USE ONLY</i>)			
Request Number		Request Initiator	
Project Name		Date Received (<i>mm-dd-yyyy</i>)	

PAPERWORK REDUCTION ACT STATEMENT		
<p>*Public reporting burden for this collection of information is estimated to average 75 minutes per response, including time required for searching existing data sources, gathering the necessary documentation, providing the information and/or documents required, and reviewing the final collection. You do not have to supply this information unless this collection displays a current valid OMB control number. If you have comments on the accuracy of this burden estimate and/or recommendations for reducing it, please send them to: U.S. Dept. of State, 2201 C St. NW, SA-15 room 3200, Washington, DC 20520.</p>		
PRIVACY ACT STATEMENT		
<p>Authority: 18 U.S.C. 2339A, 2339B, 2339C, 22 U.S.C. 2151 et seq., Section 559 of the Appropriations Act, Executive Orders 13224, 13099, and 12947, and Homeland Security Presidential Directive 6.</p> <p>Purpose: The information in the system supports the vetting of directors, officers, or other employees of organizations who apply for Department of State contracts, grants, or other funding. The information collected from the organizations and individuals is specifically used to conduct screening to ensure that Department funds are not used to provide support to entities or individuals deemed to be a risk to US national security interests.</p> <p>Routine Uses: The information is used to make determinations on applications for contracts, grants, or other funding and may be disclosed to the United States Agency for International Development (USAID) for collaborative and vetting programs.</p> <p>Disclosure: Disclosure of the information provided on this form will be done in accordance with the Department of State's System of Records Notice concerning the Risk Analysis and Management System (RAM) (enter SORN #) which establishes the routine uses and Privacy Act exceptions which apply to this system.</p>		
INSTRUCTIONS		
<p>Appendix Key Personnel (<i>Use continuation sheets, as necessary</i>)</p> <p>Key personnel may include but is not limited to:</p> <ul style="list-style-type: none"> • The organization/company's President, Vice President, Executive Director, Deputy Executive Director, Chief Executive Officer, Chief Operating Officer, Treasurer, Secretary, and the Board of Directors. • It may also include Program Managers or Project Managers. <p>Proposed Subcontractors or Sub-grantees must also complete a separate Information Form listing their key personnel.</p> <p>Indicate "N/A" if a category does not apply. If no organization or company is listed, complete the information on each individual who will receive cash or in-kind assistance (<i>including technical assistance</i>).</p>		
APPENDIX: KEY PERSONNEL INFORMATION		
Name (Last, First, MI)		Other Names Used (<i>"Also known as", nicknames, alias, different spelling</i>)
Place of Birth		Date of Birth (<i>mm-dd-yyyy</i>)
Citizenship(s)		Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female
U.S. citizen or Permanent Legal Resident? <input type="checkbox"/> Yes <input type="checkbox"/> No		
If yes, provide your U.S. Passport or Social Security Number _____		
Government Issued Photo ID Type	Government Issued Photo ID Number	Country of Issuance
Address	Phone Number	Cell Phone Number
	Fax Number	E-mail Address
Current Employer	Organizational Title	Project Title
Afghan Citizen Use Only (If Section 2 Has Been Completed)		
Father's Name		Tribe
Tazkera Number	Passport Number	Country of Issuance

ABOUT

The Project on Counterterrorism and Humanitarian Engagement (CHE Project) is based at the Harvard Law School. The CHE Project undertakes legal research, policy analysis, and engagement initiatives in order to identify and develop — as well as to facilitate networks to support — sustainable, principled, and practical solutions to the challenges of large-scale humanitarian operations conducted in areas where listed armed groups are active and counterterrorism laws affect humanitarian action.

This publication is part of the CHE Project's Research and Policy Paper series, which is intended to inform the humanitarian community regarding critical issues of law, policy, and practice related to counterterrorism and humanitarian action.

The CHE Project seeks to inform and shape debate regarding the intersecting trajectories of counterterrorism norms and humanitarian action. The Project does so principally by:

- Producing independent analyses of emerging and foundational challenges and opportunities concerning humanitarian engagement in situations involving listed non-state armed actors; and
- Engaging actors across international humanitarian NGOs, intergovernmental agencies, academic centers, and governments to capture, examine, and inform their perspectives and approaches.

The Counterterrorism and Humanitarian Engagement Project receives generous support from the Swiss Federal Department of Foreign Affairs.

CONTACT

Naz K. Modirzadeh
Senior Fellow
HLS-Brookings Project on Law and Security
Counterterrorism and Humanitarian Engagement Project
Harvard Law School
nmodirzadeh@law.harvard.edu