



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

To: The Committee on Regulation

From: Todd Rubin, Staff Counsel and In-House Researcher

Re: Project on Public-Private Partnerships

Date: July 24, 2018

This package contains the following materials:

- 1) A memorandum from the Committee Chair to the Committee
- 2) The draft recommendation
- 3) An appendix containing the draft *Guide to Legal Issues Encountered in Public-Private Partnerships*



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

To: The Committee on Regulation

From: Connor Raso, Committee Chair

Re: Project on Public-Private Partnerships

Date: July 24, 2018

In October 2015, the Administrative Conference of the U.S. (Conference) convened an expert roundtable composed of agency and private foundation representatives to discuss salient issues regarding public-private partnerships (P3s) and determine whether a Conference study and recommendation on P3s would be helpful in addressing those issues. The participants expressed support for a Conference project on P3s and the discussion elucidated a number of concerns that a potential study might address.

Based on this work, the Council of the Conference approved a project on P3s, and the Committee on Regulation met twice in the fall of 2016 to discuss the project. The Committee decided not to proceed with a recommendation for the Assembly's consideration. The then-Committee Chair suggested that the Office of the Chairman prepare a guide to legal issues encountered in P3s. The Office of the Chairman agreed to do so.

In the spring of 2017, at the suggestion of the Committee on Regulation, the Conference's Office of the Chairman convened dozens of federal officials from 21 different agencies who actively work on P3s. Throughout the course of three in-person meetings from July 2017 through February 2018, and various discussions with individual group members, the working group collaboratively drafted the *Guide to Legal Issues Encountered in Public-Private Partnerships (Guide)*, which can be found in the appendix. The draft *Guide* is, as its title indicates, centered on the major legal issues that agencies will likely encounter as they participate in P3s. It also offers a definition of P3s; briefly discusses a previous interagency effort regarding P3s; highlights activities that agencies often undertake as part of P3s; and provides examples of specific P3s. In addition, it discusses issues pertaining to agencies' vetting of potential private partners. Officials from the Office of Management and Budget offered feedback on the draft *Guide*, and the working group will continue to work with them as it is further developed.

The draft Recommendation below commends the *Guide*, which will be finalized by the December plenary session, to agencies and suggests some reforms to improve how agencies vet private sector entities. During the Committee meeting on July 31, and if necessary, future meetings, the Committee will discuss and vote on the draft recommendation, not the draft *Guide*.



Public-Private Partnerships

Committee on Regulation

Proposed Recommendation for Committee | July 31, 2018

1 Federal agencies, to assist in carrying out their missions, have long participated in public-
2 private partnerships (P3s).¹ An interagency working group has defined “public-private
3 partnerships” as “collaborative working relationships between the U.S. government and non-
4 federal actors in which the goals, structures, and roles and responsibilities of each partner, are
5 mutually determined.”²

6 P3s are distinct from other forms of interaction between agencies and the private sector,
7 such as regulatory relationships and meetings with private citizens, in that they entail: 1) a high
8 degree of collaboration between the agency and the private sector partners, both in the
9 conception of the partnership and in its administration; 2) mutual determination of roles, goals,
10 and responsibilities; and 3) written agreements or oral understandings, often formalized through
11 non-binding memoranda of understanding (MOU) or memoranda of agreement (MOA), or
12 binding contracts.

¹ The term “public-private partnership” is most commonly used to describe agreements between a government entity and a private firm in which the government owns and seeks to upgrade or replace an infrastructure asset, and the private partner designs, builds, finances, operates, or maintains the asset. The *Guide*, though applicable to such P3s, draws heavily on examples of other kinds of P3s, such as those that address health, labor, and diplomacy. Readers who are interested exclusively in infrastructure P3s should also consult, among other sources, U.S. Dept. of Treas., *Expanding the Market for Infrastructure Public-Private Partnerships: Alternative Risk and Profit Sharing Approaches to Align Sponsor and Investor Interests* (Apr. 2015).

² CMTY. P’S SHIPS INTERAGENCY POLICY COMM., BUILDING PARTNERSHIPS: A BEST PRACTICES GUIDE 1 n.1 (2013).



13 A private sector entity and the federal government may have a variety of reasons for
14 wanting to partner with one another. Both sectors may find, for instance, that a partnership with
15 the other allows them to access more resources and expertise. Expanded access to such resources
16 and expertise may allow them to complement and reinforce their missions, producing outcomes
17 with greater impact than they could achieve working entirely independently of one another.³

18 **Development of the *Guide to Legal Issues Encountered in Public-Private Partnerships***

19 In the spring of 2017, at the suggestion of the Committee on Regulation, the
20 Conference’s Office of the Chairman convened dozens of federal officials from 21 different
21 agencies who actively work on P3s. Throughout the course of three in-person meetings from July
22 2017 through February 2018, and various discussions with individual group members, the group
23 collaboratively drafted the *Guide to Legal Issues Encountered in Public-Private Partnerships*
24 (*Guide*).

25 The *Guide* addresses major legal issues that agencies will likely encounter as they
26 participate in P3s. The *Guide* also offers a definition of P3s, briefly discusses a previous
27 interagency effort regarding P3s, highlights activities that agencies often undertake as part of
28 P3s, and provides examples of specific P3s. Finally, the *Guide* discusses issues pertaining to
29 agencies’ vetting of potential private partners.

30 **Potential Inefficiencies in Vetting Private Entities**

31 Officials across agencies can benefit from sharing experiences with one another
32 regarding P3s. One issue that has emerged as a particularly good candidate for such interagency
33 discussion is how agencies conduct due diligence of potential partners (“vetting”). Vetting is the
34 process agencies undertake to evaluate a potential private partner to avoid possible conflicts of

³ See *id.* at 2.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

35 interest or harm to the agency’s reputation. Vetting can be very time intensive and a potentially
36 duplicative enterprise.

37 Agencies have differing practices with respect to vetting of private sector partners. Some
38 agencies have central vetting units with officers whose exclusive responsibility is to vet proposed
39 private sector partners and an official whose responsibility is to approve partnerships for the
40 entire agency. Other agencies lack a central vetting unit and, instead, authorize each of their
41 offices to conduct their own due diligence. Some of these latter kinds of agencies produce
42 resources that all staff are directed to use as they vet organizations and develop partnerships.

43 Duplication of vetting happens across agencies (“external duplication”) when two or
44 more agencies vet the same potential private partner using the same or substantially similar
45 criteria. Duplication also happens within agencies (“internal duplication”) when two or more
46 parts of a single agency vet the same potential private partner. Some agencies have developed or
47 are developing practices to avoid internal duplication. To date, there do not appear to have been
48 robust efforts to avoid external duplication.

49 Agencies with a centralized vetting unit are able to avoid internal duplication by
50 maintaining copies of their vetting reports and updating those reports rather than starting anew
51 when there is another request to partner with that same entity. Some agencies that do not have
52 centralized vetting units maintain central databases that allow all employees to manage P3s and
53 upload relevant documents, including vetting results. Other employees, as they begin exploring
54 potential partnerships, can access these databases and search them for past or current P3s and
55 supporting documentation before vetting a potential partner, thereby reducing or eliminating
56 duplicative vetting.



57 **Agency Officials Exchanging Best Practices Regarding P3s**

58 An online forum to exchange best practices on any number of issues involving P3s could
59 include:

- 60 • How the vetting process works structurally at each agency. For example, is there a central
61 vetting unit, or is vetting carried out office by office?
- 62 • Internal processes that agencies have developed, or are considering establishing, to
63 reduce duplication in vetting
- 64 • Complex legal issues encountered during the lifecycle of partnerships, and how they were
65 resolved.

66 The forum could also be structured to allow agencies to exchange resources, including
67 sample MOUs and MOAs; checklists or worksheets that agencies use when vetting; strategies for
68 evaluating the success of P3s; and notes about specific private sector entities that have been
69 vetted. These notes may help reduce external duplication by allowing agencies to see the results
70 of other agencies' vetting of specific entities.

71 MAX.gov, a website created by the Office of Management and Budget in 2007, can offer
72 such a forum. The website can be accessed only by those with a federal government email
73 address. An agency could set up an interagency P3 group on MAX.gov with forum topics
74 including the above-mentioned issues and resources.

75 **RECOMMENDATION**

- 76 1. All agencies that are considering, or are currently participating in, a public-private
77 partnership (P3) should distribute the *Guide to Legal Issues Encountered in Public-
78 Private Partnerships (Guide)* to attorneys in their general counsels' offices, or other
79 central legal offices, and should distribute it to partnership staff throughout the agency.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 80 2. The Office of the Chairman of the Administrative Conference of the United States should
81 create a group on MAX.gov (MAX) titled “Strategies for Developing and Managing
82 Successful P3s.” The group should consist of the following discussion topics, which may
83 be modified over time as participants so determine:
- 84 ○ How the vetting process works structurally at each agency. For example, is there a
85 central vetting unit or is vetting carried out office by office?
 - 86 ○ Internal processes that agencies have developed, or are considering establishing,
87 to reduce duplication in vetting
 - 88 ○ Complex legal issues that have arisen and how they were resolved
- 89 The group should also contain sections that allow agencies to upload sample MOUs and
90 MOAs; checklists or worksheets that agencies use when vetting; strategies for evaluating
91 the success of P3s; and notes about specific private sector entities that have been vetted.
92 Given agencies’ unique structures and historical roles, solutions to the common problem
93 of duplication will likely vary by agency.
- 94 3. All agencies that are considering, or are currently participating in, a P3 should encourage
95 staff that are responsible for P3 efforts to join the MAX group and actively participate in
96 the discussion topics and uploading of resources.

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

Introduction to the Guide

This Guide is intended to serve as a resource for staff of federal agencies that are considering participating in, or are currently participating in, public-private partnerships (P3s).¹ A private sector entity and the federal government may have a variety of reasons for wanting to partner with one another. Both sectors may find, for instance, that a partnership with the other allows them to access more resources and expertise. Expanded access to such resources and expertise may allow them to complement and reinforce their missions, producing outcomes with greater impact than they could achieve working entirely independently of one another.²

The Guide will start by briefly describing two previous interagency efforts to address issues regarding P3s. It will then point the reader to the interagency groups' definition of the term "public-private partnership." The Guide will then identify agency activities that are often associated with P3s. The specific activities this Guide highlights are: 1) Drafting of the Memorandum of Understanding (MOU)³; 2) Financial Transactions; and 3) Evaluating Results. There are, of course, many other kinds of activities that can comprise P3s, but it would be nearly impossible to list all possible activities. The Guide calls attention to these three specifically because they capture particularly well the ways that agencies and private entities interact with one another as the partnership is developed and carried out. Further, they relate to the major legal issues encountered in P3s, to be discussed in the Common Legal Issues section below.

The Guide then offers some examples of recent P3s in which agencies have participated, followed by a detailed discussion of some of the major legal issues that arise in P3s. Finally, the Guide discusses the importance of agencies' conducting due diligence (vetting) of potential private partners.

History of Interagency Efforts Regarding P3s

In 2012, a federal interagency working group, led by the National Security Council and consisting of 23 federal agencies, was established to define "public-private partnerships" and to address a range of cross-agency issues involving P3s. The group developed a best practices guide, using the following definition of a P3, which all agency participants in the working group approved:

"[A] collaborative working relationship[] between the U.S. government and non-federal actors in which the goals, structures, and roles and responsibilities of each partner, are mutually determined."⁴

¹ The term "public-private partnership" is most commonly used to describe agreements between a government entity and a private firm in which the government owns and seeks to upgrade or replace an infrastructure asset, and the private partner designs, builds, finances, operates, or maintains the asset. The *Guide*, though applicable to such P3s, draws heavily on examples of other kinds of P3s, such as those that address health, labor, and diplomacy. Readers who are interested exclusively in infrastructure P3s should also consult, among other sources, U.S. Dept. of Treas., *Expanding the Market for Infrastructure Public-Private Partnerships: Alternative Risk and Profit Sharing Approaches to Align Sponsor and Investor Interests* (Apr. 2015).

² See CMTY. P'SHIPS INTERAGENCY POLICY COMM., BUILDING PARTNERSHIPS: A BEST PRACTICES GUIDE 2 (2013).

³ Some agencies use Memoranda of Agreement (MOA) rather than MOUs. This Guide will use the term "MOU" but the same principles apply to MOAs.

⁴ See CMTY. P'SHIPS INTERAGENCY POLICY COMM. *supra* note 2 and 1 n.1.

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

P3s are distinct from other forms of interaction between agencies and the private sector, such as regulatory relationships and meetings with private citizens, in that they entail: 1) a high degree of collaboration between the agency and the private sector partners, both in the conception of the partnership and in its administration; 2) mutual determination of roles, goals, and responsibilities; and 3) written agreements or oral understandings, often formalized through non-binding memoranda of understanding (MOU) or memoranda of agreement (MOA), or binding contracts.

In the spring of 2017, at the suggestion of the Administrative Conference of the United States' (the Conference's) Committee on Regulation, the Conference's Office of the Chairman convened dozens of federal officials from 21 different agencies who actively work on P3s. Throughout the course of three in-person meetings from July 2017 through February 2018, and various discussions with individual group members, the group collaboratively drafted this Guide.

Agency Activities Often Associated with P3s

Drafting Memoranda of Understanding

A memorandum of understanding (MOU) is a non-binding, written document that defines the roles and responsibilities of each party.⁵ The drafting of the MOU is the process by which the vision of the partnerships is formalized in writing. There are many reasons an agency might want to formalize its partnership through one or more MOUs, including policy and logistical reasons such as measuring the impact and effectiveness of the partnership, and specifying the duration of the partnership. An MOU can also help ensure that both parties stay well within the bounds of ethical and other legal requirements, some of which are discussed in the Common Legal Issues section below. Numerous agencies have wisely adopted internal policies that require P3s to be formalized through an MOU, even if a statute does not require it. All MOUs should be drafted in consultation with the agency's designated legal counsel.

Financial Transactions

A grant, contract, gift, or other financial transaction between an agency and a private sector entity or individual does not itself establish a P3. However, P3s might involve such transactions, which should be reviewed by agency counsel.

At a minimum, agencies and their private partners nearly always spend funds on day-to-day or operational expenses such as the salaries of employees involved in the activities of the P3. Travel and the purchase of supplies or equipment may also be involved, depending on the roles of the partners.

Beyond routine expenses, P3s may involve more substantial expenditures of funds directly in furtherance of the goals of the P3. For example, an agency and a private foundation that have similar missions (say, for instance, to reduce childhood obesity) might decide to work together to advance their missions by identifying grassroots organizations that encourage healthy eating

⁵ See CTRS. FOR DISEASE CONTROL & PREVENTION, DEVELOPMENT AND EXECUTION OF MEMORANDA OF UNDERSTANDING AND MEMORANDA OF AGREEMENT OPERATIONAL POLICY 2 (2013).

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

habits for children and agree to each fund one or more such organizations. Funding of this sort is often called an “aligned investment.”

In this case, the grant from the agency to the organization can be thought of as one part of a large bundle of actions that comprise the P3. Other actions that comprise the P3 may include the drafting of the MOU between the agency and the foundation, the joint strategizing of the vision and mission of the partnership, and the joint evaluation of the results of the partnership.

Evaluating Outcomes

P3s are often undertaken for a specific social purpose. A given P3 might be initiated, for example, to reduce recidivism or homelessness, increase literacy, or to remedy water pollution. Agencies and their private partners often attempt to evaluate how successful their initiatives have been in achieving these goals.

Evaluation may consist of hiring an independent third party to collect and analyze data, or doing the data collection and analysis “in-house,” using the agency’s or private partner’s staff (or both in tandem). Agencies and private partners often work closely with one another as they identify a suitable third-party evaluator, perform the relevant analyses, interpret the results, and decide whether to modify, continue, or terminate the partnership based on the evaluation.

In some P3s, evaluation and achievement of outcomes are pre-conditions for awarding of funding. This kind of funding mechanism is sometimes referred to as “Pay for Success,” “Pay for Results,” or “Performance-based Contracting.” For example, the U.S. Department of Veterans Affairs and the Corporation for National and Community Service are administering a P3 to improve employment outcomes for veterans with Post Traumatic Stress Disorder. To receive funding, applicants must illustrate that, over an 18-month period, they have fulfilled certain metrics related to employment outcomes for such veterans. An independent third party analyzes the data, but the VA itself is also heavily involved in defining outcomes. The evaluation is a joint enterprise between the VA and the third-party evaluator.

Examples of P3s

Example 1: Occupational Safety and Health Administration’s (OSHA’s) Strategic Partnership agreements. Under these agreements, OSHA enters into an extended, voluntary, cooperative relationship with private sector employers, groups of employers and with labor unions to encourage, assist, and recognize their efforts to eliminate serious hazards and achieve a high level of worker safety and health. The partners work with OSHA in a cooperative manner to find solutions to the problems of worker safety and health. Partnership agreements may include commitments to work with the agency to collect and analyze relevant data, develop and carry out training programs, develop guidance about best practices, and engage in other efforts to improve worker safety and health.⁶

Example 2: State Department Diplomacy Lab. Under this program, the State Department partners with various colleges and universities and signs MOUs with these institutions laying out

⁶ See OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR PARTNERSHIP: AN OSHA COOPERATIVE PROGRAM, <https://www.osha.gov/dcsp/partnerships/index.html> (last visited Aug. 18, 2017).

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

the parties' responsibilities. The program seeks to engage Americans in the work of diplomacy and broaden the State Department's research base. The State Department provides potential partner institutions with a list of project proposals on topics including counterterrorism, energy security, and economic policy. Institutions identify faculty members who can lead teams of typically at least four students to develop work products for these proposals, and they submit bids for their preferred projects. The final work products take various forms, including brief policy memoranda, research papers, statistical analyses, and data sets, which are specified by the Department in its project announcements.⁷ Students performing research are given the opportunity to meet with State Department officials such as career diplomats for the purpose of presenting their findings.

Example 3: DOJ, HHS and HUD's Partnership for Freedom. Under this program, which ended in 2016, the U.S. Department of Health and Human Service's Administration for Children and Families, the U.S. Department of Housing and Urban Development (HUD), and various offices within the U.S. Department of Justice partnered with an organization called Humanity United to combat human trafficking. Humanity United provided staff time, expertise, and overall coordination of the project. Additionally, Humanity United authorized funding for a prize competition for eligible entities that could demonstrate innovative approaches to combating human trafficking. The agency partners provided staff time for the overall coordination of the project and pledged funding for organizations that work on human trafficking initiatives. The parties also jointly evaluated and monitored results and engaged in outreach and publicity surrounding the project.⁸ Responsibilities were memorialized through an MOU.

Common Legal Issues that Arise in P3s

The below describes the most common legal issues that agency officials should consider before they participate in, and as they participate in, a P3. It is not exhaustive. Each partnership will likely raise a unique set of legal issues that cannot be captured in a single document.

Authorization and Appropriations

Agencies are creatures of statute.⁹ As such, they may only act pursuant to statutory authority, which can be found in the agency's authorizing statutes and appropriations statutes. Although agencies generally do not need specific authority to participate in a P3, an agency considering participating in a P3 must carefully identify the specific actions that it will take under the P3, and then determine whether it has statutory authority to take those actions or perform those functions. In addition, if an agency will obligate and expend funds in furtherance of the P3, it must ensure it has the legal authority to do so.

In other words, an agency may obligate and expend money in furtherance of a P3 only if the obligation and expenditure is consistent with the terms of the statute appropriating the funds or another authorizing statute. This includes the use of employee time in furtherance of the P3, which may be done only if the employee time is being used in compliance with the agency's

⁷ See SEC'Y'S OFFICE OF GLOB. P'SHIPS, U.S. DEP'T OF STATE, DIPLOMACY LAB, <https://www.state.gov/s/partnerships/ppp/diplab/> (last visited Aug. 18, 2017).

⁸ See PARTNERSHIP FOR FREEDOM, <https://partnershipforfreedom.org/> (last visited Aug. 18, 2017).

⁹ See, e.g., *Atlantic City Elec. Co. v. F.E.R.C.*, 295 F.3d 1, 8 (D.C. Cir. 2002).

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

authorizing statutes and any statutes that provide authority to obligate and expend funds for the salaries of the employees.

The U.S. Government Accountability Office's Principles of Federal Appropriations Law (commonly known as "the GAO Red Book") is a comprehensive, authoritative source for matters related to appropriations and authorization.¹⁰ Agencies should consult the GAO Red Book, along with their authorizing and appropriations statutes, to ensure that the actions they take in furtherance of a P3 comply with all requirements.

Endorsement

A variety of ethics considerations arise with respect to P3s. One such consideration is endorsement. According to the Standards of Ethical Conduct for Employees of the Executive Branch, "An employee shall not use or permit the use of his Government position or title or any authority associated with his public office to endorse any product, service or enterprise."¹¹ The Standards do not specifically define "endorsement," but note as a hypothetical example a government official appearing in a commercial encouraging people to buy a product.

Although there is generally a wide prohibition on endorsements, the Standards do provide exceptions to this general prohibition for authorized statements of an individual employee acting in an official capacity, when such endorsement is in "furtherance of statutory authority to promote products, services or enterprises" or "[a]s a result of documentation of compliance with agency requirements."¹² In addition to the Standards, there are statutes, regulations, and other policies that may limit the unauthorized use of agency names, logos, seals, decorations, insignia, or symbols.

In the context of partnerships, private partners sometimes wish to highlight their affiliation with a government agency, or perhaps even use the agency's logo, on their websites. Although this area is highly fact-dependent, such actions could appear to constitute "endorsements," even if an agency official is not involved in the private partner's decision to highlight the partner's affiliation with the agency. Therefore, the MOU should specify to what extent a private partner may highlight its affiliation with the government agency or use agency logos, and ensure that the private partner obtain written permission from the agency before it publishes any statement highlighting its affiliation with the agency or uses the agency logo. Before such permission is granted, the agency's designated counsel should review the proposed statement or use of the logo to ensure it does not create the perception of an impermissible endorsement or violate other relevant law.

Personally Identifiable Information Generally

Agencies are required to develop, implement, document, maintain, and oversee an agency-wide privacy program that includes people, processes, and technologies. Agencies' privacy programs are led by Senior Agency Officials for Privacy (SAOPs). SAOPs manage privacy risks, develop

¹⁰ See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 3rd ed. (Jan. 2004)

¹¹ 5 C.F.R. § 2635.702(c) (2018).

¹² *Id.*

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

and evaluate privacy policy, and ensure compliance with all applicable statutes, regulations, and policies regarding the creation, collection, use, processing, storage, maintenance, dissemination, disclosure, and disposal of personally identifiable information (PII) by programs and information systems. The term “PII” refers to information that can be used to distinguish or trace an individual’s identity, either alone or when combined with other information that is linked or linkable to a specific individual.

Partnerships may, at times, entail the sharing of PII between government and private partners. There are a series of federal requirements of which agencies must be aware with respect to any material that may contain PII. The Privacy Act of 1974,¹³ privacy provisions of the E-Government Act of 2002, the Federal Information Security Modernization Act of 2014, as well as the Office of Management and Budget’s (OMB) implementing guidance (e.g., OMB Circular A-130) are some of those key authorities. Agencies’ privacy programs are required to ensure that entities that create, collect, use, process, store, maintain, disseminate, disclose, or dispose of information on behalf of a Federal agency or that operate or use information systems on behalf of a Federal agency comply with the privacy requirements in law and OMB policies.

Among other responsibilities, this includes documenting and implementing policies and procedures for privacy oversight of contractors and other entities and ensuring that privacy controls selected for information systems and services used or operated by contractors or other entities on behalf of the agency are effectively implemented and comply with National Institute of Standards and Technology standards and guidelines and agency requirements. Agencies’ partnership staff should consult with their agencies’ SAOP and/or privacy program staff for additional guidance.

The Freedom of Information Act

All information or records a private partner submits to a federal agency are subject to public disclosure under the Freedom of Information Act (FOIA). If an agency receives a FOIA request for agency records, it may assert several statutory exemptions. For example, FOIA exempts from release certain confidential or proprietary information (known as a (b)(4) exemption).¹⁴ It also exempts from release information that would invade another individual’s personal privacy, provided that there is not a sufficiently overriding public interest for the release of the information (known as a (b)(6) exemption).¹⁵

In the MOU, agencies should include a clause covering FOIA applicability that instructs partners, before they turn over any documents to the agency, to mark as proprietary any communications that might reveal trade secrets or confidential business information, which generally includes financial information and organizational processes and operations. Additionally, the MOU should note that the private partner should label any names or personal information associated with documents they hand to the agency, such as addresses or phone numbers, as PII. The MOU should, in addition, note that such marking does not guarantee that a

¹³ See 5 U.S.C. § 552a (2012).

¹⁴ Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2012).

¹⁵ Freedom of Information Act, 5 U.S.C. § 552(b)(6) (2012).

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

document or piece of information will, in fact, be protected from disclosure, since an agency determination that the information is exempt could be challenged in court.

If the agency receives a FOIA request, agency counsel should carefully review all materials that the private partner marked as confidential or as containing PII to ensure that such designations are correct, and should review other materials to determine whether a potential exemption applies. If there is a relevant FOIA request, and the information qualifies as agency records, the agency must release to the requestor all relevant agency records that do not meet one of the statutorily delineated exemptions.

Ownership of Partnership-Related Intellectual Property, including Proprietary Data

Agency counsel should be mindful of the fact that intellectual property, including proprietary data, may be developed during the course of a P3. This may result in disputes between the agency and the private partner, or between an agency's employee and the agency, as to who owns the property. For example, a private sector partner may enter a P3 with technology that it owns, but then, during the course of the P3, both the public and private entities improve upon or otherwise work on it. Disputes could arise about which partner owns the improvements and whether the other partner must license its use.

Who owns intellectual property, including proprietary data, and under what conditions, are highly fact-dependent inquiries that elude generalization. Counsel should be very familiar with the relevant statutes, regulations, and guidance that pertain to ownership of intellectual property,¹⁶ and should consider including a statement in the MOU that these statutes, regulations, and guidance will be used to resolve questions of ownership and use of any intellectual property, including proprietary data, created or modified during the course of the P3.

The Paperwork Reduction Act

The Paperwork Reduction Act (PRA) applies when the federal government seeks to collect information from non-federal actors. Generally, if an agency intends to collect "information" from at least ten people, not acting in their capacity as federal employees, it must submit an information collection request to the Office of Information and Regulatory Affairs, within the Office of Management and Budget (OMB), for review.

The PRA is potentially relevant to many different activities carried out under a P3. For example, it applies to any applications that an agency puts forward to participate in a P3 (just as it applies to grant applications). It also potentially applies to reporting obligations that are part of the P3; any recordkeeping requirements; any required disclosures that are part of the MOU; and any collections used to evaluate the P3.

It is important to note that "information" is a term of art as used in the PRA. Under some circumstances, if an agency requests certain kinds of "information," the PRA might not apply. For example, the PRA does not apply to general solicitations of information or feedback.¹⁷ An agency that runs a prize competition, for example, need not concern itself with the PRA as long

¹⁶ See ENVTL. PROT. AGENCY, FEDERAL TECHNOLOGY TRANSFER ACT AND RELATED LEGISLATION, <https://www.epa.gov/ftta/federal-technology-transfer-act-and-related-legislation>.

¹⁷ See 5 C.F.R. § 1320.3(h) (2018).

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

as it frames its request for ideas in an open-ended way that “permits respondents to create their own submissions.”¹⁸ However, if it requires participants to answer standardized questions (other than those questions necessary to contact the contestant), including demographic questions, the PRA does apply.¹⁹

Agency counsel should carefully review the PRA and associated guidance to determine whether the information collection requirements apply to a particular activity envisioned by its agency in relation to a partnership. The applicability of the PRA will vary on a case-by-case basis.

Special Legal Requirements Pertaining to Contracts, Grants, and Other Financial Transactions

As discussed above, financial transactions are not in and of themselves P3s. Nonetheless, P3s may involve a variety of financial transactions, including contracts and grants. Agencies considering awarding grants or contracts, or making other financial transactions pursuant to a P3 (or otherwise) must first locate their authority to do so in any relevant authorizing or appropriations statutes. Those provisions will instruct the agency on how much they may spend or obligate, the time period during which they may spend or obligate, who may receive the funding, and the purposes for which funds may be used.

Beyond authorizing and appropriations statutes, there are several government-wide authorities that agencies must consult before engaging in any financial transaction. These include the Federal Acquisition Regulation (FAR), the Procurement Integrity Act, relevant supplemental agency regulations for procurement, and the OMB Uniform Guidance for grants and cooperative agreements. Furthermore, the DATA Act, Executive Order 13,576, the Federal Financial Accountability and Transparency Act of 2006, and the Federal Grant and Cooperative Agreement Act are some of the authorities that structure OMB guidance and internal agency procedures concerning grants and cooperative agreements.

The FAR is the primary regulation applicable to all Federal Executive agencies in their acquisition of supplies and services with appropriated funds. For contracts below the simplified acquisition threshold, the FAR Part 13 lays out simplified acquisition procedures.²⁰ The threshold changes periodically. The 2018 Defense Authorization Act increased the simplified acquisition threshold from \$150,000 to \$250,000.²¹

In general, contracts, grants, and other financial transactions must be competed. However, there are some exceptions to this general rule. The FAR, for example, allows agencies to award “sole source” contracts under certain circumstances.²² Agencies that wish to award grants, contracts, or

¹⁸ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FREQUENTLY ASKED QUESTIONS RELATED TO CHALLENGES AND PRIZES 1 (2010), available at

<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/challenge-and-prizes-faqs.pdf>.

¹⁹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDEPENDENT REGULATORY AGENCIES 7 (Apr. 7, 2010), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

²⁰ See 48 C.F.R. pt. 13 (2017).

²¹ See 2018 Defense Authorization Act, Pub. L. No. 115-91, 131 Stat. 1283.

²² See 48 C.F.R. §6.303-1 (2017) (requirements for awarding sole source contracts).

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

other financial transactions to any entity on a sole source basis must adhere strictly to the relevant authorities, which almost always require transparent analysis justifying the deviation from open competition.²³

Most acquisition and procurement-related information can be found at acquisition.gov. There is a tab at the top of that website that allows users to search the FAR, and another tab that allows users to search the supplemental agency regulations.

Gift Acceptance Authority

As discussed above, financial transactions such as gifts do not in themselves establish P3s. However, P3s sometimes involve gifts from a private sector entity or individual to an agency. Absent statutory authority, agencies may not augment their appropriations from sources outside the government, including from gifts. Many federal agencies, however, have gift acceptance authority, which can overcome augmentation concerns. Gifts may include both in-kind and monetary resources. The parameters of an agency's gift acceptance authority vary. For instance, some agencies may not accept conditional gifts or gifts of real or personal property. Other agencies have broad authority to accept and utilize gifts and property, and to utilize the services and facilities of various entities with or without reimbursement.²⁴

Conditional gifts are especially relevant to P3s because donors often wish to place limits on the use of the gift funds; at times, donors have asked the agency to sign grant agreements or similar documents. If an agency lacks the statutory authority to accept conditional gifts, the gifts that place a duty, burden, or condition upon the government cannot be accepted.²⁵

Given that gift funds are public funds, certain requirements attach. If the gift funds will be used to acquire services or to make a grant, they may need to be competed. Agencies may wish or be bound to follow established procedures, including publication in the *Federal Register* of notices of awards made with gift funds. It may also be advisable to notify Congress. For example, the Explanatory Statement accompanying HUD's annual appropriation directs HUD to notify Congress when it establishes a new program, even with a gift. HUD did so with the Strong Cities Strong Communities (SC2) Fellowship Program, funded by a gift from the Rockefeller Foundation, by including the \$2.5 million gift in its FY 2012 budget justifications.

The gift of services, which commonly arises when a private partner offers its employees' time to the agency, presents other complexities. First, agencies should check whether their authorizing statutes specifically permit them to accept voluntary services, and under what circumstances. Such language will be controlling.

²³ See 48 C.F.R. §6.303-1 to 6.303-2 (2017)

²⁴ See, e.g., 5 U.S.C. § 595(c) (2012).

²⁵ See *Story v. Snyder*, 184 F.2d 454, 456 (D.C. Cir. 1950). For example, the Department of State is generally permitted to accept conditional gifts "at the discretion of the Secretary." 22 U.S.C. § 2697(a) (2012).

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

Generally, people enrolled in educational programs (i.e., students), may lend their services to the government without pay, provided that they are receiving academic credit.²⁶ To accept voluntary services from any private sector individual other than students, agencies must be aware of at least two statutes that apply governmentwide: the Intergovernmental Personnel Act (IPA) and the Antideficiency Act (31 U.S.C. §§ 1341–54 (2012)). The IPA permits agencies to accept detailees, without paying them, provided that the detailee is permanently employed by an eligible entity, which includes non-profit organizations that the agency has certified as eligible to participate as an IPA sponsor.²⁷ Agency counsel should be familiar with the IPA and its regulations before accepting an IPA detailee.

If an agency accepts voluntary services from any non-student other than a detailee approved pursuant to a valid IPA agreement, and if the agency does not have specific statutory authority to accept services from such volunteers, it runs a high risk of violating the Antideficiency Act. Although the agency may be able to avoid an Antideficiency Act violation if it receives a written waiver of payment from the prospective volunteer, the far safer course for the agency seeking voluntary services from non-student private sector individuals is to accept a detailee using the IPA process.²⁸

Permissible Categories of Partners

Most agencies do not have a general statutory or other regulatory or ethical bar to partnering with certain kinds of organizations (e.g., for-profit organizations). However here, as elsewhere, the agency's authorizing statute should be the guide.

Assuming there is no statutory prohibition to partnering with certain kinds of organizations, agencies have broad discretion to select the kind of partner. In general, an agency may engage in partnerships with both non-profit and for-profit enterprises, including private businesses, foundations, financial institutions, philanthropists, investors, business and trade associations, faith-based organizations, international organizations, universities, civic groups, and service organizations.²⁹

Agencies' ethics counsel may wish to limit that discretion on a case-by-case basis or more broadly based on political or other agency-specific considerations. Some agencies, such as the Food and Drug Administration and HUD, primarily partner with non-profit organizations based on guidance from ethics counsel, whereas other agencies, such as the Department of State and the United States Agency for International Development (USAID), readily work with for-profit partners.

Personal and Organizational Conflicts of Interest

²⁶ See 5 U.S.C. § 3111 (2012) (permitting voluntary services rendered by student interns)

²⁷ See 5 U.S.C. §§ 3371–75 (2012).

²⁸ See Dep't of the Treasury—Acceptance of Voluntary Services, B-324214, 2014 WL 293545 (Comp. Gen. Jan. 27, 2014).

²⁹ See CMTY. P'SHIPS INTERAGENCY POLICY COMM, *supra* note 2, at 6.

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

Agencies must be aware of the potential for conflicts of interest in the selection of partners, and must take safeguards to guard against such conflicts. Conflicts can arise both with respect to individual employees (“personal conflicts of interest”) and with respect to the agency as a whole (“organizational conflicts of interest”). A personal conflict of interest arises when an employee of an agency has a financial or imputed financial stake in a particular private entity that seeks a partnership with the agency. That employee would therefore have a financial interest in securing a partnership between the agency and the entity. Under federal law, the employee would be disqualified from taking part in the agency’s decision to partner with the entity, subject to criminal and civil penalties. As a result, the agency must guard against the possibility of such conflicts of interest arising.

An agency might consider requiring employees, before they become involved in the solicitation and selection of private sector partners, to commit to informing agency counsel if they have a financial stake in the entities they are considering for partnership. Additionally, the agency might consider having agency counsel review available records such as previously filed financial disclosure reports to determine whether such employees would have a disqualifying financial interest in a partnership the agency is considering. Agencies may also consider requiring such employees to file confidential financial disclosure reports, if they are not already required to do so.³⁰

The legal basis for the avoidance of such conflicts is found in the Standards of Ethical Conduct for Employees of the Executive Branch,³¹ and the criminal conflict of interest statutes (18 U.S.C. § 201-209 (2012)), which prohibit executive branch employees from participating in government matters that will affect their financial interests.³² The financial disclosure requirements that are overseen by the U.S. Office of Government Ethics are intended to uncover and eliminate potential conflicts of this sort.³³

Organizational conflicts of interest can arise when potential partners have applied for grants or contracts in the recent past with the agency or plan to do so in the future. They may also arise when a partner is lobbying Congress on issues relevant to the agency, has activities, products, or interests directly in conflict with the agency’s mission, is regulated by the agency, or has meetings planned in which the partner is seeking favorable agency action.³⁴

³⁰ 5 C.F.R. § 2634.904(a)(1)(i) (2018).

³¹ 5 C.F.R. pt. 2635 (2018).

³² Agencies should also consider the potential application of other relevant criminal conflict of interest laws. *See* 18 U.S.C. §§ 201–209 (2012).

³³ *See* 5 U.S.C. app. §§ 101–111 (2012); 5 C.F.R. pt. 2634 (2018).

³⁴ The Centers for Disease Control and Prevention (CDC), for example, considers the following to be sources excluded from partnerships with the agency: tobacco corporations or foundations related to tobacco corporations; private interests involved in the manufacture, sale, or distribution of products or services that in CDC’s view directly conflict with agency missions and do unequivocal harm to the public’s health; private entities that seek to fund an investigation into their own conduct and practices; and entities that seek to exercise undue influence over the design, management, reporting of results, or the dissemination of findings and will not agree to modifications that permit the CDC to maintain control of all phases of the project and avoid undue influence, either in fact or appearance.

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

To guard against organizational conflicts, agency ethics counsel should conduct due diligence and vetting of potential partners. During such vetting, agency counsel should examine whether the potential partner has applied for contracts or grants from the agency in the recent past or plans to do so in the future. Ethics counsel should also consider whether the partner is currently lobbying Congress on issues relevant to the agency, is regulated by the agency, or has meetings planned in which the partner is seeking favorable agency action.

If agency partnership staff and counsel determine that a given P3 would reflect poorly on the agency, or that a private entity is attempting to gain preferential treatment from the agency, it should exclude from consideration that private sector entity. Furthermore, once a partner is selected, it is incumbent on the office participating in the P3 to ensure that personal and organizational conflicts do not arise during the course of the partnership.

Within such boundaries, agency staff should feel free to explore potential partnerships. A recommended best practice to avoid preferential treatment concerns is to issue a general notice to, or have discussions with, a broad audience of potential partners, rather than approaching partners individually. The selection should be made based on objective criteria rooted in the agency's interests for choosing the partner. Once a partner is selected, the agency should be prepared to articulate why that partner was selected.

Due Diligence

Running afoul of relevant legal requirements can result in severe consequences for the agency, including unfavorable inspector general reports, congressional inquiries and investigations, litigation, and financial penalties. These consequences, in addition to the underlying agency action that led to them, cast the agency in a negative light. However, even if the agency complies with all relevant laws, its reputation may suffer if it partners with an entity that does not, or if that entity exhibits otherwise unethical conduct.

Therefore, before any partner is selected, the agency must perform due diligence and research the potential partner for any positive or negative impacts a relationship may have on the agency's reputation. The scope of the review is at the discretion of the agency and its ethics counsel, but the public image and motivation of the private partner, its financial soundness, dedication to social and environmental responsibility, and conflicts of interest as described above, comprise some relevant factors.

Due diligence requires a substantial amount of time and resources. Commonly, agency ethics counsel research publicly available information and conduct reference checks. The research informs an evaluation of the risks and benefits of an association with the presumptive private partner. Some of the factors relevant to a due diligence inquiry include whether the private entity is likely to be an effective partner; any legal claims made against the partner or substantiated claims of impropriety; whether the partner is party to any pending legal action brought by or against a government agency; and whether the partner is complying with industry standards and practices, as well as applicable laws and regulations. If social and environmental responsibility is a significant issue, the partner's reputation, labor policies and practices, the nature of the goods or services from which it profits, and how much a share of its business such activities account for

Appendix

Work Product of the Public-Private Partnerships Working Group (Convened by the Office of the Chairman of the Conference)

should all be considered. Finally, the public image of the partner, and its motivation for pursuing the partnership (both subjective qualities, to some extent) are basic elements of the due diligence process.

The multifaceted nature of this inquiry is, at its core, an effort to arrive at a prudential judgment about how a potential partnership might affect the agency's reputation. The extent of the vetting is at the discretion of an agency's internal process, agency ethics counsel or other designee.

DRAFT