



## Administrative Conference of the United States

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### PUBLIC-PRIVATE PARTNERSHIPS

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**Introduction:**

This report analyzes the most pressing legal and policy issues raised by public-private partnerships. A variety of federal agencies have explored and even embraced such partnerships as a solution to some of the most intractable and complex problems agencies face. The advantages a public-private partnership offers are many, including private sector expertise otherwise unavailable to a particular agency, additional resources in an era of fiscal constraint, and the opportunity to experiment with policies and programs. Attendant upon such opportunities are risks, especially those involving an unwitting violation of federal laws, regulations, or requirements. Moreover, the adverse publicity arising from an unsuccessful partnership contributes to an understandable reluctance or risk aversion among some agency general counsel offices. This report aims to address some of these risks, namely to provide some guidance on legal issues partnerships raise, in order to enable agencies to better evaluate the risks and rewards partnerships offer and to share current legal practices on partnerships.

Because public-private partnerships involve novel and crosscutting issues that do not fall neatly into ethics, appropriations, or procurement law – the conventional divisions in agency general counsel offices – legal expertise is likewise segmented. In addition, the temporary, ad-hoc nature of the various panels and workshops used for sharing best practices means such expertise is consequently diffuse and impermanent. This report will address the segmentation of expertise and the lack of institutional knowledge that impede agencies from utilizing partnerships efficiently and effectively. It will highlight best practices for building partnerships as well as identify the common legal barriers partnerships must overcome and offer guidance on how agencies, and agency general counsel offices, in particular, can navigate the maze of appropriations, procurement, and ethics requirements, to name a few, applicable to public-private partnerships.

This report proceeds as follows: Part I surveys agency definitions of public-private partnerships, various forms of partnerships, and identifies core components. Part I also reviews relevant presidential memoranda and executive orders.

Part II discusses successful public private partnerships, paying special attention to the distinct type of partnership used and specific agency innovations and best practices. This section also highlights some recent proposed legislation to encourage and facilitate agency uses of the public private partnerships. Legislation on foreign aid, pay for success, and innovative authorizations via appropriations acts indicate Congress generally favors the expanded use of public-private partnerships.

Part III, Legal Constraints, analyzes the general legal and ethical hurdles public-private partnerships must overcome. It examines existing statutory authority for partnerships and suggests that gift authority in combination with an agency's enabling legislation is often sufficient authorization to engage in a partnership. This section then moves on to review the various legal restrictions related to appropriations, ethics, and procurement that might prove problematic in specific types of partnerships. It also considers whether public-private partnerships might run afoul of the limitation on using private entities to perform inherently governmental functions. It briefly touches upon relevant statutes such as the Federal Advisory Committee Act and the Privacy Act before concluding with a discussion of formalized vehicles and processes to memorialize partnerships and provide public notice. Part IV covers proper documentation for memorializing partnership agreements.

## I. Public Private Partnerships and Federal Agencies

Traditionally, when seeking to work with the private sector rather than regulate it, federal agencies engage the private sector through contracts or grants. These arrangements are hierarchical and asymmetric. The agency, as authorized by Congress and directed by the President, develops and funds a program or project which will, in turn, be implemented by a private organization. The vast majority of federal action in the sphere of social policy, public health, foreign assistance, research and so forth, fits the conventional model. However, in the late 1990s, agencies, in particular the United States Agency for International Development (USAID), started to reach out to the private sector as coequal partners rather than grantees or contractors.<sup>1</sup>

This new approach to engaging the private sector, as an equal partner when interests and goals are in accord, received critical support when Secretary of State Condoleezza Rice established the Global Partnership Center (GPC) at the U.S. Department of State in order to promote the use of public-private partnerships in diplomacy. In recognition of the powerful role private entities play in projecting American values and identity, the Center's principal task was to match for-profit companies, non-governmental organizations, philanthropic foundations, and other organizations with government agencies.<sup>2</sup> As Secretary of State for the Obama Administration, Hillary Clinton continued Secretary Rice's partnership initiatives and GPC office to use public-private partnerships as a diplomatic tool and as a way to take advantage of private sector resources (increasingly significant during sequestration) and expertise to tackle complex international problems.<sup>3</sup> Secretary Clinton renamed the Global Partnership Center "The Secretary's Office of Global Partnerships" and soon after made it a Secretarial Office.<sup>4</sup> The Secretary's Office of Global Partnerships has pioneered the use of partnerships in foreign policy and is a leader in facilitating and promoting the use of partnerships among other agencies through working groups, events such as Global Partnerships Week, and overseeing some of the most successful partnerships to date.

"Public-private partnerships are not a Republican or a Democratic concept."<sup>5</sup> The Bush Administration initiated the U.S. President's Emergency Plan for AIDS Relief (PEPFAR), an

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<sup>1</sup> *Public-Private Partnerships in Foreign Aid: Leveraging U.S. Assistance for Greater Impact and Sustainability: Hearing Before the Subcomm. on State Dep't and USAID Mgmt., Int'l Operations, and Bilateral Int'l Dev. of the S. Comm. on Foreign Relations*, 114th Cong. 1 (2016) [hereinafter Hearings] (statement of Eric G. Postel, Associate Administrator, U.S. Agency for Int'l Dev.).

<sup>2</sup> David Frances, *The State Department's Public-Private Matchmaker*, DEVEX (Mar. 10, 2009), <https://www.devex.com/news/the-state-department-s-public-private-matchmaker-59312>.

<sup>3</sup> CORRI ZOLI ET AL., SYRACUSE UNIV., UNDERSTANDING GLOBAL OPPORTUNITY: EXPLORING THE ROLE OF THE US DEPARTMENT OF STATE'S OFFICE OF GLOBAL PARTNERSHIP IN PUBLIC-PRIVATE PARTNERSHIP (P3) DEVELOPMENT OF THE GLOBAL ALLIANCE FOR CLEAN COOKSTOVES 5 (2015), <http://www.state.gov/documents/organization/251105.pdf>. Examples of global problems driving the creation of public private partnerships include, climate based conflict, water scarcity, energy needs, famine and food insecurity.

<sup>4</sup> *Id.* at 14. See also U.S. DEP'T OF STATE & U.S. AGENCY FOR INT'L DEV., THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW 68 (2010), <http://www.state.gov/documents/organization/153108.pdf>.

<sup>5</sup> Hearings, *supra* note 1, at 5 (statement of Daniel F. Runde, Director, Ctr. for Strategic & Int'l Studies).

unprecedented effort to save the lives of people suffering from AIDS. The plan proceeds through seven different agencies and is specifically authorized to use public-private partnerships. The Accelerating Children’s HIV/AIDS Treatment (ACT) initiative, a \$200 million dollar partnership with the Children’s Investment Fund foundation to double the number of children receiving life-saving treatment, is one recent example of a PEPFAR authorized partnership. The Obama Administration has continued to build upon the foundations established by the previous administration through presidential memoranda, budget requests, and special offices within the White House, namely the Office of Faith Based and Neighborhood Partnerships and the Office of Social Innovation and Civic Participation.

Public-private partnerships are more than a passing trend. Global capital is transforming the foreign and domestic landscape as private philanthropies offer funds at a scale to rival many government agencies. To take one example, foreign aid by governments to developing countries amounts to \$160 billion per year. Private foundations donate approximately \$70 billion.<sup>6</sup> Private foundations, corporations, and other non-governmental organizations offer expertise and other valuable resources. The Coca-Cola Company, a longtime partner of USAID, lends its logistics, supply chain, and distribution network to Project Last Mile to deliver medicines and supplies to remote communities in Africa.<sup>7</sup> The Global Alliance for Clean Cookstoves, a signal achievement of State’s Office of Global Partnerships, is a partnership comprising the Environmental Protection Agency, the Department of Energy, the Department of Health and Human Services, both Morgan Stanley and Shell companies and their respective foundations, and the United Nations Foundation.<sup>8</sup> The Alliance works to advance the adoption of cleaner cooking stoves and promotes a sustainable market for efficient cooking solutions in the developing world.<sup>9</sup>

#### A. What is a Public Private Partnership?

Public-private partnerships (PPPs) appear in a variety of forms which leads to some ambiguity in definition.<sup>10</sup> There are federal organizations that partake of both the government and private sectors (e.g. Fannie Mae, the Legal Services Corporation). These hybrid organizations, also known as the “quasi government,” are outside the scope of this report.<sup>11</sup> In a different vein, transportation and infrastructure PPPs at the federal, state, and local levels have garnered increased

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<sup>6</sup> *Id.* at 1 (statement of Michael Goltzman, Vice President, Int’l Gov’t Relations & Pub. Affairs, The Coca-Cola Company).

<sup>7</sup> *Id.*

<sup>8</sup> *Our Mission*, GLOB. ALL. FOR CLEAN COOKSTOVES, <http://cleancookstoves.org/about/our-mission/> (last visited Aug. 5, 2016).

<sup>9</sup> GLOB. ALL. FOR CLEAN COOKSTOVES, 2014 RESULTS REPORT 5 (2014), <http://cleancookstoves.org/binary-data/RESOURCE/file/000/000/414-1.pdf>. Unsafe exposure to household pollution from open fires or inefficient cookstoves is responsible for over 4 million premature deaths annually. *See ZOLI ET AL., supra* note 3, at 12.

<sup>10</sup> “A Public-Private Partnership (PPP) is a contractual agreement between a public agency (federal, state, or local) and a private sector entity.” *See 7 Keys to Success*, NAT’L COUNCIL FOR PUB. PRIV. P’SHPIS, <http://www.ncppp.org/ppp-basics/7-keys/> (last visited Aug. 3, 2015).

<sup>11</sup> *See KEVIN R. KOSAR, CONG. RES. SERV., RL30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS* 1, 8 (2011).

attention as a possible solution to a widely acknowledged decline in the quality of the nation's infrastructure.<sup>12</sup> While innovations in infrastructure finance are of signal importance, this report seeks to isolate an increasingly common but less studied type of PPP, namely a joint venture between federal departments and agencies and private sector institutions primarily focused on improvements to health, safety, and welfare. A recent term for this type of partnership is a "public-philanthropic partnership."<sup>13</sup> Many of the private sector partners in these new initiatives are philanthropic foundations that have long experience initiating and supporting efforts in the arena of public health, education, and the arts and humanities.<sup>14</sup> The factors stimulating this distinct model of public-private partnership include the 2008 financial crisis, the climate of fiscal restraint limiting federal government agencies' ability to sustain programs or pursue new ones and private organizations' interest in seeking new strategies to leverage or maximize the impact of their endeavors. Over the past decade, these forces coalesced in a manner encouraging leaders in government and the private sector to think creatively about how partnerships might enhance their respective efforts to devise more effective solutions to public problems.<sup>15</sup>

This joint venture type of partnership often involves exploring a policy or programmatic innovation that might otherwise be impossible or would benefit from private sector resources and expertise, rather than privatizing a government function. In addition to infrastructure projects, public-private partnership has been used to describe governmental reliance on private actors to deliver services to the public, ranging from schools, prisons, and the provision of healthcare.<sup>16</sup> In American public law public-private partnership stands for a "type of government procurement agreement."<sup>17</sup> There is a scholarly literature, both descriptive and prescriptive, devoted to the potentially problematic delegations of public authority such contracts may entail.<sup>18</sup> By contrast, the focus of this report is on a comparatively novel form of collaboration. As illustrated by the Secretary's Office of Global Partnership at the Department of State, these collaborative partnerships are defined by shared risk in pursuit of solutions to shared problems and by

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<sup>12</sup> Memorandum from President Barack Obama to the Heads of Exec. Dep'ts & Agencies, Expanding Pub.-Private Collaboration on Infrastructure Dev. & Fin. (July 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/07/17/presidential-memorandum-expanding-public-private-collaboration-infrastru>; DIANA CAREW, PROGRESSIVE POLICY INST., HOW PUBLIC-PRIVATE PARTNERSHIPS CAN GET AMERICA MOVING AGAIN 2 (2014), [http://www.progressivepolicy.org/wp-content/uploads/2014/05/2014.05-Carew\\_How-Public-Private-Partnerships-Can-Get-America-Moving-Again.pdf](http://www.progressivepolicy.org/wp-content/uploads/2014/05/2014.05-Carew_How-Public-Private-Partnerships-Can-Get-America-Moving-Again.pdf).

<sup>13</sup> ALAN ABRAMSON ET AL., COUNCIL ON FOUNDATIONS, PUBLIC-PHILANTHROPIC PARTNERSHIPS IN THE U.S.: A LITERATURE REVIEW OF RECENT EXPERIENCES 2 (2012), <http://www.cof.org/sites/default/files/documents/files/GMU-PPP%20Lit%20Review.pdf>

<sup>14</sup> Kenneth Prewitt, *Foundations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 355–77 (Walter W. Powell & Richard Steinberg eds., Yale Univ. Press 2d ed. 2006).

<sup>15</sup> *Id.* at 4; ABRAMSON ET AL., *supra* note 14, at 10–11.

<sup>16</sup> Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. 555, 556 (2010).

<sup>17</sup> *Id.* at 559. In contrast to American public law, European Union law recognizes *both* contractual and institutional public private partnerships.

<sup>18</sup> See Jody Freeman, *The Contracting State*, 28 FLA. S. U.L. REV. 155, 209–12 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–94 (2003) (discussing the ways in which contracting private entities to administer prisons, schools, and state welfare programs authorizes private actors to act as government officials).

“leveraging unique partner skills and assets, producing outcomes with greater impact than could be achieved independently.”<sup>19</sup>

## 1. Definitions of Public-Private Partnerships

One difficulty this new type public private partnership faces is the lack of a generally accepted definition across the federal government. A brief survey of federal agency descriptions illustrates a range of definitions. Following President Obama’s lead, Executive Agencies have begun defining what PPPs are and setting up offices to coordinate the establishment of PPPs.<sup>20</sup>

The Office of the Associate Director for Policy at the Centers for Disease Control and Prevention (CDC) has issued a publication of guiding principles to direct CDC staff on effective ways to establish PPPs. Within this guide, the CDC defines PPPs as “relationships between CDC and the private sector that are not legally binding where skills and assets are shared to improve the public’s health and each partner shares in the risks and rewards that result from the partnership.”<sup>21</sup>

In its third annual State of Global Partnerships Report from 2016, the U.S. Department of State defined public-private partnerships as:

[A] collaborative working relationship with external, non-USG partners (such as businesses, financial institutions, entrepreneurs, investors, non-profits, universities, philanthropists, and foundations) in which the goals, structure, and governance, as well as roles and responsibilities, are mutually determined and decision-making is shared. PPPs are distinct from traditional contractual arrangements—such as grants, cooperative agreements, and contracts—in that they are rooted in co-creation, co-design, and co-resource mobilization towards a shared and mutually beneficial objective. Further, PPPs are characterized by jointly defined objectives, and collaborative program design and implementation. Successful partnerships entail: complementary equities; transparency; mutual benefit; shared risks and rewards; and accountability.<sup>22</sup>

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<sup>19</sup> *Partner with State*, U.S. DEP’T OF STATE, <http://www.state.gov/s/partnerships/partner/index.htm> (last visited Aug. 5, 2016).

<sup>20</sup> Office of Soc. Innovation & Civic Participation, *Partnerships*, WHITE HOUSE, <https://www.whitehouse.gov/administration/eop/sicp/initiatives/partnerships> (last visited July 11, 2016).

<sup>21</sup> OFFICE OF THE ASSOC. DIR. FOR POLICY, CDC’S GUIDING PRINCIPLES FOR PUBLIC-PRIVATE PARTNERSHIPS: A TOOL TO SUPPORT ENGAGEMENT TO ACHIEVE PUBLIC HEALTH GOALS 1 (2014), <http://www.cdc.gov/about/pdf/business/partnershipguidance-4-16-14.pdf>.

<sup>22</sup> U.S. DEP’T OF STATE, STATE OF GLOBAL PARTNERSHIPS REPORT 5 (2016), <http://www.state.gov/documents/organization/254358.pdf>.

USAID applies the same definition for PPPs as the Department of State listed above.<sup>23</sup> USAID works with the private sector when shared interests and joint visions align to create sustainable development and economic impact.<sup>24</sup>

Generally, the Departments of Agriculture, Commerce, Energy, Transportation, Treasury, Defense, and the Environmental Protection Agency focus on contractual public-private partnerships for infrastructure.<sup>25</sup> For example, Treasury defines a PPP as “government contracts with a private firm to design, finance, construct, operate, and maintain (or any subset of those roles) an infrastructure asset on behalf of the public sector. When the private sector takes on risks that it can manage more cost-effectively, a PPP may be able to save money for taxpayers and deliver higher quality or more reliable service over a shorter timeframe.”<sup>26</sup> The key element in the definition of these partnerships is the contractual agreement, which is not unusual given that the conventional usage of a public-private partnership involves infrastructure projects or the contracting out of government service functions. These agencies, thus, retain the traditional definition of a public-private partnership. Admittedly, the definition of an infrastructure PPP is imprecise as it embraces a variety of assets and financing arrangements. Despite the variations

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<sup>23</sup> *Id.*

<sup>24</sup> U.S. AGENCY FOR INT'L DEV., PARTNERING FOR IMPACT: USAID AND THE PRIVATE SECTOR 5, 8 (2015), [https://www.usaid.gov/sites/default/files/documents/15396/usaid\\_partnership%20report\\_FINAL3.pdf](https://www.usaid.gov/sites/default/files/documents/15396/usaid_partnership%20report_FINAL3.pdf).

<sup>25</sup>, *RCA Issue Brief #8, Wetlands Programs and Partnerships*, U.S. DEP'T OF AGRIC., [http://www.nrcs.usda.gov/wps/portal/nrcs/detail/me/programs/?cid=nrcs143\\_014214#partnerships](http://www.nrcs.usda.gov/wps/portal/nrcs/detail/me/programs/?cid=nrcs143_014214#partnerships) (last visited Aug. 30, 2016); Steve Betza, *Public-Private Partnerships: A Key Enabler for American Manufacturing Innovation*, THE COMMERCE BLOG (Oct. 1, 2014, 5:00 PM), <https://www.commerce.gov/news/blog/2014/10/public-private-partnerships-key-enabler-american-manufacturing-innovation>; U.S. DEP'T OF ENERGY, PUBLIC-PRIVATE PARTNERSHIPS FOR CLEAN ENERGY MANUFACTURING (2015), [http://energy.gov/sites/prod/files/2015/09/f26/Public-Private%20Partnerships\\_9.14.15.pdf](http://energy.gov/sites/prod/files/2015/09/f26/Public-Private%20Partnerships_9.14.15.pdf); Office of Nuclear Energy, *Department of Energy Fostering Public-Private Partnerships: Eight Small Businesses Selected for First GAIN Nuclear Energy Vouchers*, U.S. DEP'T OF ENERGY (June 13, 2016, 2:16 PM), <http://energy.gov/ne/articles/department-energy-fostering-public-private-partnerships-eight-small-businesses-selected>; Office of Energy Efficiency & Renewable Energy, *A Public-Private-Academic Partnership to Advance Solar Power Forecasting*, U.S. DEP'T OF ENERGY, <http://energy.gov/eere/sunshot/public-private-academic-partnership-advance-solar-power-forecasting> (last visited July 12, 2016); U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., SUCCESSFUL PRACTICES FOR P3S: A REVIEW OF WHAT WORKS WHEN DELIVERING TRANSPORTATION VIA PUBLIC-PRIVATE PARTNERSHIPS 1 (2016), [https://www.transportation.gov/sites/dot.gov/files/docs/P3\\_Successful\\_Practices\\_Final\\_BAH.PDF](https://www.transportation.gov/sites/dot.gov/files/docs/P3_Successful_Practices_Final_BAH.PDF); Cheryl Pellerin, *Carter Seeks Tech-sector Partnerships for Innovation*, U.S. DEP'T OF DEF. (Apr. 23, 2015), <http://www.defense.gov/News-Article-View/Article/604513>; ENV'T PROT. AGENCY, PUBLIC-PRIVATE PARTNERSHIPS (P<sup>3</sup>) STRATEGY 5 (1989), <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=9100NWJ9.txt>; ENV'T FIN. ADVISORY BD., PUBLIC PRIVATE PARTNERSHIPS IN THE PROVISION OF WATER AND WASTEWATER SERVICES: BARRIERS AND INCENTIVES iv (2008), <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100AM1T.txt>.

<sup>26</sup> OFFICE OF ECON. POLICY, U.S. DEP'T OF TREASURY, EXPANDING OUR NATION'S INFRASTRUCTURE THROUGH INNOVATIVE FINANCING 4 (2014), <https://www.treasury.gov/press-center/press-releases/Documents/Expanding%20our%20Nation%27s%20Infrastructure%20through%20Innovative%20Financing.pdf>; OFFICE OF ECON. POLICY, U.S. DEP'T OF TREASURY, EXPANDING THE MARKET FOR INFRASTRUCTURE PUBLIC-PRIVATE PARTNERSHIPS: ALTERNATIVE RISK AND PROFIT SHARING APPROACHES TO ALIGN SPONSOR AND INVESTOR INTERESTS 1 (2015), <https://www.treasury.gov/connect/blog/Documents/Treasury%20Infrastructure%20White%20Paper%20042215.pdf>.

specific partnerships entail, it is generally understood that an infrastructure PPP is “a legally binding contract between a public sector entity and a private company.”<sup>27</sup>

Contractual arrangements do not define the newer phenomenon of federal agency partnerships with private parties. In these situations, the private partner does not provide a service or good or operate a facility in accord with a legal agreement. Particular activities and programs under the auspices of the partnership may involve contracts or grants, for instance, but the partnership itself is by nature broader and more flexible as evinced by the various definitions that refrain from legal terminology to instead emphasize collaboration and shared goals or interests.

Within the Domestic Policy Council of the White House, the Office of Social Innovation and Civic Participation focuses on cultivating programs to address community challenges.<sup>28</sup> A primary initiative of this Office is to “partner with nonprofits, foundations, philanthropists, private organizations, academia, and all levels of government in solving shared problems.”<sup>29</sup> The Office offers a succinct definition that captures some key features of public private partnerships:

For our purposes, a partnership is a collaborative working relationships between the U.S. government and non-government partners, or among US government entities, in which the goals, structure, and governance of the partnership as well as the roles and responsibilities of each partner, are mutually determined.<sup>30</sup>

It also elaborated on key characteristics of public-private partnerships. They are:

based upon the convergence of interests between US government and non-government partners that advance the objectives of each respective organization. They require shared risk, investment (direct or indirect), and potential reward for all partners. And, when effective, partnerships result in the leveraging of unique partner skills and assets, producing outcomes with greater impact than could be achieved independently.<sup>31</sup>

The key elements of the various definitions discussed (and those available in an appendix to this report) are that the partnerships may or may not be legally binding, may be monetary or non-monetary, involve shared risks and rewards, as well as shared decision making with a variety of partner organizations. Such generalities may border on the banal, but it is possible to extract a critical element from one last definition:

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<sup>27</sup> PATRICK SABOL & ROBERT PUENTES, BROOKINGS INST., PRIVATE CAPITAL, PUBLIC GOOD: DRIVERS OF SUCCESSFUL INFRASTRUCTURE PUBLIC PRIVATE PARTNERSHIPS 4 (2015).

<sup>28</sup> Office of Soc. Innovation & Civic Participation, *About SICP - The Community Solutions Agenda*, WHITE HOUSE, <https://www.whitehouse.gov/administration/eop/sicp/about> (last visited July 11, 2016).

<sup>29</sup> Office of Soc. Innovation & Civic Participation, *Partnerships*, WHITE HOUSE, <https://www.whitehouse.gov/administration/eop/sicp/initiatives/partnerships> (last visited July 11, 2016).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

P3s are not synonymous with grants or contracts. These involve the acquisition of goods or services from an external entity. P3s involve a closer collaborative bond, an integrated working relationships between public and private actors...<sup>32</sup>

Grants and contractual arrangements are conceptually as well as legally distinct and any definition of public-private partnership, in the context of this report, should exclude them. The relationship between federal agency and private partner(s) under scrutiny is a type of arrangement that is not legally binding and involves collaboration and cooperation rather than fulfilling the terms of an agreement. Although specific binding grant agreements and contracts may fall under the umbrella of the broader partnership or follow from it, as will be discussed in forthcoming sections, the main overarching agreement between agency and private partner is neither a grantor/grantee nor a contractor/service provider arrangement. The Department of State explicitly distinguishes PPPs from cooperative agreements. Like grants and contracts, individual cooperative agreements are legally binding, but the close cooperation between federal agency and participant incorporated in such arrangements bear much in common with PPPs, so they can also be viewed as a specific type of partnership and a working definition should be broad enough to encompass such agreements.

Drawing on the various definitions discussed, a plausible working definition of PPP is:

A joint-venture between a U.S. government agency, department, board, or commission and private sector parties, including for-profit and non-profit organizations, in order to address public problems in innovative ways. The cooperation between public and private partners often involves a project or program funding either partially or entirely by the private partner for which risks are shared by both partners. The goals, structure, and governance of the partnership as well as the roles and responsibilities of each partner, are mutually determined and in accord with the public interest. Though the partnership may encompass traditional binding legal agreements, it, itself, is not necessarily legally binding.

The term “public-private partnership” need not be explicit, provided an agency’s statutory authorization broadly encompasses the relevant activity and, when the private partner wishes to donate property or funds to the agency, the agency has been authorized to receive gifts. Collaborative endeavors that are primarily contractual in nature, involving the provision of a service, infrastructure financing, private standards setting incorporated into federal regulation, or government enterprises are excluded from this definition.

## 2. Agencies with Partnership Offices

A small but significant number of federal agencies have established offices devoted to public-private partnerships with The Secretary’s Office of Global Partnerships at the Department

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<sup>32</sup> CORRI ZOLI, ET AL., SYRACUSE UNIV., P3 PLANNING & ASSESSMENT TOOLKIT 5 (2015), [http://insct.syr.edu/wp-content/uploads/2015/11/DOS\\_Evaluation\\_Tool-mwedit111715.pdf](http://insct.syr.edu/wp-content/uploads/2015/11/DOS_Evaluation_Tool-mwedit111715.pdf).

of State the most prominent among them. Within the Department of Health and Human Services (DHHS) The Food and Drug Administration's (FDA) Office of the Commissioner houses the Strategic Partnerships and Intellectual Property department through which the public-private partnership program is administered.<sup>33</sup> The Private Sector Office within the Office of Policy at the Department of Homeland Security (DHS) is responsible for promoting PPPs to improve the nation's homeland security.<sup>34</sup> This office holds a yearly conference entitled "Building Resilience through Public-Private Partnerships."<sup>35</sup> In addition, departments within DHS have offices focused on PPPs. An initiative of FEMA's Private Sector Division of the Office of External Affairs is the development of PPPs to assist with emergency management.<sup>36</sup> The Office of Public-Private Partnerships within the Research and Development Office of the Science and Technology Directorate also promotes the creation of PPPs to "develop and implement programs that identify, evaluate, and commercialize technologies into products or services."

Within HUD, the Office for International and Philanthropic Innovation has initiated several partnerships to enhance HUD's impact in local communities.<sup>37</sup> The FBI's Partnership and Outreach Office through its Community Relations Unit works with private sector organizations to support FBI investigations and operations and enable mutually beneficial information sharing that helps the FBI to better understand emerging threats and foster crime prevention initiatives.<sup>38</sup>

In addition to the new Office of Social Innovation and Civic Participation, the White House has another office dedicated in part to public-private partnerships. Founded by President Bush, The White House Office of Faith-based and Community Initiatives and corresponding Centers for Faith-Based and Community Initiatives in other Federal agencies were founded by President George W. Bush to expand the role of faith-based and community organizations (FBCO) in providing social services to their communities.<sup>39</sup> This initiative has expanded and can be interpreted as promoting PPPs within each agency focusing on partnerships with FBCOs. Each agency included in the following list has a Center for Faith-Based and Neighborhood Initiatives working to create partnerships with community organizations to further the agencies'

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<sup>33</sup> U.S. Food & Drug Admin., *About the FDA Public-Private Partnerships Program*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/PublicPrivatePartnershipProgram/ucm166075.htm> (last visited July 11, 2016).

<sup>34</sup> *Private Sector Office*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/private-sector-office> (last visited July 11, 2016).

<sup>35</sup> *Building Resilience Through Public-Private Partnerships Conference*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/event/public-private-partnerships-conference> (last visited July 11, 2016).

<sup>36</sup> *Public-Private Partnerships*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/public-private-partnerships> (last updated Dec. 22, 2015, 3:39 PM).

<sup>37</sup> Office of Policy Dev. & Research, *International and Philanthropic Innovation*, U.S. DEP'T OF HOUS. & URBAN DEV., <https://www.huduser.gov/portal/ipi/about-ipi.html> (last visited July 11, 2016).

<sup>38</sup> *Partnerships*, FED. BUREAU OF INVESTIGATION, [https://www.fbi.gov/about-us/partnerships\\_and\\_outreach](https://www.fbi.gov/about-us/partnerships_and_outreach) (last visited July 11, 2016); *Community Outreach*, FED. BUREAU OF INVESTIGATION, [https://www.fbi.gov/about-us/partnerships\\_and\\_outreach/community\\_outreach](https://www.fbi.gov/about-us/partnerships_and_outreach/community_outreach) (last visited July 11, 2016).

<sup>39</sup> *White House Faith-Based & Community Initiative*, WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/government/fbci/president-initiative.html> (last visited July 11, 2016).

objectives: Department of Agriculture<sup>40</sup>; Department of Commerce<sup>41</sup>; Department of Education<sup>42</sup>; Department of Health and Human Services<sup>43</sup>; Department of Homeland Security<sup>44</sup>; Department of Housing and Urban Development<sup>45</sup>; Department of Justice<sup>46</sup>; Department of Labor<sup>47</sup>; Department of State<sup>48</sup>; Department of Veterans Affairs<sup>49</sup>; United States Agency for International Development<sup>50</sup>

The National Park Service, an agency within the Department of Interior, contains the Office of Partnerships and Philanthropic Stewardship.<sup>51</sup> The Broadcasting Board of Governors (BBG) has an Office of Digital and Design Innovation which engages in partnerships and related forms of outreach.<sup>52</sup> The STEM and Community Engagement Advisor at the Institute for Museum and Library Services (IMLS) is responsible for partnership initiatives.<sup>53</sup> The Office of the Center for the Chief Technologist at the National Aeronautics and Space Administration (NASA) strategizes potential public-private partnership opportunities.<sup>54</sup> The National Science Foundation (NSF) established the Division of Industrial Innovation and Partnerships.<sup>55</sup>

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<sup>40</sup> *Welcome to Faith-Based and Neighborhood Partnerships*, U.S. DEP’T OF AGRIC., <http://www.usda.gov/wps/portal/usda/usdahome?navid=fbnp> (last visited July 11, 2016).

<sup>41</sup> *Center for Faith Based and Neighborhood Partnerships*, U.S. DEP’T OF COMMERCE, <https://www.commerce.gov/doc/os/center-faith-based-and-neighborhood-partnerships> (last visited July 11, 2016).

<sup>42</sup> *Center for Faith Based and Neighborhood Partnerships*, U.S. DEP’T OF EDUC., <http://sites.ed.gov/fbnp/?src=oc> (last visited July 11, 2016).

<sup>43</sup> *Center for Faith Based and Neighborhood Partnerships*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/about/agencies/iea/partnerships/index.html> (last visited July 11, 2016).

<sup>44</sup> *Center for Faith Based and Neighborhood Partnerships*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/dhs-center-faith-based-neighborhood-partnerships> (last visited July 11, 2016).

<sup>45</sup> *Center for Faith Based and Neighborhood Partnerships*, U.S. DEP’T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/faith\\_based](http://portal.hud.gov/hudportal/HUD?src=/program_offices/faith_based) (last visited July 11, 2016).

<sup>46</sup> *Center for Faith Based and Neighborhood Partnerships*, U.S. DEP’T OF JUSTICE, <http://ojp.gov/fbnp> (last visited July 11, 2016).

<sup>47</sup> *Center for Faith Based and Neighborhood Partnerships*, U.S. DEP’T OF LABOR, <https://www.dol.gov/cfbnp> (last visited July 11, 2016).

<sup>48</sup> *Center for Faith Based and Neighborhood Partnerships*, U.S. DEP’T OF STATE, <http://www.state.gov/s/rga> (last visited July 11, 2016).

<sup>49</sup> *Center for Faith Based and Neighborhood Partnerships*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www1.va.gov/cfbnpartnerships> (last visited July 11, 2016).

<sup>50</sup> *Center for Faith Based and Neighborhood Partnerships*, U.S. AGENCY FOR INT’L DEV., <https://www.usaid.gov/partnership-opportunities/fbci> (last visited July 11, 2016).

<sup>51</sup> Nat’l Park Serv., *Office of Partnerships and Philanthropic Stewardship*, DEP’T OF THE INTERIOR, <https://www.nps.gov/orgs/partnerships/index.htm> (last visited July 28, 2016).

<sup>52</sup> *Office of Digital and Innovation Design*, BROAD. BD. OF GOVERNORS, <http://www.innovation-series.com/index.html> (last visited July 28, 2016).

<sup>53</sup> *National Initiatives & Partnerships*, INST. FOR MUSEUM & LIBRARY SERVS., <https://www.imls.gov/issues/national-initiatives> (last visited July 28, 2016).

<sup>54</sup> U.S. NAT’L AIR & SPACE ADMIN., PUBLIC-PRIVATE PARTNERSHIPS FOR SPACE CAPABILITY DEVELOPMENT (2014), [https://www.nasa.gov/sites/default/files/files/NASA\\_Partnership\\_Report\\_LR\\_20140429.pdf](https://www.nasa.gov/sites/default/files/files/NASA_Partnership_Report_LR_20140429.pdf).

<sup>55</sup> *Division of Industrial Innovation and Partnerships*, NAT’L SCI. FOUND., <http://www.nsf.gov/eng/iip/about.jsp> (last visited July 28, 2016).

These new offices embody an effort to make public-private partnerships a permanent feature of agencies through institutional design. A recent report states that the appearance of such offices, at the federal, state, and local level, “represent an intriguing innovation in philanthropic-government relations.”<sup>56</sup> At the federal level, the Office for International and Philanthropic Innovation at HUD is headed by a Deputy Assistant Secretary who is supported by a director and coordinator. At the Department of Education, the Office of the Director of Strategic Partnerships is located with the Secretary’s Office. There may be advantages in housing a partnership office within a cabinet official’s office, given the perception of access it presents to private organizations. However, this organizational model may convey that the office is dependent upon a particular leader or administration rather than a permanent addition to the agency. The presence of an office dedicated to private sector engagement and partnerships initiation appears to be a positive force in pursuing such relationships and in maintaining the institutional knowledge required for such partnerships to grow and develop. Agency leaders may wish to consider establishing offices of strategic partnerships along the lines of the Departments of State, Housing and Urban Development, and Education.

## B. Different Types of Public-Private Partnerships

Most executive and independent agencies and departments engage in four basic types of partnerships that can be monetary or non-monetary: (1) aligned investments. Aligned investments describe when a government agency coordinates its funding, usually a grant, with a private partner or provides a grant in the expectation the grantee will in turn receive private funding to further leverage resources.<sup>57</sup> Aligned investments sometimes appear as demonstration programs. Demonstration programs are experimental, smaller scale programs authorized by statute or annual appropriations acts.<sup>58</sup> (2) Co-sponsored events, such as symposia or conferences like the Department of State’s Partnership Practitioners Forum jointly organized with Concordia, a private organization or the National Environmental Health Association and HUD Healthy Homes Conference comprise a second model. Yet another type of partnership covers (3) private gifts to agencies in order to fund agency projects, either to fund preexisting programs or to establish new programs, exemplified by philanthropist David Rubenstein’s February, 2016 donation of \$18.5 million to the National Park Service to restore the Lincoln Memorial. (4) Another partnership model is cooperative agreement authority, commonly provided in annual appropriation acts and

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<sup>56</sup> JAMES M. FERRIS & NICHOLAS P.O. WILLIAMS, CTR. ON PHILANTHROPY & PUB. POLICY, PHILANTHROPY AND GOVERNMENT WORKING TOGETHER: THE ROLE OF OFFICES OF STRATEGIC PARTNERSHIP IN PUBLIC PROBLEM SOLVING (2012), <http://www.isgimpact.com/wp-content/uploads/2013/03/PhilGovtWorkingTgthr.pdf>.

<sup>57</sup> For example, see the exception for “public-private alliances” or participation in a “Global Partnership Initiative” in the Department of State’s guidance for assistance, which otherwise requires that assistance awards be completed, unless prohibited by statute. U.S. DEPARTMENT OF STATE FEDERAL ASSISTANCE POLICY DIRECTIVE (2016) (on file with author) 1, 48.

<sup>58</sup> For example, section 470 of the Urban and Rural Recovery Act of 1983 gives the U.S. Department of Housing and Urban Development the authority to engage in demonstration programs. See 42 U.S.C. § 3542(a). The Department is required to issue a Federal Register notice announcing the program. *Id.*; see Fed. Highway Admin., *Highways for Life*, U.S. DEP’T OF TRANSP., <https://www.fhwa.dot.gov/hfl/projects/> (last modified June 29, 2016).

governed by statute. A cooperative agreement is legal vehicle governing the relationship between a federal agency and a partner, be it a state, local, or tribal government entity or a non-profit organization and is used to transfer funds when the envisaged activity entails cooperation between the parties and substantial agency involvement.<sup>59</sup> These four distinct types of partnerships have evolved over time.<sup>60</sup> After passage of the America COMPETES Reauthorization Act in 2011, federal agency prize competition blossomed.<sup>61</sup> Because the Act permits agencies to, in effect, “partner” with a private, nonprofit to administer the competition and to permit financial support to come from the private sector in addition to appropriated funds, prize competitions could be considered an additional type of partnership, one that exhibits characteristics of cosponsored events and private gifts.

### C. Specific Partnership Authority

Congress has granted some agencies specific authority for partnerships. One example is the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 which authorized the President’s Emergency Plan for AIDS Relief (PEPFAR) and seven implementing agencies to expand public private sector partnerships for the purposes of combating the specified diseases.<sup>62</sup> The National Oceanographic Partnership Act, which directs the Secretary of the Navy to carry out partnerships “among federal agencies, academia, industry, and other members of the oceanographic scientific community in the areas of data, resources, education, and communication,” is another example.<sup>63</sup>

More recently, Congress has begun to include explicit partnership authority in legislation that applies to a broad swath of agencies. The America COMPETES Reauthorization Act<sup>64</sup> provided agencies with a clear legal path to engage in private sector partners for prize competitions.<sup>65</sup> The American Recovery and Reinvestment Act of 2009 was a supplemental appropriation (commonly known as the “stimulus bill”) that provided funds for the Department of Education to engage in “partnership[s] with the private sector and the philanthropic community.”<sup>66</sup> In addition, the Act set aside grant money for distribution to eligible agencies that “demonstrate[d] that they have established partnerships with the private sector, which may include philanthropic

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<sup>59</sup> Federal Grant and Cooperative Agreement Act, Pub. L. No. 95-224, 92 Stat. 3 (1978).

<sup>60</sup> The Department of Education’s Office of General Counsel, Ethics Division, classifies partnerships or “projects with NGOs” into three basic categories: (1) Department projects supported by a gift from a non-governmental organization, (2) joint projects with NGOs, and (3) NGO projects with assistance from the Department. *See U.S. DEP’T OF EDUC., PUBLIC PRIVATE PARTNERSHIPS AT THE U.S. DEPARTMENT OF EDUCATION* (2008) (on file with author).

<sup>61</sup> America Competes Reauthorization Act of 2010, Pub. L. No. 111-358, 124 Stat. 3982 (2011).

<sup>62</sup> 22 U.S.C. § 7603(4).

<sup>63</sup> 10 U.S.C. §§ 7901–03.

<sup>64</sup> America Competes Reauthorization Act, 124 Stat. 3982.

<sup>65</sup> 15 U.S.C. § 3719. Section 105(a) of the Act amended the Stevenson-Wydler Technology Innovation Act of 1980. 15 U.S.C. §§ 3701–22.

<sup>66</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14007(a)(3)(B), 123 Stat. 115, 284.

organizations, and that the private sector will provide matching funds in order to help bring results to scale.”<sup>67</sup>

#### D. Broader Authority for Partnerships

Explicit statutory authority for partnerships is not necessary provided that an agency has the general authority to undertake a proposed activity and the activity is consonant with the agency’s mission. Put another way, the term “public-private partnership” does not need to appear in the text of an agency’s enabling legislation or subsequent authorizations for an agency to engage in a partnership. Depending on the specific activities envisioned by a particular partnership and whether funds are being received or expended, more precise statutory authority or authorization via an appropriation may be required, on a case by case basis. “Indeed, a federal agency is a creature of law and can only carry out any of its functions to the extent authorized by law.”<sup>68</sup> From the concept of agencies as creatures of statute stems the requirements that agencies must function in accord with funding levels established by Congress and consonant with their authorizing statutes.<sup>69</sup> For instance, if an agency has the authority to engage in research or exchange information, this is likely to be sufficient to co-sponsor a conference with a private organization, so long as no funds are being expended. The expenditure of agency funds must comply with the specific appropriation governing the funds under consideration. To take another example, an agency may have the authority to fund a program, activity, or research on a discretionary or non-competitive basis, which can be considered a form of partnership, especially if there is a matching requirement for private funds.

The Department of HUD Act provides the Secretary with the authority to “encourage private enterprise to serve as large a part of the Nation’s total housing and urban development needs as it can and develop the fullest cooperation with private enterprise in achieving the objectives of the Department.”<sup>70</sup> HUD’s Office of General Counsel has interpreted this language to permit public-private partnerships in general provided they are consonant with the goals of Department. The Department of Commerce has an expansive authorization “to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, and fishery industries of the United States.”<sup>71</sup> Such sweeping authorizations can be interpreted to embrace public-private partnerships, and the fact that the term PPP is absent from the text should not be determinative. The broad language of these two examples - to engage or work with the private sector – mean that HUD and Commerce are not barred from partnerships. In these cases, broad authorizations combined with the authority to receive private gifts and donations are enough to legitimize a range of partnerships. Put another way, specific statutory authorizations to some agencies (PEPFAR) or

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<sup>67</sup> *Id.*; see § 14007(a)(3)(B) and § 14007(b)(4); see also 15 U.S.C. § 6552 (explaining the Federal Trade Commission’s authorization to use private sector resources to promote safe use of the internet by children).

<sup>68</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-6 (4th. ed. 2016). See, e.g., Atl. City Elec. Co. v. FERC, 295 F.3d 1, 8 (D.C. Cir. 2002).

<sup>69</sup> *Id.*

<sup>70</sup> 42 U.S.C. § 3532.

<sup>71</sup> 15 U.S.C. § 1512.

in some contexts (prize competitions) need not be interpreted to limit to block other partnerships permissible under an agency's broader enabling legislation and its gift acceptance authority

Whether additional authority is needed depends on the types of activities covered by the prospective partnership and whether agency funds will be expended. As discussed in greater detail below, if a private partner donates funds to or services to establish a new program or enhance an existing one, the agency should have the authority to undertake the activity. The Department of Transportation probably does not have the authority to give grants for education, no matter the intent of the donor. The Department of Agriculture doesn't have the authority of USAID to provide technical assistance to farmers in foreign nations.<sup>72</sup> In addition, 31 U.S.C. § 1301(a) establishes the axiom that appropriated funds may be used only for their intended purposes. In recognition that every expenditure need not be explicitly provided for in the appropriation and agencies have some reasonable discretion in the matter, the "necessary expense doctrine" or the "necessary expense rule" has evolved. In seeking to expend agency funds on an activity incidental or related to a partnership, the agency must identify the specific appropriation to be charged and then apply a three-pronged test: (1) the expenditure of funds must be logically related to the appropriation charged; (2) the expenditure must not be prohibited by law; and (3) the expenditure must not fall under another appropriation.<sup>73</sup> In practice, the necessary expense test means that when agencies spend money provided for in an appropriation, it can do so only for a permissible use. The expenditure cannot simply be justified because it is a good or valuable idea, but it has to contribute to the purpose of that appropriation.<sup>74</sup> Congress' power of the purse gives it a certain amount of control over the executive branch. Even if an agency can enter into a public-private partnership, which this report argues many can do, an agency still has to comply with the necessary expense rule, which limits agency discretion in critical ways.

The first question an agency general counsel should ask when considering whether a specific partnership is authorized is how close a nexus is there between the proposed project or venture and government interest specified in the agency's mission. Irrespective of the merits of a particular proposal, does it further the agency's mission or enhance its operations? The answer is, as many legal interpretations are, more a matter of judgment than of the rote application of language. The Department of Education's partnership guidance states, "while many projects and events are worthwhile, the Department may only spend its resources, including government property, staff resources, and appropriated funds, to fulfill its own mission."<sup>75</sup> The second question, as discussed above, is whether agency funds will be expended, and, if so, whether that expenditure is consonant with the purpose of the appropriation to be charged, through application of the necessary expense test.

Reliance on an agency's enabling legislation and gift authority subjects partnerships to a variety of constraints, which might otherwise be bypassed via legislation. Thanks to America

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<sup>72</sup> An inter-agency agreement (IAA) may transfer authority along with funds to undertake a project.

<sup>73</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-21 (3d. ed. 2016).

<sup>74</sup> See Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, 2003 WL 174196 (Comp. Gen. Jan. 27, 2003).

<sup>75</sup> See U.S. DEPARTMENT OF EDUCATION, *supra* note 61.

COMPETES, prize competitions are exempt from the Paperwork Reduction Act. The jury is exempt from the Federal Advisory Committee Act. What this means is that agencies can develop and collaborate on some types of partnerships on the basis of their own authorization and gift authority. Targeted legislation or appropriations certainly helps streamline the process and may enable some partnerships that might otherwise be impermissible, such as Pay for Success/Social Impact Bonds).

#### E. Presidential Memoranda and Executive Orders

In addition to the authority for partnerships that may be found in enabling legislation and gift authority, as well as program specific appropriations or other legislation, the White House has encouraged federal agencies and departments to collaborate with the private sector. In the early days of the Obama Administration, the President issued a memorandum to the heads of executive departments and agencies entitled, “Transparency and Open Government”<sup>76</sup> The relevant section reads:

Collaboration actively encourages Americans in the work of their Government. Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector. Executive departments and agencies should solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation.

In 2014, the President issued a memorandum on public-private partnerships in the context of infrastructure development and financing.<sup>77</sup> On June 24, 2016, the President promulgated an Executive Order on Global Entrepreneurship.<sup>78</sup> The E.O. establishes programs to support innovation, the American private sector, and global entrepreneurs by linking global entrepreneurs with capital, skills, and markets. The E.O. charges the Department of Commerce with the administration of The Presidential Ambassadors for Global Entrepreneurship (PAGE) program. State, Commerce, USAID, and SBA are tasked with furthering the goals of the Global Entrepreneurship Summit. Specifically, the Global Connect Initiative shall focus on encouraging foreign countries to prioritize internet connectivity. The steering group is composed of federal agencies, charged with “consulting industry, academia, and other non-federal entities” in an effort to spur economic growth. Thus, the E.O. approaches the ambit of public-private partnerships, but does not explicitly discuss them.

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<sup>76</sup> Memorandum from Barack Obama, President, U.S., to Heads of Exec. Dep’ts and Agencies, Transparency and Open Government (Jan. 26, 2009), [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment/](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/); see Memorandum from Peter R. Orszag, Dir., Exec. Office of the President, to Heads of Exec. Dep’ts and Agencies, M-10-16, Open Government Directive (Dec. 8, 2009), [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf).

<sup>77</sup> Memorandum from President Barack Obama to the Heads of Exec. Dep’ts & Agencies, *supra* note 12.

<sup>78</sup> Exec. Order No. 13,731, 81 Fed. Reg. 42,221 (June 24, 2016).

## **II. Major Successes and Political Support of Public-Private Partnerships**

Successful public-private partnerships demonstrate the potential such arrangements offer – whether through policy experimentation, increased impact, or promoting new markets. The following case studies, Rebuild By Design, the Feed the Future Program, and the Global Alliance for Clean Cookstoves, exemplify the advantages partnerships offer. As the number of successful partnerships grows, political support for such partnerships has increased.

### **A. Prize Competitions – Rebuild By Design**

In 2013 the Rockefeller Foundation approached the HUD Secretary, Shaun Donovan, who was also Chair of the Sandy Task Force, with the idea of donating additional funds to the Department to finance a design competition to promote resilience in the Hurricane Sandy affected region.<sup>79</sup> The concept envisioned - a multi-state urban, landscape and architecture competition to proceed in a series of stages or rounds with funding progressing as the designs evolved and the class of competitors narrowed - was unprecedented. The sheer scope of the project and the various moving parts, from jury selection to prize money to contest administration to public notice, threatened to be its undoing. OGC ethics and administrative law attorneys tasked with providing guidance for the competition first explored HUD's conducting the competition under the Secretary's general authority and the authority of the Department's Office Policy Development and Research.<sup>80</sup> In this manner, HUD would accept the money from the Rockefeller Foundation as a gift and administer the competition. With respect to a competition administrator, HUD would need to run a procurement to identify a contest administrator or enter into a cooperative agreement, under the Office of Policy Development & Research's non-competitive cooperative agreement authority with New York University's Institute of Public Knowledge (NYU-IPK), an administrator suggested by Rockefeller, or NYU-IPK might sign a voluntary services agreement with HUD.<sup>81</sup> In the realm of private sector philanthropy, requirements naturally accompany a grant or donation. However, as previously discussed, most government agencies cannot agree to any conditions or burdens incidental to gift acceptance.<sup>82</sup> Moreover, the delays needed to comply with various statutory and regulatory requirements such as the Paperwork Reduction Act or the Federal Advisory Committee Act, that drag the competition out too long to accomplish its goals. A final option considered was Rockefeller running the competition with HUD providing its imprimatur. Concerns over endorsement and favoritism would have forced HUD to distance itself from a private sector contest, an unfortunate situation given HUD's leading role in Hurricane Sandy recovery.

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<sup>79</sup> Exec. Order No. 13,632, 77 Fed. Reg. 74,341 (Dec. 14, 2012).

<sup>80</sup> 42 U.S.C. § 3532(b); 12 U.S.C. § 1701(z)(1).

<sup>81</sup> The procurement option assumed Rockefeller was willing to provide funding to administer the contest in addition to prize money. Use of the cooperative agreement option required HUD to front a 50% match from its PD&R non-competitive cooperative agreement appropriation.

<sup>82</sup> Unless the agency has the authority to accept conditional gifts.

## 1. America Competes

The America COMPETES Reauthorization Act<sup>83</sup> provided agencies with a clear legal path to conduct prize competitions, eliminating the multiple barriers (such as the ones discussed in previous sections of this memo) that previously inhibited the use of prizes.<sup>84</sup> Notably, the Act authorizes agencies to use Federal appropriated funds to design prizes and offer monetary rewards (again, previously an agency needed a specific appropriation to do so). Agencies are given flexibility in prize selection (the phrased prize of RBD is possible thanks to this section). Most significant is the authorization to enter into an agreement with a private, nonprofit to design and administer the competition and to permit financial support for the prize to come from the private sector as well as appropriated funds. The Act authorizes advisory committees to select topics for prize competitions and the appointment of private sector judges. The committees created for the purpose of judging are exempt from FACA. To save agencies from the time required to draft specific contracts, the Act required GSA to develop model contracts to provide agencies “access to relevant products and services, including technical assistance.”<sup>85</sup> The Act anticipated the usual debates over what constitutes adequate notice with the requirement to publish a notice announcing the competition in the Federal Register.<sup>86</sup> OMB also clarified that agency-run contests, so long as public outreach takes the form of a general solicitation of ideas, are not subject to the Paperwork Reduction Act.<sup>87</sup>

## 2. RBD - Act II

The solution was to have HUD conduct the competition under the authority of the America COMPETES Act. External partners administered key aspects of the competition, including NYU-IPK, the National Endowment for the Arts, the Municipal Art Society, the Regional Plan Association, and the Van Alen Institute.<sup>88</sup> In all, 148 teams from 15 countries submitted proposals, representing the top engineering, architecture, design, and planning firms.<sup>89</sup> While the MOU envisioned up to \$2 million in prize funding from Rockefeller, in the end \$1 million was donated for the prizes. Because the competition proceeded in stages and contestants needed to be rewarded for the outlay of resources needed to participate, funds were disbursed in

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<sup>83</sup> Pub. L. No. 111-358, 124 Stat. 3982 (2011).

<sup>84</sup> 15 U.S.C. § 3719. Section 105(a) of the Act amended the Stevenson-Wydler Technology Innovation Act of 1980. 15 U.S.C. § 3701 *et. seq.*

<sup>85</sup> 15 U.S.C. § 3719(n).

<sup>86</sup> See, e.g., Rebuild by Design – Competition and Registration, 78 Fed. Reg. 45,551, 45,554 (July 29, 2013).

<sup>87</sup> Memorandum from Cass R. Sunstein, Admin., Exec. Office of the President, for Heads of Exec. Dep’ts and Agencies, and Indep. Regulatory Agencies, Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act (April 7, 2010), [https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance\\_04072010.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf). Agency use of the Challenge.gov tools designed by GSA are also not subject to the PRA. *Id.*

<sup>88</sup> 15 U.S.C. § 3719(l).

<sup>89</sup> Eligibility to win a prize is limited by statute to entities incorporated in the United States, or individuals who are citizens or permanent residents of the United States. 15 U.S.C. § 3719(g)(1).

order to avoid any confusion with grants. HUD OGC recommended that \$100,000 be given at the end of stage 2 and 3 of competition. In the end, \$50,000 was disbursed at the beginning and \$50,000 at the conclusion of each stage.<sup>90</sup> The Act also addressed the thorny issue of intellectual property.<sup>91</sup> HUD opted to obtain licenses to the intellectual property of the winning designs via written consent from each contestant.<sup>92</sup>

In addition to private partners, RBD involved extensive community outreach. The competition engaged 535 organizations and 181 government agencies in 141 neighborhoods and cities through more than 64 community events. In July 2014, the Secretary announced the six winning proposals. In order to ensure FACA did not apply to the RBD Jury, chosen in accordance with the Act, the deliberation process was calibrated so that jurors provided advice on an individual basis, and the Jury Chair (the HUD Secretary) chose the winning proposals.

Arguably, one gap in the Act is authority to implement prize winning proposals. For example HUD-OGC stressed that the allocation of Community Development Block Grant-Disaster Relief (CDBG-DR) funds to state and local governments is not a prize associated with the design competition. The grant process ran parallel to RBD and no crossover was permissible. Moreover, what states and localities do with federal funds are governed by OMB regulations and agency procedures, but may not be dictated by the agency. HUD's use of CDBG-DR funding to encourage state and local grantees to incorporate the funded projects is legally ambiguous.<sup>93</sup>

Covered extensively in the design and popular press, named first among CNN's Top Ten Ideas of 2013, and the winner of the ACUS's Walter Gellhorn Innovation Award, RBD is a success, exemplifying the best in government and the private sector collaboration. The success of RBD led HUD and the Rockefeller Foundation to expand their partnership and launch the National Capacity Building Initiative and the National Disaster Resilience Competition (NDRC) in 2015. The new statutory authority for prize competitions greatly facilitated the development of RBD. While it might have been possible to run a competition under HUD's various authorities and its gift authority, the legal constraints would have delayed the project, or made it a poor investment of agency and foundation time and resources. This conclusion should not be interpreted as a criticism of the various constraints that justifiably limit PPPs, but it does imply that additional statutory authority, either via the appropriations process or as separate legislation, perhaps limited in scope as COMPETES was confined to prize competitions, can facilitate PPPs by streamlining the process.

As an aside, America COMPETES could well be referred to as the Act that launched a thousand prize contests. Challenge.gov, the site GSA maintains in accordance with the Act in

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<sup>90</sup> SCOTT DAVIS & CLAIRE DESJARDINS, DEP'T HOUSING & URBAN DEV., FY 2014 REPORT ON THE USE OF PRIZE AUTHORITY UNDER THE AMERICA COMPETES REAUTHORIZATION ACT (2015) (on file with the Admin. Conf. of the U.S.).

<sup>91</sup> 15 U.S.C. § 3719(j).

<sup>92</sup> See, e.g., 37 C.F.R. § 401.1 (codifying the Bayh-Dole rule under which small businesses and non-profits using federal funds can elect to retain the title to inventions, but the government retains a royalty free license).

<sup>93</sup> The extent to which OGC approved requiring grantees to amend their Disaster Recovery Action Plans to incorporate the funded projects is not known to the author, who, along with Ethics counsel, had voiced concerns about this approach.

partnership with the White House Office of Science and Technology Policy, lists 707 active agency sponsored competitions.<sup>94</sup> At this date over \$220 million in prize money has been awarded. The prizes range from a few thousand to millions, encompassing crafts (The Artisan Enterprise Multimedia Competition, U.S. Dept of State) to hacking (the Federal Trade Commission's DetectaRobo challenge) to engineering the Air Force Turbine Prize (U.S. Department of Defense). The site also maintains extensive guidance for federal agencies and a 600 plus "community of practice" or listserv for sharing best practices. The challenge community listserv is exemplary for its activity and the useful and practical webinars it sponsors.

## B. The Global Alliance for Clean Cookstoves

This Global Alliance for Clean Cookstoves is considered one of the most successful PPPs to date. Traditional cookstoves—that is, traditional, wood-burning stoves—pose a number of risks relative to alternatives presented by clean, efficient stoves.<sup>95</sup> The World Health Organization estimates that four million die worldwide each year from the smoke pollution related to cookstoves.<sup>96</sup> This figure makes cookstoves the second-worst health risk to women and girls worldwide.<sup>97</sup> Further, collecting fuel for wood stoves can pose a particularly acute problem in conflict zones.<sup>98</sup> Because cookstoves are responsible for 20% of global back carbon emissions, they are also an environmental hazard.<sup>99</sup>

Initially launched as a partnership among EPA, the Departments of State, Energy, HHS, the United Nations Foundation, and the Morgan Stanley and Shell Companies, the Alliance now boasts over one thousand partners.<sup>100</sup> The Alliance aims to stimulate a robust global market for clean and efficient household cooking solutions. The development of a global clean cookstove industry that makes clean stoves and fuels more affordable is the key to the wider adoption of clean cooking solutions. Through 2014, the U.S. Government has obligated over \$80 million to the clean cooking sector and the Alliance. Research on the myriad benefits of clean and efficient cooking options are being led by the State Department, EPA, the Department of Health and Human Services' National Institutes of Health and Centers for Disease Control and Prevention, the U.S. Agency for International Development, the Department of Energy, the National Science Foundation, and the National Oceanic and Atmospheric Administration. In addition to research, the U.S. government has invested in financing to support the growth of commercial businesses

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<sup>94</sup> U.S. Gov't Servs. Admin., *Challenges*, CHALLENGE.GOV, <https://www.challenge.gov/list/> (last visited Aug. 5, 2016).

<sup>95</sup> *Global Alliance for Clean Cookstoves*, U.S. DEP'T OF STATE, <http://www.state.gov/s/partnerships/cleancookstoves/> (last visited Aug. 30, 2016).

<sup>96</sup> *Id.*; *Our Mission*, GLOB. ALL. FOR CLEAN COOKSTOVES, <http://cleancookstoves.org/about/our-mission/> (last visited Aug. 30, 2016).

<sup>97</sup> *Global Alliance for Clean Cookstoves*, U.S. DEP'T OF STATE, <http://www.state.gov/s/partnerships/cleancookstoves/> (last visited Aug. 30, 2016); *Our Mission*, GLOB. ALL. FOR CLEAN COOKSTOVES, <http://cleancookstoves.org/about/our-mission/> (last visited Aug. 30, 2016).

<sup>98</sup> *Global Alliance for Clean Cookstoves*, U.S. DEP'T OF STATE, <http://www.state.gov/s/partnerships/cleancookstoves/> (last visited Aug. 30, 2016).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

that design, make, distribute, or sell clean or efficient cooking stoves and fuels. With this goal in mind, USAID has joined with the Swedish International Development Agency, financial partners, and institutional investors to mobilize up to \$125 million in new private financing for manufacturers and distributors of clean cookstoves and fuels. In addition, the Overseas Private Investment Corporation has committed up to \$50 million in debt financing for cookstoves businesses. Finally, the Department of State, USAID, EPA, and the Peace Corps are funding efforts to greatly expand the adoption of clean cookstoves and fuels.<sup>101</sup>

After surpassing the original goal of 20 million cookstoves by 2014, The Alliance now aims to drive investments, foster innovation, bring operations to scale, and enable 60 million households to adopt clean and efficient cookstoves by 2017.<sup>102</sup> The Alliance seeks to cultivate demand and then to point private investment towards the clean cooking arena.<sup>103</sup> Peripheral goals include using economic growth in the cookstove sector to create new employment opportunities for women.<sup>104</sup> Further, to facilitate broader adoption, the organization seeks to make clean, efficient cookstoves more affordable by offering consumer financing options will also make clean cookstoves more affordable and, in that manner, smooth the way for wider adoption.<sup>105</sup> The Cookstoves Future Summit recently attracted 400 leaders and over \$400 million in commitments.<sup>106</sup>

### C. The Investing in Innovation Fund

The Investing in Innovation Fund, or i3 Fund, was authorized by Section 14007 of the American Recovery and Reinvestment Act of 2009.<sup>107</sup> The goal of the program is to invest in innovative practices that clearly have a positive impact on student achievement or student growth, through closing achievement gaps, decreasing dropout rates, increasing high school graduation rates, or increasing college enrollment and completion rates. The program offers grants and cooperative agreements that permit eligible entities to work in partnership with the private sector and the philanthropic community. In addition, the grants allow eligible entities to expand and develop innovative practices that can serve as models of best practices and to identify and document best practices that can be shared and expanded based on demonstrated success. Private partners are built into the conditions of the award as potential recipients must obtain private sector matching funds or in kind donations.

The i3 program has awarded schools and nonprofit partners over \$1.3 billion dollars which have been matched by more than \$200 million in private sector matching funds. According to the Department of Education, the i3 program is responsible for improved student scores in the Bellevue School District of Washington State, The Boys and Girls Club of Great

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Programs: Investing in Innovation Fund (i3), U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/innovation/index.html> (last modified Aug. 24, 2016).

Milwaukee's SPARK Literacy program that improved reading achievement and reduced chronic absence, and a new teaching model that closed the achievement gap in math and reading between Hispanic and non-Hispanic students in California.<sup>108</sup>

## D. Legislation

### 1. Pay for Success

Congressional support for public-private partnerships is evident not only in America COMPETES, but also in other pieces of proposed and recently passed legislation. In the 114<sup>th</sup> Congress, pay for success type bills have been introduced in both Houses.<sup>109</sup> The Social Impact Partnership Act, which has bipartisan support in both Houses, would adapt the social impact bond/pay for success model for broad use at the federal level. The bills would require either the Secretary of the Treasury or the Director of OMB to publish, in the Federal Register, a request for proposals from states or local governments for social impact partnership projects. The proposals should consist of projects with measurable results such as decreased unemployment, improved high school graduation rates, and reduced teen pregnancy. They also should include a feasibility study. The Act would also establish a Federal Interagency Council on Social Impact Partnerships comprising designees from the Departments of Labor, Agriculture, Justice, HUD, Education, Veterans Affairs, the Treasury, Health and Human Services, and the Corporation for National and Community Service.<sup>110</sup> The Director of OMB (or Treasury Secretary) in consultation with the Interagency Council and the head of the relevant agency, will decide to enter into a social impact partnership project with a state or local government. If the project achieves specified outcomes, the Federal Government will pay the State or local government the amount specified in the contract. The State or local government will be responsible for initial funding, most likely through raising private or philanthropic capital.<sup>111</sup> Both bills make appropriations for ten years to fund the social impact partnerships. Both bills were referred to committee.<sup>112</sup>

On May 6, 2016, Rep. Todd Young, sponsor of H.R. 1336, the Social Impact Partnership Act, introduced H.R. 5170, The Social Impact Partnerships to Pay for Results Act.<sup>113</sup> It follows

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<sup>108</sup> Press Release, U.S. Dep't of Educ., U.S. Department of Education Marks the Success of Investing in Innovation (i3), and Launches Seventh and Final i3 Competition (Apr. 26, 2016), <http://www.ed.gov/news/press-releases/us-department-education-marks-success-investing-innovation-i3-and-launches-seventh-and-final-i3-competition>.

<sup>109</sup> Social Impact Partnership Act, S. 1089, 114th Cong. (2015); Social Impact Partnership Act, H.R. 1336, 114th Cong. (2015).

<sup>110</sup> H.R. 1336 § 2056.

<sup>111</sup> *Id.* § 2053(e)(E).

<sup>112</sup> H.R. 1336 was referred to the House Ways and Means Subcommittee on Health on March 19, 2015; S. 1089 was referred to the Committee on Finance on April 27, 2015.

<sup>113</sup> Social Impact Partnerships to Pay for Results Act, H.R. 5170, 114th Cong. (2016). See H. R. REP. NO. 114-616 (2016).

the Social Impact Partnership Act as introduced in the Senate, S. 1089, in giving the Secretary of the Treasury, rather than the Director of OMB oversight authority over the program. Furthermore, it requires that 50% or more of the funds expended under its authority be used for programs that benefit children, establishes a Commission on Social Impact Partnerships, extends funding for the Temporary Assistance to Needy Families Program (TANF) for FY 2017 at current levels, and requires HHS to research the effect of state TANF programs. H.R. 5170 passed the House on June 21, 2016 and was received by the Senate and referred to the Committee on Finance the following day.

## 2. Foreign Aid

Recent foreign aid legislation references and authorizes public-private partnerships in discrete contexts. The Foreign Aid Transparency and Accountability Act of 2016 directs the President to establish uniform guidelines for agencies to ensure consistent performance measures to improve the monitoring and evaluation of foreign aid.<sup>114</sup> The guidelines will provide direction to federal agencies on how to create collaborative partnerships with academic, national, and international institutions “that have expertise in program monitoring, evaluation, and analysis.”<sup>115</sup> The Global Food Security Act of 2016 tasks the President with the development of a government wide strategy for United States foreign assistance to developing countries to reduce global poverty and hunger; achieve food and nutrition security; and promote inclusive, sustainable agriculture and economic development.<sup>116</sup> Among other things, the global food security strategy shall:

leverage resources and expertise through partnerships with the private sector, farm organizations, cooperatives, civil society, faith-based organizations, and agricultural research and academic institutions;

strengthen and expand collaboration between United States universities, including public, private, and land-grant universities, with higher education institutions in target countries to increase their effectiveness and relevance to promote agricultural development and innovation through the creation of human capital, innovation, and cutting edge science in the agricultural sector;<sup>117</sup>

The Electrify Africa Act of 2015 directs USAID, the Trade and Development Agency, the Overseas Private Investment Corporation, and the Millennium Challenge Corporation to expedite and prioritize efforts and assistance for power projects in sub-Saharan Africa and to partner with private sector actors. Further, those agencies should promote the use of private financing and remove barriers to private financing for projects covered by the Act.<sup>118</sup>

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<sup>114</sup> Foreign Aid Transparency and Accountability Act of 2016, Pub. L. No. 114-191, 130 Stat. 666.

<sup>115</sup> *Id.* § 3(c)(1)(K).

<sup>116</sup> Global Food Security Act of 2016, Pub. L. No. 114-195, 130 Stat. 675.

<sup>117</sup> *Id.* § 5(a)(13).

<sup>118</sup> Electrify Africa Act of 2015, Pub. L. No. 114-121, § 5(c), 130 Stat. 86, 90.

### 3. Appropriations

Appropriations acts are additional sources of authority for public-private partnerships in a variety of ways. The language of the appropriation specifies how the agency is to proceed, often requires a report to Congress or GAO, and, of course, provides funds for that program for a specific period of time. For example, in HUD's FY 2010 Appropriations Act, Congress created the Transformation Initiative (TI), which made up to one percent of program funds available for (1) research, evaluation, and program metrics; (2) program demonstrations; (3) technical assistance; and (4) information technology. Congress has continued to fund HUD's TI. While HUD already has statutory authority to develop demonstration programs, the TI provides funding explicitly earmarked for the rigorous testing of new program approaches. This approach provides a path forward, on a carefully modulated and limited basis, for Congress to expand authority for PPPs. Congress could authorize other agencies to experiment with demonstration programs in the PPP arena and provide appropriate funding to do so in a future appropriations acts.

Appropriations acts can also authorize partnerships through non-competitive cooperative agreement authority, similar to the authorization provided to HUD most recently in the FY 2016 appropriation and the National Institutes of Justice/Office of Justice Programs at DOJ in multiple years.<sup>119</sup> In the FY 2014 Appropriation Act, the Corporation for National and Community Service's Social Innovation Fund (SIF) was given the authority to use up to 20 percent of 2014 grant funds to implement a competition to test various methods of using pay for success/social impact bonds.<sup>120</sup>

Pilot programs are also often authorized in yearly appropriations acts. Like demonstration programs, pilot programs allow agencies to test regulatory alternatives and experimental policies or programs on a limited basis and, significantly, to evaluate the results of the pilots, which in turn influence Congress and the Administration. As mentioned in the vetting section of this report (pp. 33-35), the FY 2012 Appropriations Act directed USAID and the Department of State to develop and implement a pilot program for partner vetting.<sup>121</sup> As part of the Department of Transportation's Contracting Initiative Pilot Program, Section 192 of the FY 2016 Appropriations Act authorizes certain DOT contracts using hiring preferences not otherwise authorized by law if the recipient makes certain certifications. The broader DOJ pilot program is designed to test whether various contracting requirements "unduly limit competition," in accord with an OLC opinion.<sup>122</sup> In conclusion, appropriations acts provide Congress with an

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<sup>119</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-153, 129 Stat. 2242 (2015); *P3 Fact Sheet*, YOUTH.GOV, <http://youth.gov/youth-topics/reconnecting-youth/performance-partnership-pilots/fact-sheet> (last visited Aug. 31, 2016).

<sup>120</sup> Consolidated Appropriations Act, 2014, Pub. L. No. 113-76.

<sup>121</sup> Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786.

<sup>122</sup> See 80 Fed. Reg. 12,257 (Mar. 6, 2015). In the pilot program, Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) recipients can take advantage of contracting requirements that have been impermissible due to concerns about negative impacts on competition. The pilot program is designed to test whether such requirements actually due "unduly limit competition." Competitive Bidding Requirements Under the Fed.-Aid Highway Program, 37 Op. Att'y Gen. 1 (2013).

effective way to authorize public-private partnerships on an agency or program specific scale, for a limited period of time, with reporting requirements.

### **III. General Legal & Ethical Hurdles**

#### **A. Appropriations**

“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”<sup>123</sup> If any agency resources will be used, meaning both funds expended and employee time allocated, for a joint project, it is essential that there be a specific appropriation for the program that covers the project. Moreover, as previously discussed, the agency resources used must be considered a necessary expense of that particular appropriation.<sup>124</sup> An appropriation need not explicitly mention PPPs, but the restrictions imposed on funds constrain what an agency may do in the course of a PPP.<sup>125</sup> To expend funds for an activity related to a PPP, an agency needs to avail itself of the three-part purpose test to determine if the expenditure of funds bears a reasonable relationship to the appropriation being charged.

Many appropriated funds have competition requirements, which routinely appear in annual appropriations acts, meaning grants, cooperative agreements, or other types of assistance must be awarded competitively unless provided otherwise by law. Section 204 of the HUD 2014 annual appropriation act is a typical example.<sup>126</sup> If an agency has such a requirement, it cannot give appropriated funds to a private partner (again, aligned investments or joint projects are separate matters), unless that partner has been selected via a competition or procurement governed by internal agency procedures in accord with final guidance issued by the Executive Office of the President.<sup>127</sup> OMB collected and revised its circulars and issued Uniform Guidance covering federal award administrative requirements, cost principles, and audit requirements. The DATA Act, E.O. 13578 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.<sup>128</sup> Such restrictions are not attached to permanent indefinite appropriations, non-competitive award or

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<sup>123</sup> *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

<sup>124</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-19 (3d. ed. 2004).

<sup>125</sup> Put another way, although Congress could enact other statutory restrictions on PPPs if it so chose, Congress’ power of the purse already exerts significant constraints.

<sup>126</sup> Section 204 of the Consolidated Appropriations Act, 2014 requires competition or procurements for all appropriated funds. Pub. L. No. 113-76, § 204, 128 Stat 5, 67 (2014).

<sup>127</sup> OMB collected and revised its circulars and issued Uniform Guidance covering federal award administrative requirements, cost principles, and audit requirements. 2 C.F.R. § 200.2 (2013).

<sup>128</sup> Examples of statutes that structure OMB guidance and internal agency procedures concerning grants and cooperative agreements are as follows: DATA Act, Pub. L. No. 113-101, 128 Stat. 1146 (2014); Exec. Order No. 13,578 (2011); Federal Financial Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 1186 (2006); and Federal Grant and Cooperative Agreement Act, Pub. L. No. 95-224, 92 Stat. 3 (1978).

agreement authority, independent agencies funded through user fees, and, as will be discussed, gift funds.

As a general rule, agencies may not augment their appropriations from sources outside the government.<sup>129</sup> Many federal agencies, (forty-five at the most recent count) however, have gift acceptance authority which overcomes augmentation concerns.<sup>130</sup> The parameters of an agency's gift acceptance authority vary.<sup>131</sup> For instance, some agencies may not accept conditional gifts or gifts of real or personal property.<sup>132</sup> On the other hand, the Administrative Conference of the United States (ACUS) has broad authority to accept and utilize gifts and property, and to utilize the services and facilities of various entities with or without reimbursement.<sup>133</sup> Conditional gifts are especially relevant to public private partnerships because private partners often wish to place limits on the use of the gift funds; at times private partners wishing to make a gift have asked the agency to sign grant agreements or similar documents. If an agency lacks the authority to accept conditional gifts, the gifts that place a duty, burden, or condition upon the government cannot be accepted.<sup>134</sup> A gift that would necessitate future expenditures, such as requiring an agency to promise to continue financing a specific program in years to come, for instance, is not permissible.

It is comparatively simple for a private party to make a gift to a federal agency – a letter from the donor to the agency head providing the funds for a stated purpose is sufficient.<sup>135</sup> Immediately thereafter, the difficulties begin. The agency has to decide who, in addition to the agency head, may accept the money and make sure the gift will not entail future costs by the agency. Gift funds are considered trust funds and must be deposited in the Treasury under 31 U.S.C. § 1321(b). More commonly, an agency's gift authority states that the funds may be available at any time.<sup>136</sup> Although gift funds are not subject to all the restrictions that apply to direct appropriations, they remain “public funds” and for all other purposes are considered

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<sup>129</sup> See, e.g., Letter from Anthony H. Gamboa, Gen. Counsel, Gov't Accountability Office, U.S., to Christopher Bond, Member, Comm. on Small Bus. & Entrepreneurship, Senate, U.S., (Jan. 15, 2004), <http://www.gao.gov/decisions/other/300248.pdf>.

<sup>130</sup> See DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONF. OF THE U.S., A SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 119 (2012); see also Letter from Jason Campbell, Comp. Gen., U.S., Robert P. Griffin, Member, House of Reps., U.S. (Aug. 20, 1963), <http://www.gao.gov/products/403961#mt=e-report> (providing a partial list of statutorily authorized gifts).

<sup>131</sup> Compare 10 U.S.C. § 2608 (providing the gift acceptance authority of the Department of Defense) with 42 U.S.C. § 3535(k) (providing the gift acceptance authority for Department of Housing and Urban Development).

<sup>132</sup> The authority of the EPA to accept gifts under the Clean Air Act does not include gifts of money. See Whether Subsection 104(B)(4) of the Clean Air Act Permits the Receipt of Monetary Donations, 33 Op. O.L.C. 1, 1 (2009).

<sup>133</sup> 5 U.S.C. § 595(c) (“The chairman is the chief executive of the Conference. In that capacity he has the power to—(11) utilize, with their consent, the services and facilities of Federal Agencies and of State and private agencies and instrumentalities with or without reimbursement; (12) accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference.”)

<sup>134</sup> See *Story v. Snyder*, 184 F.2d 454, 456 (D.C. Cir. 1950) *cert. denied*, 340 U.S. 866 (1950). The Department of State is one exception as it is permitted to accept conditional gifts “at the Secretary’s discretion.” 22 U.S.C. § 2697 (2015); see also Denali Comm’n, B-319246, 2010 WL 3507303 (Comp. Gen. Sept. 1, 2010).

<sup>135</sup> See Advisory Comm’n on Intergovernmental Relations, B-274855, 1997 WL 24233 (Comp. Gen. Jan. 23, 1997).

<sup>136</sup> Gifts received “shall be deposited in the Treasury in a separate fund and shall be disbursed upon order of the Secretary.” 42 U.S.C. § 3537(k).

appropriated funds. In consequence, gift funds may be used only in support of authorized agency purposes in light of the terms of the trust.<sup>137</sup> Before the enactment of 31 U.S.C. § 1321(b), an agency with gift authority could accept the money but could not obligate it until Congress authorized the use of the money. According to the statute, gifts analogous to the trust funds named in subsection (a) shall be deposited in a trust fund account and dispersed in compliance with the terms of the trust. In this light, gift proceeds resemble offsetting collections or permanent indefinite appropriations. Offsetting collections is a form of budget authority that allows agencies to obligate and expend the proceeds of their business or market type activities without the need of an additional appropriation.<sup>138</sup> A permanent, indefinite appropriation is created by legislation and available for expenditure by the agency without any further action from Congress.

Given that gift funds are public funds (and technically appropriated) certain requirements attach. The salaries of federal employees may not be paid by an outside source.<sup>139</sup> If the gift funds will be used to acquire services or to make a grant, they may need to be competed.<sup>140</sup> 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.<sup>141</sup> For example, the Conference Report accompanying HUD's annual appropriation suggests HUD 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 dollar gift in its FY 2013 budget justifications. The time it takes for an agency to accept a donation; draft the relevant funds control and legal documents, including a memorandum; develop and start a program can deter potential partners.

Congress has granted some agencies and sub-agencies extra flexibility in their gift acceptance authority. The Holocaust Memorial Council has tailored gift authority to solicit and accept donations and Congress exempted its funds from other laws governing the expenditure of public funds.<sup>142</sup> In order to facilitate the receipt of gifts to the National Park Service, in 1967 Congress established the National Park Foundation (NPF), a chartered non-profit corporation

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<sup>137</sup> See Advisory Comm'n on Intergovernmental Relations, 1997 WL 24233, *supra* note 136; see also Am. Battle Monuments Comm'n, B-275669.2, 97-2 CPD ¶ 41 (Comp. Gen. July 30, 1997); Terrance Constance A. Morella, 68 Comp. Gen. 237 (1989); Afr. Dev. Found., B-300218, 2003 WL 1454075 (Comp. Gen. Mar. 17, 2003).

<sup>138</sup> GAO, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 22 (2005), <http://www.gao.gov/new.items/d05734sp.pdf>.

<sup>139</sup> 18 U.S.C. § 209.

<sup>140</sup> See Am. Battle Monuments Comm'n, *supra* note 138.

<sup>141</sup> GAO has recommended that agencies be required to disclose gift fund operations in budget submissions. See Letter from Elmer B. Staats, Comp. Gen., U.S., to Max Baucus, Chairman, Subcomm. on Limitations of Contracted & Delegated Auth. to Gov't Accountability Office, Senate, U.S., Review of Federal Agencies' Gift Funds (Comp. Gen. Sept. 24, 1980), <http://www.gao.gov/assets/140/131116.pdf>.

<sup>142</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-228 (3d ed. 2006) (noting in this context the exemption from the Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 1.104, 12.101); see also Letter from Milton J. Socolar, Acting Comp. Gen., U.S., to Sidney R. Yates, Chairman, Subcomm. on the Dep't of the Interior and Related Agencies, Comm. on Appropriations, House of Reps., U.S., B-211149, 1985 WL 53671 (Comp. Gen. Dec. 12, 1985).

designed to accept and administer gifts given to the NPS.<sup>143</sup> Congress established the foundation in order to permit the NPS to receive gifts and not be required to deposit them in the Treasury. Privately funded but controlled by the NPS and Department of the Interior, the NPF has the flexibility to engage in public private partnerships with greater ease. In 1998 Congress authorized the NPF to encourage the creation of local fund-raising partner organizations tied to a specific national park which will voluntarily “affiliate” with the NPF.<sup>144</sup>

The gift of services, which commonly arises when a private partner offers its employees’ time, presents other complexities. Without specific statutory authority to accept voluntary services, an agency runs the risk of a potential Antideficiency Act violation. Voluntary services violate the Antideficiency Act (31 U.S.C. §§ 1341–54). The Antideficiency Act prohibits making or authorizing and expenditure from, or authorizing an obligation under any appropriation or fund in excess of the amount available, unless authorized by law. It also prohibits obligating government funds in advance of an appropriation, as well as accepting voluntary services for the United States, and making obligations or expending funds in excess of an apportionment or reapportionment.<sup>145</sup> A written agreement signed in advance stating that the services are voluntary and the individual waives the right to any future claim against the government turns voluntary services into gratuitous services, which are permissible.<sup>146</sup> Non-appropriations related issues to consider when entering into gratuitous services agreements include conflicts of interest, personnel law issues, and inherently governmental functions. It should also be noted that particular authorities, such as the Intergovernmental Personnel Act, may permit an agency to accept voluntary services on a case by case basis.<sup>147</sup>

The potential for a constructive augmentation arises in relation to a no-cost contract, a contract in which a private party offers services to the government for free because it will charge fees from other private parties, commonly conference attendees or vendors. An augmentation arises when an agency increases or enhances its appropriations from outside sources without specific statutory authority. As the General Accountability Office puts it, when Congress makes an appropriation, it establishes an authorized level of program financing. By doing so, it conveys to the agency that it cannot expand a program beyond what it can finance under its appropriation. “To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional

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<sup>143</sup> 54 U.S.C. §§ 10111–101120. The NPF superseded the National Park Trust Fund established by Congress in 1935. KOSAR, *supra* note 11, at 15.

<sup>144</sup> The National Park Omnibus Management Act of 1998, Pub. L. No. 105-391 (codified as 16 U.S.C. § 190 and recodified in 54 U.S.C. §§ 10111–101120 (2015)). The Trust for the National Mall, which bills itself as the “official fundraising partner of the National Park Service,” probably owes its partnership to this authority. The Statue of Liberty National Monument which includes Ellis Island is also operated by the NPS. The Statue of Liberty Ellis Island Foundation, a non-profit foundation, fundraises for the Monument pursuant to an agreement signed in 1983 which predates the Omnibus Management Act.

<sup>145</sup> 31 U.S.C. §§ 1341–54.

<sup>146</sup> See Dep’t of Treasury—Acceptance of Voluntary Services, B-324214 (Comp. Gen. Jan 27, 2014), <http://www.gao.gov/assets/670/660395.pdf>.

<sup>147</sup> See 5 U.S.C. §§ 3371–75; see also 5 U.S.C. § 3111 (permitting voluntary services rendered by student interns); and 5 U.S.C. § 3109 (providing for voluntary services from experts and consultants).

prerogative.”<sup>148</sup> The rule against augmentation is based in separate statutes, including 31 U.S.C. § 3302(b), the “miscellaneous receipts” statute; 31 U.S.C. § 1301(a), restricting the use of appropriated funds to their intended purposes; and 18 U.S.C. § 209, which prohibits the payment of, contribution to, or supplementation of the salary of a government officer or employee as compensation for his or her official duties from any source other than the government of the United States.<sup>149</sup> To avoid a constructive augmentation a no-cost contract must be carefully drafted to state that the services will be provided at no cost to the government, and the government’s liability is zero.<sup>150</sup>

If the appropriations process and related laws circumscribe agency creativity in engaging in new forms of partnerships, agency gift authority provides a critical legal basis for many partnerships.

## B. Ethics

### 1. Partner Selection

Public private partnerships invite close scrutiny for a variety of government ethics concerns. Transparency and neutrality are the guiding precepts of an ethics analysis of PPPs. The first issue an agency ethics counsel must address is the range and type of potential partners. There is no general statutory or other regulatory or ethical bar to partnering with for-profit organizations. The presumption may be that agencies can partner with a variety of organizations, but may wish to limit that discretion on a case-by-case basis or more broadly based on a decision of the agency’s ethics counsel. Some agencies, such as FDA and HUD, only partner with non-profit organizations based on guidance from ethics counsel while other agencies, such as the Department of State and USAID, will work with for-profit partners.<sup>151</sup> In general, a government agency or department 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, both U.S. and non-U.S., civic groups, and service organizations.<sup>152</sup> The question remains as to whether agencies’ inconsistent policies with respect to partnering with for-profit organizations deter or confuse potential partners. A broad “no partnering with for-profits” policy may be efficient if such organizations are likely to present serious concerns about optics and the appearance of a quid pro quo. If agency experience

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<sup>148</sup> 2 GOV’T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-162 (3d ed. 2006).

<sup>149</sup> *Id.* at 6-163.

<sup>150</sup> See Letter from Anthony H. Gamboa, Gen Couns., Comp. Gen., U.S., to James Obestar, Comm. on Transp’n and Infra., and Eleanor H. Norton, Subcomm. on Pub. Bldgs., Econ. Dev. & Emergency Mgm’t, B-302811, 2004 WL 1809869 (July 12, 2004), which elaborated on the distinction between a no-cost contract and the SBA contract at issue, which was found to be a “constructive augmentation” in violation of section 3302(b); Letter from Gary L. Kepplinger, Gen. Couns., Compt. Gen., U.S., to Barbara A. Mikulski, U.S. Senate, B-308968, 2007 WL 4226075 (Nov. 27, 2007).

<sup>152</sup> Charles Donnell, WHITE HOUSE NAT’L SEC. COUNCIL, Building Partnerships: A Best Practices Guide 6 (Apr. 29, 2013) (unpublished manuscript) (on file with author).

demonstrates that for-profit organizations often present problems revealed through due diligence and vetting, it may be advisable to have a clear policy of non-engagement. It should be stressed that there are no broad legal restrictions requiring agencies to limit potential partners. Agencies may opt to partner only with non-profit organizations or philanthropic foundations, but such restrictions are voluntary.

## 2. Avoid Privileged Access

Agencies must be wary to avoid the appearance and the reality of privileged access, so the selection of a private partner must be as open as realistically possible.<sup>153</sup> The legal basis for this avoidance is found in the Standards of Ethical Conduct for Employees of the Executive Branch.<sup>154</sup> In particular, agency employees must act impartially and not give preference to any organization or individual.<sup>155</sup> Nor may agency employees use their public office for private gain.<sup>156</sup> Nevertheless, agency staff can reach out to potential partners. The Office of Legal Counsel has held that an agency's gift acceptance authority implies the authority to solicit gifts.<sup>157</sup> A recommended best practice to avoid endorsement and preferential treatment concerns is to issue a general notice to a broad audience of potential partners, rather than approaching partners individually.<sup>158</sup> The procedures favored by the United States Agency for International Development (USAID) and HUD are both instructive in this regard. Each year USAID issues an annual program statement inviting organizations (private businesses, financial institutions, entrepreneurs, venture capitalists, and investors; Foundations and philanthropists; and other for-and not-for-profit non-governmental entities) to submit proposals for public private partnerships.<sup>159</sup> The program statement advises applicants that successful proposals demonstrate a business's interests and one of USAID's announced development goals. It recommends that proposals should aim for clear and measurable results in an efficient manner. Potential alliance partners are expected to bring "significant new resources, ideas, technologies, and/or partners to development activities."<sup>160</sup> Also noteworthy is the requirement that partners contribute cash and in-kind resources on a one-to-one basis.<sup>161</sup> HUD by contrast, issues announcements in the *Federal Register*, on a case by case basis, as the Department determines a partnership is desirable or receives specific authority from Congress. For the research partnerships program, the notice states

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<sup>153</sup> See 5 C.F.R. §§ 2635.101(b)(8) (no preferential treatment), 2635.702 (no use of public office for private gain).

<sup>154</sup> 5 C.F.R. § 2635.

<sup>155</sup> See 5 C.F.R. § 2635.101(b)(8).

<sup>156</sup> See 5 C.F.R. § 2635.702.

<sup>157</sup> Authority to Solicit Gifts, 25 Op. O.L.C. 55, 55–58 (2001).

<sup>158</sup> See 5 C.F.R. § 2635.702(c) (no official endorsements).

<sup>159</sup> See, e.g., *Global Development Alliance Annual Program Statement*, U.S. AGENCY FOR INT'L DEV., <https://www.usaid.gov/work-usaid/get-grant-or-contract/opportunities-funding/global-development-alliance-annual-program> (last updated May 29, 2016).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

it is accepting research proposals that align with HUD’s research priorities.<sup>162</sup> Both approaches can be considered best practices.

### 3. Due Diligence

Once a potential partner is identified, 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. Moreover, the selection of a partner must be justified in terms of the expertise, resources, or other exceptional capacities that the partner offers. 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, and dedication to social and environmental responsibility comprise some relevant factors. Due diligence requires a substantial amount of time and resources. Commonly, agency ethics counsel research publicly available information in addition to 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 allegations taken against the partner; 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.<sup>163</sup> 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 should all be considered. Finally, the public image of the partner in addition to its motivation for pursuing the partnership, both subjective qualities, to some extent, are also basic elements of the due diligence process.<sup>164</sup>

### 4. Vetting

Separate from due diligence (but closely related) is vetting for conflicts of interest. Agency ethics counsel ascertain whether the potential partner has applied for contracts or grants in the recent past or plans to do so in the future. Ethics counsel also considers whether the partner is currently lobbying Congress on issues relevant to the agency, is regulated by the agency, or has meetings planned where the partner is seeking favorable agency action. Whether the agency has hired a former employee of the potential partner is yet another necessary question.<sup>165</sup> The

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<sup>162</sup> See, e.g., Authority to Accept Unsolicited Proposals for Research Partnerships, 81 Fed. Reg. 38,207, 38,209 (June 13, 2016) (Strengthening Housing Markets; Affordable Quality Rental Housing; Housing as a platform for improving quality of life; Resilient and inclusive communities).

<sup>163</sup> U.S. DEP’T OF VETERANS AFFS., DIRECTIVE 0008: DEVELOPING PUBLIC-PRIVATE PARTNERSHIPS WITH, AND ACCEPTING GIFTS TO VA FROM, NON-GOVERNMENTAL ORGANIZATIONS 5 (2015), [http://www1.va.gov/vapubs/viewPublication.asp?Pub\\_ID=803&FType=2](http://www1.va.gov/vapubs/viewPublication.asp?Pub_ID=803&FType=2).

<sup>164</sup> DONNELL, *supra* note 153, at 9.

<sup>165</sup> Cheryl Embree, Fed. Trade Comm’n Deputy Ethics Official, Presentation at the Inter-Agency Ethics Council: Public Private Partnerships (June 5, 2014).

multifaceted nature of this inquiry is, at its core, an effort to arrive at a prudential judgment about how a potential partnership might impact the agency's reputation. The extent of the vetting is at the discretion of agency ethics counsel. Though primarily a matter of good practice in public-private partnerships, there is a basis in the criminal conflict of interest statute (18 U.S.C. § 208) prohibiting executive branch employees from participating in government matters that will affect his or her financial interest.<sup>166</sup>

At an ACUS sponsored roundtable on public-private partnerships, agency representatives unanimously agreed that due diligence and vetting are the most serious barriers to the effective use of partnerships because the process absorbs so much time. Many counsels at the meeting suggested that a process for shared vetting would be an enormous help in making the partnership process more streamlined and effective. The following two examples illustrate how such a system might be conceived and developed. The FY 2012 Appropriations Act contained a provision mandating that the Department of State and USAID implement a coordinated Partner Vetting System (PVS) pilot program.<sup>167</sup> The pilot program will test vetting policies and procedures, in particular a risk based approach to vetting individuals, both U.S. and non-U.S. citizens as a means to prevent the accidental funding of terrorism. The novel aspects of this vetting pilot are the risk based assessment involved in determining when to vet individuals as well as organizations.<sup>168</sup> In this particular program, the vetting of individuals involves the acquisition and maintenance of personally identifiable information (PII) which requires compliance with the Privacy Act of 1974 (5 U.S.C. § 552a) so the process involved not only the issuance of new rules for partner vetting in assistance and acquisition, but also the establishment of a new system of records.<sup>169</sup> While the results of this specific pilot program are not yet available, the program itself suggests ideas for how a program of shared vetting in the context of public-private partnerships might proceed. Congress could provide for a shared vetting program for potential private partners among a few agencies in an annual appropriations bill. The program would be a temporary pilot program with a required report at the end to evaluate the program and possibilities for expansion.

One caveat is that each agency looks for specific factors and weighs those factors differently when vetting a potential partner. However, shared information and up to date research on partners even when conducted by another ethics office may well be relevant and save time. A second model is the Do Not Pay Portal (DNP).<sup>170</sup> The DNP is a centralized web based

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<sup>166</sup> See 18 U.S.C. § 203 (forbidding a federal employee from accepting compensation as an agent or attorney before the government on behalf of another person or organization); *see also* 18 U.S.C. § 205.

<sup>167</sup> Pub. L. No. 112-74, § 7034(i), 125 Stat. 1215 (2011).

<sup>168</sup> *USAID/STATE Partner Vetting System Pilot Program*, U.S. AGENCY FOR INT'L DEV., <https://www.usaid.gov/work-usaid/partner-vetting-system> (last visited Aug. 8, 2016).

<sup>169</sup> See Partner Vetting in USAID Acquisitions, 77 Fed. Reg. 8,166 (Feb. 14, 2012); Partner Vetting in USAID Assistance, 80 Fed. Reg. 36,693 (June 26, 2015); PVS System of Records Notice, 72 Fed. Reg. 39,042 (July 17, 2007).

<sup>170</sup> Bureau of Fiscal Serv., *Privacy Program*, U.S. DEPT OF THE TREASURY, <http://donotpay.treas.gov/Privacy.htm> (last visited Aug. 8, 2016).

system that agencies use to check data sources, such as the Death Master File of the Social Security Administration and the Debt Check Database of the Department of the Treasury, from participating agencies to verify eligibility before making a payment to a vendor, grantee, loan recipient, or beneficiary. This online database, which is fed from various agencies databases, works through matching data an agency provides about a potential recipient with data on that same recipient held by other agencies. Before the portal, such relevant data could not easily be shared among agencies due to the Privacy Act and a variety of other issues, time and agency resources among them. The authority, as well as the impetus, for the portal came from the Improper Payments Elimination and Recovery Improvement Act of 2012 (IPERIA).<sup>171</sup> IPERIA specified the agency database required for the program and left implementation to the Office of Management and Budget (OMB). The difficulties involved in securing the databases and agency participation should not be underestimated. Agencies and Treasury debated Privacy Act compliance and who was responsible for updating and establishing the necessary system of records notices. Some of the information in agency databases contained information on individuals with poor credit rather than bad debt, which increased the likelihood the portal would improperly deny people payments or awards; the redress provisions were insufficient.<sup>172</sup> And participating agencies insisted computer matching agreements must be signed. At the opportune time, OMB released Memorandum M-13-20 which offered much needed guidance on how agencies should proceed in a manner that ensured individual privacy was protected in accordance with the Privacy Act.<sup>173</sup>

The DNP portal is illuminating because it involves several agencies sharing data which reduces improper payments through a streamlined system. A system for shared vetting related partnership data might offer fewer obstacles especially because the data is unlikely to contain PII and in part because the OMB MAX system is already up and running and could house the data. Along the lines of the USAID/State vetting pilot program, a future appropriations act could establish a pilot program involving a few selected agencies, culminating in an evaluative report to decide if the program merits expansion.

## 5. Endorsement

The final major ethics consideration in PPPs is endorsement. Private partners often assume, not without reason, that they can use an agency logo on their websites and publications or vice versa. This is not the case. The governing principle of the Standards of Ethical Conduct for Employees of the Executive Branch is that employees will act impartially and not give preferential treatment to any private organization or individual. More precisely, an employee may not use his

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<sup>171</sup> Pub. L. No. 112-248, 126 Stat. 2390 (2013).

<sup>172</sup> § 5(b)(4).

<sup>173</sup> Memorandum from Sylvia M. Burwell, Dir., Exec. Office of the President, for Heads of Exec. Dep'ts and Agencies, Protecting Privacy While Reducing Improper Payments with the Do Not Pay Initiative (Aug. 16, 2013), <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-20.pdf>.

government position to endorse any product, service, or enterprise.<sup>174</sup> This regulation is the legal basis for the prohibition on endorsements. Unless an agency has the requisite statutory or regulatory authority, it may not appear to promote or endorse products or services.<sup>175</sup> Put another way, Federal endorsement is permissible only when it is “[i]n furtherance of statutory authority to promote products, services or enterprises” or “[a]s a result of documentation of compliance with agency requirements or standards or as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency’s mission.” For example, the Department of Education recognizes “Blue Ribbon Schools” only because it has the authority to do so under 20 U.S.C. § 7243(b)(5).

### C. Procurements, Grants, and Cooperative Agreements

Whether or not a public-private partnership involves a procurement, grant, or cooperative agreement and how that relationship should be structured is highly specific to the particular partnership and agency statutory authority at issue. Nevertheless, some basic guiding principles are applicable to PPPs generally. Federal agencies award funds through grants, cooperative agreements, or contracts. As discussed below, each funding mechanism differs and is appropriate for certain purposes. A grant is commonly used to fund research and development projects while goods or services for direct use by a federal agency are acquired through federal contracts, most of which are governed by the Federal Acquisition Regulation (FAR).<sup>176</sup> A non-monetary public-private partnership does not involve the FAR or grants and cooperative agreements. If a partnership entails the expenditure of agency funds, then that piece of the partnership is subject to competition requirements governing the use of appropriated funds. An agency may not give appropriated funds to a private partner or another organization favored by a private partner, unless that entity has been selected via a competition or procurement.<sup>177</sup> Gift funds may not be subject to competition requirements, but for all other purposes they are public funds. In addition, specific statutory authority may exempt some types of partnerships from competition requirements, but unless an agency is using gift funds or has a specific statutory authorization, the expenditure of funds for a partnership project should be disbursed via a contract, grant, or cooperative agreement.

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<sup>174</sup> Office of Government Ethics Regulations, 5 C.F.R. § 2635.702(c).

<sup>175</sup> See, e.g., 5 U.S.C. § 3107 (restricting the use of appropriated funds to hire publicity experts).

<sup>176</sup> See GRANTS.GOV, <http://www.grants.gov/> (last visited Aug. 31, 2016).

<sup>177</sup> The following are examples of statutes that structure OMB guidance and internal agency procedures concerning grants and cooperative agreements: DATA Act, Pub. L. No. 113-101, 128 Stat. 1146 (May 9, 2014), Exec. Order No. 13,578, 70 Fed. Reg. 40,591 (July 6, 2011); Federal Financial Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 1186; Federal Grant and Cooperative Agreement Act, Pub. L. No. 95-224, 92 Stat. 3 (1978).

## 1. The Federal Acquisition Regulation

Most acquisitions for goods and services by federal executive agencies with appropriated funds are governed by the FAR, codified in Parts 1 through 53 of Title 48 of the *Code of Federal Regulations*. The FAR sets out the procedures agencies must follow in such transactions, the majority of which delineate how agencies can assure “full and open competition” for government contracts. Part 52 of the FAR contains standard solicitation and contract clauses and forms that may be optional or required.<sup>178</sup> The FAR also regulates contract pricing, purchasing from foreign sources, the application of labor laws to government acquisitions and so forth.<sup>179</sup>

Public private partnerships that involve contracts are often delayed by the time it takes to draft the necessary documents. The Build America Investment Initiative Interagency Working Group, jointly chaired by the Secretary of the Treasury and the Secretary of Transportation, pursuant to the White House push to expand partnerships in the infrastructure arena, recommended standardizing public private partnership contracts. At present, the lack of model PPP contracts means contracts must be redrafted entirely for each partnership. Recognizing that some degree of specificity is natural, a general template “should reduce the cost and complexity of structuring a PPP transaction.”<sup>180</sup> The America COMPETES Act tasked the General Services Administration (GSA) with developing a contract vehicle to provide agencies with access to services needed to run a prize competition.<sup>181</sup> GSA has done so through GSA Schedule 541 4G for Challenge and Competition Services.<sup>182</sup>

## 2. Grants and Cooperative Agreements

The Federal Grant and Cooperative Agreement Act (and OMB Circulars) defines “grant” as financial assistance by the Federal Government that provides support or stimulation to accomplish a public purpose. A “cooperative agreement” is quite similar; the significant difference being the agency will be substantially involved with the recipient in carrying out the activities described in the agreement.<sup>183</sup> A cooperative agreement seems a natural fit for some public-private partnerships, but competition requirements may attach unless Congress expressly authorizes non-competitive authority. Non-competitive cooperative agreement authority, because

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<sup>178</sup> 48 C.F.R. § 6.101(a).

<sup>179</sup> 48 C.F.R. pts. 31, 25, 22.

<sup>180</sup> JACK LEW & ANTHONY FOXX, DEP’T OF TREASURY, RECOMMENDATIONS OF THE BUILD AMERICA INVESTMENT INITIATIVE INTERAGENCY WORKING GROUP 10 (2015), <https://www.treasury.gov/resource-center/economic-policy/Documents/Build%20America%20Recommendation%20Report%201-15-15%20FOR%20PUBLICATION.pdf>.

<sup>181</sup> 15 U.S.C. § 3719(n).

<sup>182</sup> Karen Trebon, *Get Started with Challenge and Prize Competitions*, DIGITALGOV, <https://www.digitalgov.gov/2014/03/31/get-started-with-challenge-and-prize-competitions/> (last visited Aug. 8, 2016).

<sup>183</sup> The Federal Grant and Cooperative Agreement Act, Pub. L. No. 95–224, 92 Stat. 3 (Feb. 3, 1978).

of the substantial involvement of the agency and the discretion the agency has in selecting a partner, can be considered a type of public-private partnership.<sup>184</sup>

## D. Inherently Governmental Functions & Special Government Employees

### 1. Inherently Governmental

Public-private partnerships invite concerns about whether private partners may inappropriately take on functions that are considered “inherently governmental.” These concerns should be taken seriously so that agencies do not, inadvertently permit private partners or their employees to perform roles or assume responsibilities reserved for the government and federal employees. The term “inherently governmental” is of signal importance in delimiting the appropriate relationships federal agencies can have with private entities. Inherently governmental functions are those that are assigned to public entities, either by the Constitution or through other means.<sup>185</sup>

The Constitution limits the extent to which private parties can perform inherently governmental functions. Private parties cannot be given authority to legislate or make rules on the government’s behalf.<sup>186</sup> But in other areas, private parties are not constitutionally barred from exercising powers that are traditionally exclusively reserved to the state. Litigation involving constitutional constraints in this context typically involves the “state action doctrine,” which considers whether private actors (1) must provide the same constitutional rights to third parties

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<sup>184</sup> State and USAID have created grant policies that allow for non-competition for assistance funds for partnerships – waiting for information from Dept. of State.

<sup>185</sup> See Alon Harel, Ariel Porat, *Essay and Comment: Commensurability and Agency: Two Yet-To-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749, 772 (2011) (appearing as an essay related to the Future of Legal Theory Symposium).

<sup>186</sup> See KATE M. MANUEL, CONG. RESEARCH SERV., R42325, DEFINITIONS OF “INHERENTLY GOVERNMENTAL FUNCTION” IN FEDERAL PROCUREMENT LAW AND GUIDANCE 18–19 (2014) (citing Carter v. Carter Coal Co., 298 U.S. 238 (1938)) (finding the Bituminous Coal Conservation Act unconstitutional, in part, because the statute penalized people who failed to observe the requirements for minimum wages and maximum hours drawn up by prescribed majorities of coal producers and employees); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (finding unconstitutional the provisions of the National Industrial Recovery Act, which allowed trade and industry groups to develop codes of fair competition that would become binding on all participants in the industry once they were approved by the president); St. Louis, Iron Mount’n & So. Ry. Co. v. Taylor, 210 U.S. 281 (1908) (upholding the constitutionality of a statute which gave the American Railway Association the authority to determine the standard height of draw bars on freight cars and to certify that figure to the Interstate Commerce Commission, which was required to accept it).

that the government must provide, or (2) can claim sovereign immunity to the same extent as government officials.<sup>187</sup>

Aside from constitutional constraints, there are also statutory, regulatory, and policy prohibitions around private parties' performance of inherently governmental functions. The Federal Activities Inventory Reform Act (FAIR) Act of 1998 states that an inherently governmental function is "a function so intimately related to the public interest as to require performance by Federal Government employees."<sup>188</sup> Along the same lines, OMB Circular A-76 provides that an inherently governmental activity is "an activity that is so intimately related to the public interest as to mandate performance by government personnel."<sup>189</sup> Circular A-76 further clarifies that the exercise of sovereign power and the establishment of policies relating to oversight of monetary transactions or entitlements are the two most common forms of inherently governmental activity.<sup>190</sup> Features of inherently governmental activities include binding the United States to take action; determining final interests by proceedings or contract management; "significantly affecting the life, liberty, or property of private persons;" or exercising final control over the disposition of the property of the United States.<sup>191</sup> Circular A-76 states that discretion does not *per se* make a function inherently governmental, it has to be "substantial discretion."<sup>192</sup> For instance, a contractor can assist an agency in developing a list of potential policy options or implement a decision made by an agency, so long as the final decision is left to the agency.

In addition to the FAIR Act and OMB Circular A-76, there are other statutes, regulations, and guidance documents that interpret the meaning of inherently governmental function. These typically either reproduce or incorporate by reference one of these two definitions.<sup>193</sup> Sometimes they also provide examples of inherently governmental functions, though the examples tend to be rather open-ended.<sup>194</sup>

The alternative to an inherently governmental function is known as a "commercial" function, which can be performed either by a federal employee or be contracted out.<sup>195</sup> Moreover,

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<sup>187</sup> *Id.* (citing *Street v. Corrections Corp. of Am.*, 102 F.3d 811, 814 (6th Cir. 1996) (finding that operation of a prison is an inherently governmental function requiring the prison's operators to respect prisoners' constitutional rights); *Giron v. Corrections Corp. of Am.*, 14 F. Supp. 2d 1245, 1248–50 (D.N.M. 1998) (same)).

<sup>188</sup> 31 U.S.C. § 501 note, at § 5(2)(A).

<sup>189</sup> OFFICE OF MGMT. & BUDGET, OMB CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, Attachment A § (B)(1)(a) (2003), [https://www.whitehouse.gov/omb/circulars\\_a076\\_a76\\_incl\\_tech\\_correction#a](https://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction#a).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* § (B)(1)(a)(1)–(4).

<sup>192</sup> *Id.* § 5(2)(B)(iv).

<sup>193</sup> See MANUEL, *supra* note 187, at 7.

<sup>194</sup> For instance, performing preemptive or other types of attacks is considered inherently governmental by the Department of Defense but protection of property and persons, as performed by private security contractors, is not. Compare *Contractor Personnel Authorized to Accompany U.S. Armed Forces*, 71 Fed. Reg. 34,826, 34,826 (June 16, 2006), with *Contractor Personnel Authorized to Accompany U.S. Armed Forces*, 73 Fed. Reg. 16,764, 16,765 (Mar. 23, 2005).

<sup>195</sup> See MANUEL, *supra* note 187, at 8–22.

according to Circular A-76, there is also an undefined category of activities which are commercial but “not appropriate for private sector performance.”<sup>196</sup>

The FAR contains a list of examples of functions considered to be inherently governmental or which shall be treated as such, although the list is not all inclusive.<sup>197</sup> FAR also contains discussion of functions that “approach” being inherently governmental due to the nature of the task, the performance of the task, or supervision by government of the task.<sup>198</sup> These may include services relating to budget preparation, acquisition management, providing technical advice to source selection boards, and serving in arbitration or dispute resolution capacities. Beyond identifying functions that may approach being governmental, however, FAR does not provide further guidance or explicitly prohibit the contracting of these “approach” functions. Also note that FAR applies to all executive branch agencies,<sup>199</sup> but *not* to services obtained through personnel appointments, advisory committees, or personal services contracts issued according to statutory authority.<sup>200</sup> Deviation from FAR is permitted on a contract-specific or ongoing “class” basis under certain conditions.<sup>201</sup> Federal agencies should take care to specify roles and responsibilities in the memorandum of understanding (pp.45-47), and to be cognizant of whether certain activities could be construed as inherently governmental. For example, if a private partner volunteers the services of its employees or employee time towards a partnership, that employee should only work on aspects of the partnership within the ambit of the partner rather than relieve or help the agency or its employees by taking on tasks of the federal employee assigned to work on the partnership. The employee of a private partner may not make a decision concerning grant funding or review grant applications, even for a project that is part of a public-private partnership. Doing so would be considered an inherently governmental function. One way to avoid violating the prohibition is to bring private sector employees into an agency as a special government employee.

## 2. Special Government Employees

The special government employee (SGE) status allows government to utilize talent outside the civil service system. Congress created the SGE in 1962 in response to growing government demand for personnel with specialized skills to perform discrete tasks, and the category has been used since then in a number of statutes and regulations to tailor the applicability of certain ethical

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<sup>196</sup> OFFICE OF MGMT. & BUDGET, OMB CIRCULAR A-76, *supra* note 190, at § (C)(1).

<sup>197</sup> 48 C.F.R. § 7.503.

<sup>198</sup> *Id.*

<sup>199</sup> With a few exceptions, including the USPS and FAA.

<sup>200</sup> 48 C.F.R. § 7.502. Personal service contracts are those which by their express terms or how they are administered make “the contractor personnel appear to be, in effect, Government employees.” 48 C.F.R. § 2.101. This form of contract is generally prohibited under the civil service laws as a circumvention unless specifically authorized by statute for direct hire authority.

<sup>201</sup> See 48 C.F.R. § 1.403 (contract-specific or “individual” deviations may be authorized by the agency head, and the contracting officer must document the justification and the agency approval in the contract file); 48 C.F.R. § 1.404 (class deviations, applicable to more than one contract, may generally be made by the agency head after consultation with or the approval of certain parties specified in the FAR).

restrictions.<sup>202</sup> An SGE is “an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis.”<sup>203</sup> SGE’s differ from independent contractors who are not subject to any ethics laws and regulations. Many SGE’s are members of advisory committees.

The Standards of Ethical Conduct for Employees of the Executive Branch apply differently to SGEs or not at all.<sup>204</sup> Moreover, SGE’s are exempt from conflict of interest statutes that circumscribe the actions of members of the civil service.

For instance,

- An SGE’s agency can use special waiver provisions to resolve financial conflicts of interest arising under 18 U.S.C. § 208 (a criminal conflict of interest statute prohibiting an employee from participating in any particular Government matter affecting personal or “imputed” financial interests, such as those of the SGE’s non-government employer).
- An SGE is not covered by 18 U.S.C. § 209 (a criminal conflict of interest statute prohibiting the supplementation of Government salary).
- An SGE is not covered by 5 U.S.C. app. 4 §§ 501 or 502 (civil statutes limiting outside earned income and restricting certain outside employment and affiliations).
- An SGE is not covered by or differently covered by a number of regulations limiting outside income and representation of outside parties before the agency.

These exceptions and less stringent standards for SGEs make the hiring of an SGE from a private partner a viable option for an agency, should it need to avail itself of the expertise or special skills of a partner’s staff member.

It should be mentioned that different departments have differing restrictions on SGEs’ concurrent and post-employment ethical constraints. The DoD’s Standards of Conduct Office has issued guidance for SGEs warning against “serving two masters” and instances where an SGE may have to recuse herself from an advisory committee due to conflicts.<sup>205</sup> The primary advice is, as always, consult an ethics official when in a grey area. Use of SGEs are comparatively common. At the State Department, for instance, a spokesperson in 2013 stated that they had 50 SGEs not on

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<sup>202</sup> See generally *Special Government Employees*, U.S. OFFICE OF GOV’T ETHICS, <https://www.oge.gov/oge.nsf/Resources/Special+Government+Employees> (last visited July 29, 2016).

<sup>203</sup> 18 U.S.C. § 202(a).

<sup>204</sup> The following list is taken in part from U.S. OFFICE OF GOV’T ETHICS, *supra* note 203.

<sup>205</sup> STANDARDS OF CONDUCT OFFICE, U.S. DEP’T OF DEF., AN ETHICS GUIDE FOR SPECIAL GOVERNMENT EMPLOYEES, INCLUDING CONSULTANTS AND EXPERTS (SUCH AS ADVISORY COMMITTEE MEMBERS) (n.d.), [http://www.dod.mil/dodgc/defense\\_ethics/resource\\_library/sge\\_rvw\\_guide.pdf](http://www.dod.mil/dodgc/defense_ethics/resource_library/sge_rvw_guide.pdf).

advisory committees, a 2014 FOIA request put the number in a range of 50-70, and a 2012 IG report put the number at 100. Data was not officially compiled by State until the 2014 FOIA request.<sup>206</sup>

## E. FACA

Public-private partnerships often try to tiptoe around the Federal Advisory Committee Act (FACA).<sup>207</sup> FACA ensures that consensus advice given to the Executive Branch from committees that include members of the private sector is both transparent and objective. As part of the partnership process, agencies should be wary of unintentionally creating a group that provides consensus advice, without complying with the statute's procedural requirements, which include consulting with the General Services Administration (GSA), drafting a charter, assembling a balanced committee, and opening meetings to the public.<sup>208</sup> Groups in which non-government members lack a formal vote or veto power are outside the purview of FACA as are groups of persons providing advice to the agency on an individual basis. A committee created by a non-federal entity (a private partner) may also be excluded from FACA.<sup>209</sup>

The statutory text suggest FACA covers nearly every interaction or meeting between the federal government and private persons. Defining the contours of the statute, as described in Reeve Bull's ACUS report, “[M]uch ink has been spilled, both in the case law and in scholarly research, to define precisely when the statute applies.”<sup>210</sup> For FACA to apply, a meeting between the federal government and two or more persons not currently affiliated with the government must meet certain criteria, namely the private parties must constitute a group, the qualifications for which have been elaborated in case law; the federal government must have established or must utilize the group, and the group must provide the government with advice.<sup>211</sup> FACA commonly does not apply to PPPs, but care must be taken to avoid triggering FACA when agency employees and private partner representatives convene to discuss the partnership and particular activity, program, event at issue. FACA applies only if the PPP is providing advice to the government.<sup>212</sup> Even if the PPP is providing advice to the government, under the terms of the statute, an exception may be relevant.

The exceptions to FACA have emerged over time to describe those government-private sector interactions that do not meet one of the three criteria required for FACA to apply.<sup>213</sup> Even

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<sup>206</sup> See Charles S. Clark, *Clinton Email Fracas Raises Question: What Is a 'Special Government Employee?'*, GOVERNMENT EXECUTIVE (Sept. 4, 2015), <http://www.govexec.com/oversight/2015/09/clinton-email-fracas-raises-question-what-special-government-employee/120362/>.

<sup>207</sup> 5 U.S.C. app. 2.

<sup>208</sup> See, e.g., Adoption of Recommendations, 77 Fed. Reg. 2,257 (Jan. 17, 2012).

<sup>209</sup> 41 C.F.R. pt. 102-3.

<sup>210</sup> REEVE T. BULL, ADMIN. CONF. OF U.S., RECOMMENDATION 2011-7, THE FEDERAL ADVISORY COMMITTEE ACT: ISSUES AND PROPOSED REFORMS 13 (2011).

<sup>211</sup> *Id.* at 13.

<sup>212</sup> Judicial Watch, Inc. v. Clinton, 76 F.3d 1232, 1233 (D.C. Cir. 1996).

<sup>213</sup> BULL, *supra* note 211, at 13.

if the PPP, or a group of private partners and agency officials meeting to discuss PPP issues to be more specific, is providing advice to the agency, a FACA exemption will apply if the private party takes the initiative in creating the group.<sup>214</sup> “In short, the utilized requirement under FACA has been interpreted relatively narrowly by the federal courts. At the very least, an agency must exert a high degree of control over an advisory committee to utilize it within the meaning of FACA, and committees formed by private entities, such as government contractors, may be per se exempt from coverage under the statute.”<sup>215</sup> If private parties do not have a vote in any advice that is offered to the agency a FACA exception applies.<sup>216</sup> Likewise, if the meetings are irregular or the advice is given on an individual basis, rather than as the product of shared deliberation, the meeting is exempt from FACA. It should be noted that the exception for individual advice is difficult to maintain in practice in a group setting.<sup>217</sup> Despite the various routes around FACA, there are times when an agency may wish to create an advisory committee under the terms of the Act, similar to the Department of State, which recently established the Secretary of State’s Advisory Committee on Public-Private Partnerships.<sup>218</sup>

#### F. Privacy and Information Sharing

The Freedom of Information Act (FOIA) frequently catches private partners by surprise. All information or records a private partner submits to a federal agency are subject to public disclosure under FOIA, subject to the assertion of an exemption for confidential or proprietary information (known as a (b)(4) exemption).<sup>219</sup> In the memorandum of understanding (MOU) which sets out the parameters and respective roles, agencies should include a clause covering FOIA applicability that instructs partners to mark privileged or confidential information as such, but such a marking is no guarantee that a document will be kept confidential as an agency determination that the information is exempt could be challenged in court. The exemption protecting inter-agency or intra-agency memorandums (a (b)(5) exemption which incorporates the statutory and case law privileges of civil discovery) are not available to communications between the agency and private partners. Private partners should mark as confidential and privileged any communications that might reveal trade secrets or confidential business information, which generally includes financial information, organizational processes and operations, profits and losses. The Court of Appeals for the District of Columbia Circuit has consistently held that the terms commercial or financial information should be given their “ordinary meanings” and has specifically rejected the argument that the term “commercial” be confined to records that “reveal basic commercial operations,” holding instead that records are commercial so long as the submitter has a “commercial interest”

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<sup>214</sup> Byrd v. Env'tl. Prot. Agency, 174 F.3d 239, 246–47 (D.C. Cir. 1999).

<sup>215</sup> BULL, *supra* note 211, at 18.

<sup>216</sup> *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005).

<sup>217</sup> BULL, *supra* note 211, at 15.

<sup>218</sup> *Establishment of the Secretary of State's Advisory Committee on Public-Private Partnerships*, U.S. DEP'T OF STATE, (Mar. 21, 2016), <http://www.state.gov/r/pa/prs/ps/2016/03/254874.htm>.

<sup>219</sup> 5 U.S.C. § 552(b)(4).

in them.<sup>220</sup> A court found commercial interest in information pertaining to water rights held by Indian tribes attributable to the tribes' interest in "maximizing" their position with respect to the resource.<sup>221</sup>

Privacy concerns should also be addressed. An agency must protect non-public information such as internal agency policies, reports, and financial plans as well as personally identifiable information (PII).<sup>222</sup> One best practice used in MOUs with private partners is to include a clause stating that no PII will be shared. The clause should also state that the only information shared will be that which is publically available. Finally, any information that might exclude the private partner from future contracts and grants will not be shared.

#### IV. How to Memorialize a Partnership

A Memorandum of Understanding (MOU) is a recommended best practice to memorialize a partnership, and it should include certain specific clauses and protocols. Federal agency MOUs are non-binding and do not obligate funds. Private partners sometimes consider MOUs to be binding, in which case the agreement should be termed a Letter of Intent, should an agency wish to execute a binding agreement. MOUs should address information sharing, publicity, voluntary services, as well as the roles and responsibilities of each partner. A review of agency practices for documenting PPPs reveals some of the essential components of a partnership agreement. The majority of agencies and departments view MOUs as legally non-binding.<sup>223</sup> However, there are situations, especially in more complicated partnerships involving the exchange of funds or services, where a non-binding agreement is insufficient and a binding contract, grant or cooperative agreement is required in addition to the MOU establishing the overall framework of the partnership.<sup>224</sup>

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<sup>220</sup> Pub. Citizen Health Res. Grp. v. Food & Drug Admin., 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing Wash. Post Co. v. Health & Human Servs., 690 F.2d 252, 266 (D.C. Cir. 1982), and Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir. 1980))

<sup>221</sup> Flathead Joint Bd. of Control v. U.S. Dep't of the Interior, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004) (declaring that "water rights themselves are an object of commerce . . . that is bought and sold," and holding that "information about the quantity available," or "information that creates the Tribes' negotiating position, supports their claims," or maximizes their position, "is all commercial information in function") (appeal pending).

<sup>222</sup> See 5 U.S.C. § 552(a); see also OFFICE OF MGMT. & BUDGET, MEMORANDUM M-14-06, GUIDANCE FOR PROVIDING AND USING ADMINISTRATIVE DATA FOR STATISTICAL PURPOSES (Feb. 14, 2014).

<sup>223</sup> See, e.g., OFFICE OF THE ASSOC. DIR. FOR POLICY, CDC'S GUIDING PRINCIPLES FOR PUBLIC-PRIVATE PARTNERSHIPS: A TOOL TO SUPPORT ENGAGEMENT TO ACHIEVE PUBLIC HEALTH GOALS 1 (2014), <http://www.cdc.gov/about/pdf/business/partnershipguidance-4-16-14.pdf> [hereinafter CDC GUIDE] (defining PPPs as "relationships between [an executive agency] and the private sector that are *not legally binding* where skills and assets are shared to improve the public's health and each partner shares in the risks and rewards that result from the partnership) (emphasis added); CORP. FOR NAT'L & CMTY. SERV., STRATEGIC PLAN 2011-2015 10 n.13 (2011), [http://www.nationalservice.gov/sites/default/files/documents/11\\_0203\\_cncs\\_strategic\\_plan.pdf](http://www.nationalservice.gov/sites/default/files/documents/11_0203_cncs_strategic_plan.pdf).

<sup>224</sup> DAVID J. SHULKIN, DEP'T OF VETERANS AFFAIRS, VHA DIRECTIVE 1098, VHA PUBLIC-PRIVATE PARTNERSHIPS A-3 app. (2015), [www.va.gov/vhapublications/ViewPublication.asp?pub\\_ID=3142](http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=3142).

In its Best Practices Guide for Building Partnerships, the White House states that “sharing the monetary responsibility for a partnership may provide an advantageous framework because it demonstrates a joint fiscal commitment to achieving mutually-defined goals.”<sup>225</sup> As previously mentioned, cooperative agreements, are governed by established procedures and confirmed in legally binding documents. When the agency receives a gift of funds to carry out a mutual objective, a letter from the donor and a non-binding MOU are recommended.<sup>226</sup> Although non-binding, MOUs should always be developed in coordination with an agency’s counsel offices.<sup>227</sup>

## A. The Memorandum of Understanding

To memorialize the agreement, detail the roles, and clarify expectations, numerous agencies require any philanthropic PPPs be formalized through the use of a Memorandum of Understanding (MOU).<sup>228</sup> (Other terms include Memorandum of Agreement or Letter of Agreement). An MOU is a non-binding, written document that defines the roles and responsibilities of each party.<sup>229</sup> All MOUs should be conducted in consultation with the agency’s Office of General Counsel.<sup>230</sup> MOUs should be non-binding for a variety of reasons, foremost among them is to avoid potential Antideficiency Act violations. An agency may not obligate funds in excess or advance of available appropriations. Nor should an agency promise funds to a partner because the provision of funds to a private partner, absent special statutory authority, must proceed through legal procedures governing assistance and procurements.<sup>231</sup>

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<sup>225</sup> CMTY. P’HIPS INTERAGENCY POLICY COMM., BUILDING PARTNERSHIPS: A BEST PRACTICES GUIDE 6 (2013) [*hereinafter CPIPC BEST PRACTICES GUIDE*].

<sup>226</sup> See CDC GUIDE, *supra* note 224, at 2; FDA HANDBOOK, *supra* note 179, at 19.

<sup>227</sup> CPIPC BEST PRACTICES GUIDE, *supra* note 178, at 6.

<sup>228</sup> See, e.g., U.S. Food & Drug Admin, *MEMORANDUM OF UNDERSTANDING: STRATEGIC PARTNERSHIPS AND INTELLECTUAL PROPERTY*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/default.htm> (last visited Aug. 3, 2016); DEP’T OF HOUS. & URBAN DEV., *MEMORANDUM OF UNDERSTANDING (MOU) GUIDE 1* (n.d.), [http://www.hud.gov/offices/pih/programs/hcv/wtw/resources/bs8/mou\\_guide.pdf](http://www.hud.gov/offices/pih/programs/hcv/wtw/resources/bs8/mou_guide.pdf) [*hereinafter HUD MOU*]; SECRETARY’S OFFICE OF GLOBAL P’SHPIS, STATE OF GLOBAL PARTNERSHIPS REPORT 20 (2015), <http://www.state.gov/documents/organization/239008.pdf> [*hereinafter STATE REPORT*]; U.S. AGENCY FOR INT’L DEV., APS-OAA-14-000001, FY2014 & FY2015 GLOBAL DEVELOPMENT ALLIANCE ANNUAL PROGRAM STATEMENT, USAID AND THE PRIVATE SECTOR: PARTNERING FOR IMPACT 38 (2014), <https://www.usaid.gov/sites/default/files/documents/1880/>.

<sup>229</sup> See CTR. FOR DISEASE CONTROL & PREVENTION, DEVELOPMENT AND EXECUTION OF MEMORANDA OF UNDERSTANDING AND MEMORANDA OF AGREEMENT OPERATIONAL POLICY 2 (2013), <https://www.cdc.gov/about/pdf/business/policy597.pdf> [*hereinafter CDC MOU*]; CDC GUIDE, *supra* note 224, at 5; HUD MOU, *supra* note 230, at 1; STATE REPORT, *supra* note 229, at 20; CPIPC BEST PRACTICES GUIDE, *supra* note 226, at 6; USAID ANNUAL STATEMENT, *supra* note 160, at 38.

<sup>230</sup> CPIPC BEST PRACTICES GUIDE, *supra* note 178, at 6.

Several agencies also provide guidelines for what should be incorporated into the MOU. An MOU should include:

- (1) Legal name and address of each partner;
- (2) Purpose and goals of the partnership;
- (3) Legal authority;
- (4) Roles and responsibilities of each partner;
- (5) Language indicating that each party bears its own expenses in connection with the preparation and execution of the MOU;
- (6) Publicity. If publicity will be allowed, delineate procedures for advance consultation and approval. Publicity must be factual, and endorsement or branding is not permissible. Agencies are prohibited from using appropriated funds for propaganda;
- (7) Intellectual Property – Who has rights to any joint product of the partnership – studies, reports, and informational guides;
- (8) Effective date, duration, amendment, and termination language;
- (9) At least one point of contact within each partnering organization;
- (10) Statement that the MOU is non-binding and there is no financial commitment. The MOU is a statement of intent. Avoid any mandatory language (such as “will,” “shall,” or “warrants”) and use the language of intent;
- (11) There should be no language regarding liability, indemnity, or choice of law;
- (12) State the MOU does not confer any legal rights on third parties;
- (13) Plan for evaluating performance metrics, impact, or efficacy of the partnership;
- (14) Address confidentiality and non-public information (such as PII, internal documents). Include language regarding the Freedom of Information Act (FOIA) because the MOU itself may be subject to disclosure in addition to items exchanged during the partnership. Advise partner that anything submitted to the agency or department may be subject to FOIA, subject to available exemptions. The partner should clearly mark any confidential information as such. Caution the partner that a Court could order disclosure. If any PII is to be exchanged, reference the Privacy Act. In this case, enter into separate confidentiality/non-disclosure agreements as appropriate;
- (15) Annual review to determine (1) if the partnership is still needed, (2) if the goals are being achieved, (3) if expectations are being met, and (4) if the roles and responsibilities of each partner are being fulfilled; and
- (16) Duration.

## B. Who Can or Should Sign the MOU?

Agencies have various internal practices regarding the officers who have the authority to sign such documents. Agencies should make sure the appropriate delegations of authority are in place to designate the signatory. In addition, an internal review procedure should be established so that all necessary program officials and OGC counsel can review the MOU before it is finalized. In addition to administrative and ethics counsel, program counsel from the relevant program offices should review. There are additional issues to consider if an agency is partnering with an entity not based in the U.S. Does the agency have the authority to undertake international activity? If it does, counsel should clarify the scope of the agency's international authority to make sure the activities covered by the MOU are within proper bounds. If the MOU is with a foreign entity, the State Department may need to review the MOU before it is executed.<sup>232</sup>

## C. Additional MOUs

Some partnerships entail more than one MOU. Depending on the number of partners, separate MOUs may need to be executed with each partner if the roles and responsibilities of each different substantially or in the interests of clarity. In addition, on some occasions a partner may ask an agency employee to serve in his or her official capacity as a board member or officer of that partner organization. Such an arrangement is permissible, but only if it is in the interest of the agency and the conflicts of interest can be managed in a way that does not reflect poorly on the agency. First, the Designated Agency Ethics Official will issue a waiver of conflicts of interest. Then, a MOU between the partner organization and the agency should delineate the time commitment and the duties of a board member or officer.<sup>233</sup> The employee will have to recuse himself or herself from any matters related to the agency in which the partner organization has a financial interest. In such cases, the Designated Agency Ethics Official will issue a statement of disqualification. The Department of the Interior has prepared a sample "MOU for Official Participation as Officer or Board Member of Partnership Organization," available as Appendix E to this report. Finally, a best practice recommended by the Department of the Interior is for a federal employee to serve as a federal liaison, a non-voting, non-fiduciary agency representative to an outside organization, rather than as a board member or officer. This designation realizes the benefits of serving on the board of a private partner while avoiding the more serious conflicts of interests serving as an official board member creates.<sup>234</sup>

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<sup>232</sup> 22 U.S.C. §§ 2651(a)(4), 2672(a).

<sup>233</sup> U.S. DEP'T OF THE INTERIOR, ETHICS ISSUES IN PARTNERSHIPS, <https://www.doi.gov/sites/doi.gov/files/migrated/partnerships/upload/ethics-issues-in-partnerships.pdf>.

<sup>234</sup> *Id.* See *Official Duty Activities Involving Outside Organizations*, NAT'L INSTS. OF HEALTH, <https://ethics.od.nih.gov/topics/official.htm> (last updated Mar. 11, 2016).

