



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public-Private Partnerships

Committee on Regulation

Proposed Recommendation | December 14, 2018

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and an additional amendment from a Conference member (with source shown in the margin).

1 Federal agencies have long participated in public-private partnerships (partnerships) to
2 assist in carrying out their missions.¹ A private-sector entity and the federal government may
3 have a variety of reasons for wanting to partner with one another. Both sectors may find, for
4 instance, that a partnership with the other allows them to access more resources and expertise.
5 Expanded access to such resources and expertise may allow them to complement and reinforce
6 their missions, producing outcomes with greater impact than they could achieve working entirely

Commented [CMA1]: Proposed amendment from Peter Davidson

¹ The term "public-private partnership" is most commonly used across levels of government (i.e., local, state, and federal) to describe agreements between a government entity and a private firm in which the government owns and seeks to upgrade or replace an infrastructure asset, and the private partner designs, builds, finances, operates, or maintains the asset. Infrastructure P3s are not the focus of this Recommendation and the *Guide to Legal Issues Encountered in P3s* (described below). Rather, the *Guide* and Recommendation focus on P3s that relate to social welfare topics, such as health, labor, education, and diplomacy. Such P3s are more common at the federal level. Readers who are interested in infrastructure P3s should consult, among other sources, U.S. Dept. of Treas., *Expanding the Market for Infrastructure Public-Private Partnerships: Alternative Risk and Profit Sharing Approaches to Align Sponsor and Investor Interests* (Apr. 2015). This Recommendation focuses on partnerships that relate to social welfare topics, such as health, labor, education, and diplomacy. The Recommendation focuses on these kinds of partnerships, as opposed to, for example, infrastructure partnerships and research and development (R&D) partnerships, because social welfare topics are areas of expertise for agencies involved in an interagency working group convened by the Office of the Chairman of the Administrative Conference to develop the *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level* (described below). Readers who are interested in infrastructure partnerships should also consult, among other sources, U.S. Dep't. of Treas., *Expanding the Market for Infrastructure Public-Private Partnerships: Alternative Risk and Profit Sharing Approaches to Align Sponsor and Investor Interests* (Apr. 2015). Those interested in R&D partnerships should also consult, among other sources, ALBERT N. LINK, *PUBLIC/PRIVATE PARTNERSHIPS: INNOVATION STRATEGIES AND POLICY ALTERNATIVES 7-22* (Springer 2006).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

7 independently of one another.² Recent government-wide initiatives relating to, among other
8 areas, workforce training³ and technology innovation,⁴ are centered on partnerships.

9 There is no binding definition of “public-private partnerships” that spans across all
10 agencies, but an interagency working group has defined them as “collaborative working
11 relationships between the U.S. government and non-federal actors in which the goals, structures,
12 and roles and responsibilities of each partner, are mutually determined.”⁵

13 There is no bright line distinction between partnerships and other forms of collaboration
14 between federal agencies and the private sector, but there are certain characteristics that are
15 indicative of a partnership. With partnerships, there is continuous, ongoing assessment and
16 decision making with respect to the goals and structures of the arrangement, the roles and
17 responsibilities of each partner, and the risks that each partner assumes. Because of the
18 continuous nature of this decision making, there is often a strong alignment of resources: that is,
19 both parties to the partnership generally spend their own materials, time, and money throughout
20 the course of the partnership, without reimbursement from the other partner.

21 In other forms of collaboration between agencies and the private sector (e.g.,
22 procurement contracts), these aspects of the relationship are typically determined at a single
23 point in time and memorialized through a legally binding instrument such as a contract.
24 Although it is possible for a partnership to be formalized through a contract, partnerships are far
25 more often formalized through non-binding memoranda of understanding (MOUs) or
26 memoranda of agreement (MOAs). These instruments are often quite concrete and specific with
27 respect to the goals of the partnership, but broad and flexible with respect to the roles and
28 responsibilities of the partners, and the governance of the partnership. They are therefore better
29 suited than contracts for formalizing partnerships.

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

³ See Exec. Order No. 13,845, 83 Fed. Reg. 35,099 (July 24, 2018).

⁴ See OFFICE OF MGMT. & BUDGET & GEN. SERVS. ADMIN.: THE GEAR CENTER,
<https://www.performance.gov/GEARcenter>.

⁵ See CMTY. P’S HIPS INTERAGENCY POLICY COMM., *supra* note 2, at 1 n.1.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

30 This Recommendation does not attempt to adopt a definitive definition of partnerships,
31 but the foregoing characteristics should help agencies identify the types of relationships that fall
32 under the partnership umbrella. Ultimately, it is up to agencies to determine what relationships
33 qualify as partnerships and under what circumstances they should draw upon the
34 recommendations below.⁶

35 **Development of the *Guide to Legal Issues Involved in Public-Private Partnerships at*** 36 ***the Federal Level***

37 In the spring of 2017, at the suggestion of the Committee on Regulation, the
38 Conference’s Office of the Chairman convened dozens of federal officials from 19 different
39 agencies who actively work on partnerships. Throughout the course of three meetings from July
40 2017 through February 2018, and various discussions with individual group members, the group
41 collaboratively drafted the *Guide to Legal Issues Involved in Public-Private Partnerships at the*
42 *Federal Level (Guide)*.⁷

43 The *Guide* addresses major legal issues that agencies will likely encounter as they
44 participate in partnerships. The *Guide* also offers a definition of “public-private partnerships,”
45 briefly discusses a previous interagency effort regarding partnerships, highlights activities that
46 agencies often undertake as part of partnerships, and provides examples of specific partnerships.
47 Finally, the *Guide* discusses issues pertaining to agencies’ vetting of potential private partners.

48 **Potential Inefficiencies in Vetting Private Entities**

49 Officials across agencies can benefit from sharing experiences with one another
50 regarding partnerships. One issue that has emerged as a particularly good candidate for such
51 interagency discussion is how agencies vet potential private-sector partners. Agencies vet

⁶ For examples of relationships that some agencies consider to be partnerships, see Occupational Safety & Health Admin., U.S. Dep’t of Labor, *Partnership: An OSHA Cooperative Program*, www.osha.gov/dcspp/partnerships/index.html; *Partnership for Freedom*, <https://partnershipforfreedom.org> (recently ended); and U.S. Dep’t of State, *Diplomacy Lab*, <https://www.state.gov/s/partnerships/ppp/diplab>.

⁷ See Public-Private Partnerships Working Group, Admin. Conf. of the U.S., Office of the Chairman, *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level* (Dec. 2018), <https://www.acus.gov/report/guide-legal-issues-involved-public-private-partnerships-federal-level-final-12-6-2018>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

52 potential private partners to avoid possible conflicts of interest or harm to the agency's
53 reputation. Vetting can be a time intensive and potentially duplicative enterprise, both for the
54 agencies and for potential private partners that are asked to submit information to agencies.⁸

55 Agencies have differing practices with respect to vetting of potential private-sector
56 partners. Some agencies have central vetting units with officers whose exclusive responsibility is
57 to vet proposed private-sector partners and an official whose responsibility is to approve
58 partnerships for the entire agency. Other agencies lack a central vetting unit and, instead,
59 authorize each of their offices to conduct its own vetting. Some of the latter agencies produce
60 resources that all staff are directed to use.

61 Duplication of vetting happens across agencies (“external duplication”) when two or
62 more agencies gather the same information about the same potential private partner. Duplication
63 also happens within agencies (“internal duplication”) when two or more parts of a single agency
64 gather the same information about the same potential private partner. Some agencies have
65 developed or are developing practices to avoid internal duplication. There do not appear to have
66 been robust efforts to avoid external duplication.

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

⁸ See INTERACTION, PARTNER VETTING INDEPENDENT ASSESSMENT: INSUFFICIENT JUSTIFICATION FOR A GLOBAL ROLLOUT 17 (2016), available at <https://www.interaction.org/document/partner-vetting-independent-assessment-insufficient-justification-global-rollout>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

75 **Agency Officials Exchanging Best Practices Regarding Partnerships**

76 An online forum could be structured to allow agency officials to exchange best practices
77 on any number of topics involving partnerships, such as how to:

- 78 • Initiate or create a partnership in a manner that is consistent with ethical requirements,
- 79 • Evaluate the success of partnerships,
- 80 • Structure an internal vetting process (for example, **whether there should there be a central**
81 **vetting unit, or whether vetting should vetting be carried out office by office?**),
- 82 • Develop internal processes to reduce duplication in vetting, and
- 83 • Resolve complex legal issues encountered during the lifecycle of partnerships.

84 The forum could also allow agency officials to exchange resources with one another,
85 including sample MOUs and MOAs, and checklists or worksheets that agencies use when vetting
86 potential private-sector partners or structuring partnerships.

87 Additionally, while taking into consideration relevant laws and protections regarding
88 privacy, ethics, and other restrictions on disclosure of personally identifiable information,
89 agencies can consider sharing notes about specific private-sector entities that have been vetted.
90 These notes may help reduce external duplication by allowing agencies to see the results of other
91 agencies' vetting of specific entities.

92 MAX.gov, a website established by the Office of Management and Budget in 2007, can
93 offer such a forum. The website can be accessed only by those with a federal government email
94 address. An agency could set up an interagency partnership group on MAX.gov that would allow
95 agency officials to exchange best practices with respect to partnerships and share resources.

RECOMMENDATION

- 96 1. All agencies that are considering, or are currently participating in, a public-private
97 partnership (partnership) should distribute the *Guide to Legal Issues Involved in Public-*
98 *Private Partnerships at the Federal Level (Guide)* to attorneys in their general counsels'
99 offices, or other central legal offices, and should distribute it to partnership staff
100 throughout the agency.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 101 2. The Office of the Chairman of the Administrative Conference should create a group on
102 MAX.gov titled “Strategies for Developing and Managing Successful Partnerships.” The
103 group should be structured to allow agency officials to exchange best practices with one
104 another regarding partnerships. It should also allow agency officials to share resources,
105 including sample memoranda of understanding or agreement, and checklists or
106 worksheets that agency officials use when vetting potential private-sector partners.
- 107 3. All agencies that are considering, or are currently participating in, a partnership should
108 encourage staff responsible for partnership efforts to join the MAX.gov group and
109 actively participate in the discussion topics and uploading of resources. Participation
110 should be consistent with protections regarding privacy, ethics, and other restrictions on
111 disclosure of personally identifiable information and should be undertaken in consultation
112 with the agency’s general counsel’s office or other designated legal office.