



## **Administrative Conference Recommendation 2018-8**

### **Public-Private Partnerships**

**Adopted December 14, 2018**

Federal agencies often participate in public-private partnerships (partnerships) to assist in carrying out their missions.<sup>1</sup> A private-sector entity and the federal government may have a variety of reasons for wanting to partner with one another. Both sectors may find, for instance, that a partnership with the other allows them to access more resources and expertise. Expanded access to such resources and expertise may allow them to complement and reinforce their missions, producing outcomes with greater impact than they could achieve working entirely independently of one another.<sup>2</sup> Recent government-wide initiatives relating to, among other areas, workforce training<sup>3</sup> and government effectiveness,<sup>4</sup> are centered on partnerships.

There is no binding definition of “public-private partnerships” that spans across all agencies, but an interagency working group has defined them as “collaborative working

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<sup>1</sup> 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, research and development (R&D) partnerships, and activities under the National Technology Transfer and Advancement Act, 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).

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

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

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

relationships between the U.S. government and non-federal actors in which the goals, structures, and roles and responsibilities of each partner, are mutually determined.”<sup>5</sup>

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

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

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

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<sup>5</sup> See CMTY. P'SHIPS INTERAGENCY POLICY COMM., *supra* note 2, at 1 n.1.

<sup>6</sup> 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*, <https://www.osha.gov/desp/partnerships/index.html>; U.S. Dep't of Justice, *Partnership for Freedom*,



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

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

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

**Potential Inefficiencies in Vetting Private Entities**

Officials across agencies can benefit from sharing experiences with one another regarding partnerships. One issue that has emerged as a particularly good candidate for such interagency discussion is how agencies vet potential private-sector partners. Agencies vet potential private partners to avoid possible conflicts of interest or harm to the agency’s reputation. Vetting can be a time intensive and potentially duplicative enterprise, both for the agencies and for potential private partners that are asked to submit information to agencies.<sup>8</sup>

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<https://ovc.ncjrs.gov/humantrafficking/announcements.html> (recently ended); and U.S. Dep’t of State, *Diplomacy Lab*, <https://www.state.gov/s/partnerships/ppp/diplab>.

<sup>7</sup> 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>.

<sup>8</sup> 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

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

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

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

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

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

- Initiate or create a partnership in a manner that is consistent with ethical requirements,
- Evaluate the success of partnerships,



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- Structure an internal vetting process (for example, whether there should be a central vetting unit, or whether vetting should be carried out office by office),
- Develop internal processes to reduce duplication in vetting, and
- Resolve complex legal issues encountered during the lifecycle of partnerships.

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

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

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

### RECOMMENDATION

1. All agencies that are considering, or are currently participating in, a public-private partnership (partnership) should distribute the *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level (Guide)* (available at <https://www.acus.gov/report/guide-legal-issues-involved-public-private-partnerships-federal-level-final-12-6-2018>) to attorneys in their general counsels' offices, or other central legal offices, and should distribute it to partnership staff throughout the agency.
2. The Office of the Chairman of the Administrative Conference should create a group on MAX.gov titled "Strategies for Developing and Managing Successful Partnerships." The



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

group should be structured to allow agency officials to exchange best practices with one another regarding partnerships. It should also allow agency officials to share resources, including sample memoranda of understanding or agreement, and checklists or worksheets that agency officials use when vetting potential private-sector partners.

3. All agencies that are considering, or are currently participating in, a partnership should encourage staff responsible for partnership efforts to join the MAX.gov group and actively participate in the discussion topics and uploading of resources. Participation should be consistent with protections regarding privacy, ethics, and other restrictions on disclosure of personally identifiable information and should be undertaken in consultation with the agency's general counsel's office or other designated legal office.