Public-Private Partnerships: A Legal Primer

Reeve Bull, Administrative Conference of the United States; Amanda Postiglione, General Accountability Office; Valerie Wenderoth, U.S. Department of State; Erlyne Nazerie, Thomson Reuters; Alissa Ardito, Administrative Conference of the United States
Public-Private Partnerships

- Appropriations Issues - GAO guidance
- Ethics - Due Diligence, Vetting, and Endorsement
- Documentation - Memoranda of Understanding
- Infrastructure Financing and related issues in P3s
- Authority for Partnerships
- Best Practices and Guidance
This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendation expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.
Contents

Introduction: .................................................................................................................. 3

I. Public Private Partnerships and Federal Agencies ................................................. 5
   A. What is a Public Private Partnership? ................................................................. 6
      1. Definitions of Public-Private Partnerships ..................................................... 8
      2. Agencies with Partnership Offices ............................................................... 11
   B. Different Types of Public-Private Partnerships ................................................. 14
   C. Specific Partnership Authority ....................................................................... 15
   D. Broader Authority for Partnerships ................................................................. 16
   E. Presidential Memoranda and Executive Orders ............................................... 18

II. Major Successes and Political Support of Public-Private Partnerships ................. 19
   A. Prize Competitions – Rebuild By Design ......................................................... 19
      1. America Competes ....................................................................................... 20
      2. RBD - Act II ............................................................................................... 20
   B. The Global Alliance for Clean Cookstoves ...................................................... 22
   C. The Investing in Innovation Fund ................................................................... 23
   D. Legislation ....................................................................................................... 24
      1. Pay for Success ............................................................................................. 24
      2. Foreign Aid .................................................................................................. 25
      3. Appropriations ............................................................................................. 26

III. General Legal & Ethical Hurdles ......................................................................... 27
   A. Appropriations ................................................................................................. 27
   B. Ethics ................................................................................................................ 31
      1. Partner Selection ......................................................................................... 31
      2. Avoid Privileged Access ............................................................................. 32
      3. Due Diligence ............................................................................................. 33
      4. Vetting ......................................................................................................... 33
      5. Endorsement .............................................................................................. 35
   C. Procurements, Grants, and Cooperative Agreements ...................................... 36
      1. The Federal Acquisition Regulation ............................................................ 37
2. Grants and Cooperative Agreements................................................................. 37

D. Inherently Governmental Functions & Special Government Employees ............. 38
   1. Inherently Governmental.................................................................................. 38
   2. Special Government Employees..................................................................... 40

E. FACA .................................................................................................................. 42

F. Privacy and Information Sharing...................................................................... 43

IV. How to Memorialize a Partnership .................................................................. 44
   A. The Memorandum of Understanding............................................................... 45
   B. Who Can or Should Sign the MOU?................................................................. 47
   C. Additional MOUs............................................................................................ 47

Appendix A: Sample Standard MOU

Appendix B: Sample Partnership Guidance

Appendix C: GAO Gift Authority Chart – presented at GAO 2015 Appropriations Law Forum

Appendix D: Draft Public-Private Partnership Guidance Chart

**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.  

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 Condolezza 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. 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. Secretary Clinton renamed the Global Partnership Center “The Secretary’s Office of Global Partnerships” and soon after made it a Secretarial Office. 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.” The Bush Administration initiated the U.S. President’s Emergency Plan for AIDS Relief (PEPFAR), an

---

5 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. 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. 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. The Alliance works to advance the adoption of cleaner cooking stoves and promotes a sustainable market for efficient cooking solutions in the developing world.

A. What is a Public Private Partnership?

Public-private partnerships (PPPs) appear in a variety of forms which leads to some ambiguity in definition. 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. In a different vein, transportation and infrastructure PPPs at the federal, state, and local levels have garnered increased

---

6 Id. at 1 (statement of Michael Goltzman, Vice President, Int’l Gov’t Relations & Pub. Affairs, The Coca-Cola Company).
7 Id.
10 “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’SHIPS, http://www.ncppp.org/ppp-basics/7-keys/ (last visited Aug. 3, 2015).
attention as a possible solution to a widely acknowledged decline in the quality of the nation’s infrastructure.\footnote{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-private-collaboration-infrastructure; 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.} 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.”\footnote{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} 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.\footnote{Kenneth Prewitt, Foundations, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 355–77 (Walter W. Powell & Richard Steinberg eds., Yale Univ. Press 2d ed. 2006).} 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.\footnote{Id. at 4; ABRAMSON ET AL., supra note 14, at 10–11.}

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.\footnote{Dominique Custos & John Reitz, Public-Private Partnerships, 58 AM. J. COMP. L. 555, 556 (2010).} In American public law public-private partnership stands for a “type of government procurement agreement.”\footnote{Id. at 559. In contrast to American public law, European Union law recognizes both contractual and institutional public private partnerships.} There is a scholarly literature, both descriptive and prescriptive, devoted to the potentially problematic delegations of public authority such contracts may entail.\footnote{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).} 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
“leveraging unique partner skills and assets, producing outcomes with greater impact than could be achieved independently.”

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.

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.”

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.

---

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

Generally, the Departments of Agriculture, Commerce, Energy, Transportation, Treasury, Defense, and the Environmental Protection Agency focus on contractual public-private partnerships for infrastructure.\textsuperscript{25} 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.”\textsuperscript{26} 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

\textsuperscript{23} Id.


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.”

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. 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.” The Office offers a succinct definition that captures some key features of public-private partnerships:

For our purposes, a partnership is a collaborative working relationship 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.

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.

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:

---

30 Id.
31 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…

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

---

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.\(^{33}\) 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.\(^{34}\) This office holds a yearly conference entitled “Building Resilience through Public-Private Partnerships.”\(^{35}\) 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.\(^{36}\) 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.\(^{37}\) 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.\(^{38}\)

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.\(^{39}\) 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’


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

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

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.” 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. Aligned investments sometimes appear as demonstration programs. Demonstration programs are experimental, smaller scale programs authorized by statute or annual appropriations acts. (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

57 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.
A cooperative agreement is a 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. These four distinct types of partnerships have evolved over time. After passage of the America COMPETES Reauthorization Act in 2011, federal agency prize competition blossomed. Because the Act permits agencies to, in effect, “partner” with a private, non-profit 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. 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.

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 provided agencies with a clear legal path to engage in private sector partners for prize competitions. 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.” 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

---

60 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).
63 10 U.S.C. §§ 7901–03.
64 America Competes Reauthorization Act, 124 Stat. 3982.
organizations, and that the private sector will provide matching funds in order to help bring results to scale."

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.” 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. 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.” 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.” 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

67 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).


69 Id.

70 42 U.S.C. § 3532.

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. 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. 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. 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.” 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

---

72 An inter-agency agreement (IAA) may transfer authority along with funds to undertake a project.
73 U.S. GOV’T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-21 (3d. ed. 2016).
75 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”76 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.77 On June 24, 2016, the President promulgated an Executive Order on Global Entrepreneurship.78 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.

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

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. 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.

81 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.
82 Unless the agency has the authority to accept conditional gifts.
1. America Competes

The America COMPETES Reauthorization Act\(^83\) 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.\(^84\) 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.”\(^85\) 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.\(^86\) 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.\(^87\)

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.\(^88\) In all, 148 teams from 15 countries submitted proposals, representing the top engineering, architecture, design, and planning firms.\(^89\) 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

---

\(^86\) See, e.g., Rebuild by Design – Competition and Registration, 78 Fed. Reg. 45,551, 45,554 (July 29, 2013).
\(^87\) 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. Agency use of the Challenge.gov tools designed by GSA are also not subject to the PRA. Id.
\(^89\) 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. The Act also addressed the thorny issue of intellectual property. HUD opted to obtain licenses to the intellectual property of the winning designs via written consent from each contestant.

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.

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

---

92 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).
93 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. 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. The World Health Organization estimates that four million die worldwide each year from the smoke pollution related to cookstoves. This figure makes cookstoves the second-worst health risk to women and girls worldwide. Further, collecting fuel for wood stoves can pose a particularly acute problem in conflict zones. Because cookstoves are responsible for 20% of global back carbon emissions, they are also an environmental hazard.

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. 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

---

99 Id.
100 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.\textsuperscript{101}

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.\textsuperscript{102} The Alliance seeks to cultivate demand and then to point private investment towards the clean cooking arena.\textsuperscript{103} Peripheral goals include using economic growth in the cookstove sector to create new employment opportunities for women.\textsuperscript{104} 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.\textsuperscript{105} The Cookstoves Future Summit recently attracted 400 leaders and over $400 million in commitments.\textsuperscript{106}

\textbf{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.\textsuperscript{107} 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

\textsuperscript{101}Id.
\textsuperscript{102}Id.
\textsuperscript{103}Id.
\textsuperscript{104}Id.
\textsuperscript{105}Id.
\textsuperscript{106}Id.
Milwaukee’s SPARK Literacy program that improved reaching 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.  

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 114th Congress, pay for success type bills have been introduced in both Houses. 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. 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. Both bills make appropriations for ten years to fund the social impact partnerships. Both bills were referred to committee.


---


110 H.R. 1336 § 2056.

111 Id. § 2053(e)(E).

112 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.

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.114 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.”115 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.116 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;117

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.118

---

115 Id. § 3(c)(1)(K).
117 Id. § 5(a)(13).
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. 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.

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. 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. In conclusion, appropriations acts provide Congress with an

122 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.”¹²³ 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.¹²⁴ 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.¹²⁵ 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.¹²⁶ 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.¹²⁷ 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.¹²⁸ Such restrictions are not attached to permanent indefinite appropriations, non-competitive award or

¹²⁵ 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.
¹²⁷ 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).
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. Many federal agencies, (forty-five at the most recent count) however, have gift acceptance authority which overcomes augmentation concerns. The parameters of an agency’s gift acceptance authority vary. For instance, some agencies may not accept conditional gifts or gifts of real or personal property. 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. 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. 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. 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. 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

131 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).
132 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).
133 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.”)
134 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).
136 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.\textsuperscript{137} 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.\textsuperscript{138} 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.\textsuperscript{139} If the gift funds will be used to acquire services or to make a grant, they may need to be competed.\textsuperscript{140} 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.\textsuperscript{141} 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.\textsuperscript{142} 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


\textsuperscript{139} 18 U.S.C. § 209.

\textsuperscript{140} See Am. Battle Monuments Comm’n, supra note 138.


designed to accept and administer gifts given to the NPS. 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.

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 reappropriation. 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. 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.

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

---

144 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. §§ 101111–101120 (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.
147 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).
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. 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.

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. 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. 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

149 Id. at 6-163.
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.\(^{153}\) The legal basis for this avoidance is found in the Standards of Ethical Conduct for Employees of the Executive Branch.\(^{154}\) In particular, agency employees must act impartially and not give preference to any organization or individual.\(^{155}\) Nor may agency employees use their public office for private gain.\(^{156}\) 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.\(^{157}\) 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.\(^{158}\) 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.\(^{159}\) 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.”\(^{160}\) Also noteworthy is the requirement that partners contribute cash and in-kind resources on a one-to-one basis.\(^{161}\) 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


\(^{154}\) 5 C.F.R. § 2635.

\(^{155}\) See 5 C.F.R. § 2635.101(b)(8).

\(^{156}\) See 5 C.F.R. § 2635.702.


\(^{158}\) See 5 C.F.R. § 2635.702(c) (no official endorsements).


\(^{160}\) Id.

\(^{161}\) Id.
it is accepting research proposals that align with HUD’s research priorities.162 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.163 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.164

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.165

162 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).


164 DONNELL, supra note 153, at 9.

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.\textsuperscript{166}

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.\textsuperscript{167} 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.\textsuperscript{168} 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.\textsuperscript{169} 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).\textsuperscript{170} The DNP is a centralized web based

\textsuperscript{166} 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.

\textsuperscript{167} Pub. L. No. 112-74, § 7034(i), 125 Stat. 1215 (2011).


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).\textsuperscript{171} 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.\textsuperscript{172} 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.\textsuperscript{173}

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

\textsuperscript{172} § 5(b)(4).
government position to endorse any product, service, or enterprise. 174 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. 175 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 government by the Federal Acquisition Regulation (FAR). 176 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. 177 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.

175 See, e.g., 5 U.S.C. § 3107 (restricting the use of appropriated funds to hire publicity experts).
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.\(^\text{178}\) The FAR also regulates contract pricing, purchasing from foreign sources, the application of labor laws to government acquisitions and so forth.\(^\text{179}\)

   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 much 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.”\(^\text{180}\) 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.\(^\text{181}\) GSA has done so through GSA Schedule 541 4G for Challenge and Competition Services.\(^\text{182}\)

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.\(^\text{183}\) 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

\(^{178}\) 48 C.F.R. § 6.101(a).
\(^{179}\) 48 C.F.R. pts. 31, 25, 22.
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.\textsuperscript{184}

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.\textsuperscript{185}

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.\textsuperscript{186} 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

\textsuperscript{184} State and USAID have created grant policies that allow for non-competition for assistance funds for partnerships – waiting for information from Dept. of State.


\textsuperscript{186} See \textsc{Kate M. Manuel, Cong. Research Serv.}, R42325, \textit{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.\textsuperscript{187}

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.”\textsuperscript{188} 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.”\textsuperscript{189} 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.\textsuperscript{190} 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.\textsuperscript{191} Circular A-76 states that discretion does not \textit{per se} make a function inherently governmental, it has to be “substantial discretion.”\textsuperscript{192} 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.\textsuperscript{193} Sometimes they also provide examples of inherently governmental functions, though the examples tend to be rather open-ended.\textsuperscript{194}

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.\textsuperscript{195} Moreover,

\textsuperscript{187} 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)).


\textsuperscript{190} Id.

\textsuperscript{191} Id. § (B)(1)(a)(1)–(4).

\textsuperscript{192} Id. § 5(2)(B)(iv).

\textsuperscript{193} See MANUEL, supra note 187, at 7.

\textsuperscript{194} 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).

\textsuperscript{195} 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.”

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. 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. 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, but not to services obtained through personnel appointments, advisory committees, or personal services contracts issued according to statutory authority. Deviation from FAR is permitted on a contract-specific or ongoing “class” basis under certain conditions. 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

---

196 OFFICE OF MGMT. & BUDGET, OMB CIRCULAR A-76, supra note 190, at § (C)(1).
197 48 C.F.R. § 7.503.
198 Id.
199 With a few exceptions, including the USPS and FAA.
200 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.
201 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. 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.” 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. Moreover, SGE’s are exempt from conflict of interest statues 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. 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

204 The following list is taken in part from U.S. Office of Gov’t Ethics, supra note 203.
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.206

E. FACA

Public-private partnerships often try to tiptoe around the Federal Advisory Committee Act (FACA).207 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.208 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.209

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.”210 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.211 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.212 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.213 Even

---


207 5 U.S.C. app. 2.


211 Id. at 13.

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

213 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. 214 “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.”215 If private parties do not have a vote in any advice that is offered to the agency a FACA exception applies.216 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.217 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.218

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).219 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”

215 BULL, supra note 211, at 18.
216 In re Cheney, 406 F.3d 723, 728 (D.C. Cir. 2005).
217 BULL, supra note 211, at 15.
in them. 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.

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). 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. 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.

---


221 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).

222 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).


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.” 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. Although non-binding, MOUs should always be developed in coordination with an agency’s counsel offices.

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). (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. All MOUs should be conducted in consultation with the agency’s Office of General Counsel. 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.

225 CMTY. P’SHIPS INTERAGENCY POLICY COMM., BUILDING PARTNERSHIPS: A BEST PRACTICES GUIDE 6 (2013) [hereinafter CPIPC BEST PRACTICES GUIDE].
226 See CDC GUIDE, supra note 224, at 2; FDA HANDBOOK, supra note 179, at 19.
227 CPIPC BEST PRACTICES GUIDE, supra note 178, at 6.
229 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.
230 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.232

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.233 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.234

MEMORANDUM OF UNDERSTANDING
among
the United States Agency for International Development,
the Office of the U.S. Global AIDS Coordinator,
the Millennium Challenge Corporation
and
Microsoft Corporation

1. Purpose

The United States Agency for International Development (hereinafter referred to as “USAID”), the Office of the U. S. Global AIDS Coordinator of the U.S. Department of State (hereinafter referred to as “OGAC”), the Millennium Challenge Corporation (hereinafter referred to as “MCC”) and Microsoft Corporation (hereinafter referred to as “Microsoft”) share the common goal of promoting international development, including economic growth and health, and disease prevention, around the world. For this reason, USAID, OGAC, MCC and Microsoft (hereinafter each referred to as a “Party” and collectively as the “Parties”) seek to share their respective strengths, experience, technologies, methodologies, and resources (including human, in-kind, and monetary) in order to pursue projects of mutual concern focused on supporting a range of specific initiatives that advance these common goals.
USAID is an independent federal government agency that receives overall foreign policy guidance from the Secretary of State. USAID supports international development and advances U.S. foreign policy objectives by supporting economic growth, agriculture and trade, global health, democracy and conflict mitigation and management; and humanitarian assistance in Sub-Saharan Africa, Asia and the Near East, Latin America and the Caribbean, and Europe and Eurasia.

OGAC’s mission is to lead the coordination of President Bush’s Emergency Plan for AIDS Relief (PEPFAR). PEPFAR is the largest commitment ever by any nation for an international health initiative dedicated to a single disease – a five-year, $15 billion, multi-faceted approach to combating HIV/AIDS in more than 120 countries around the world. OGAC seeks to develop public-private partnerships with corporate and nonprofit entities to combat HIV/AIDS, and entering into this MOU furthers this effort.

MCC is a United States government corporation designed to work with some of the poorest countries in the world. MCC’s mission is to reduce global poverty through the promotion of sustainable economic growth, based on the principle that aid is most effective when it reinforces good governance, economic freedom and investments in people. Before a country can become eligible to receive assistance from MCC, MCC considers the country’s performance on 16 independent and transparent policy indicators. Based on performance on these policy indicators, MCC selects eligible countries who then submit proposals to MCC and may receive a grant from MCC under an agreement called a millennium challenge compact (a “Compact”). Once an eligible country signs a Compact with MCC (such country is hereinafter referred to as an “MCA Country”), the MCA Country establishes an accountable entity that is responsible for implementing the Compact. Countries that have demonstrated significant improvement in policy indicators but are not selected by MCC as eligible for compact assistance may be eligible for threshold program assistance, which is designed to help improve the country’s performance on one or more of the policy indicators.
Microsoft is a private corporation employing business and technology leaders across the world to develop software and programs which allow its customers to find solutions for a full range of issues impacting society. Microsoft has several initiatives that address the needs of underserved populations in developing and emerging markets designed to help people realize their full potential. Microsoft is now strengthening its commitment to help enable social and economic empowerment through technology skills training, software and hardware donations, and a variety of programs aimed at increasing community access to technology. With this long-term initiative known as Microsoft® Unlimited Potential, Microsoft is expanding on this work with new business models, technology solutions and advanced research, all focused on solving critical pieces of the economic-development puzzle. This broad range of offerings—built on partnerships with businesses, governments and non-governmental organizations—extends Microsoft's previous goals for the reach of technology.

This MOU provides that the Parties will seek to work together on projects that reflect shared values and that the Parties will focus on identifying joint country- and project-specific collaboration opportunities within each organization's respective vision, mission, and program focus. The purpose of this Memorandum of Understanding (hereinafter referred to as "MOU") is to set forth the understandings and intentions of the Parties with regard to these shared goals. This MOU provides the framework and scope within which specific projects may be jointly developed and implemented pursuant to subsequent project- or activity-level MOUs as may be agreed upon from time to time between Microsoft and USAID, on the one hand, with respect to all sectors set forth in Section II below, and consistent with USAID's competitive requirements for procurement and assistance, or, on the other hand, between Microsoft and OGAC, with respect to HIV/AIDS-related activities.
Due to MCC’s operating model, described above, MCA Countries, rather than MCC, would be the likely counterparts to any project- or activity-level MOUs that may be entered into with Microsoft that are aligned with a Compact. This MOU also provides the framework and scope within which specific projects may be jointly developed and implemented pursuant to subsequent project- or activity-level MOUs as may be agreed from time to time by Microsoft and MCA Countries, with respect to activities that are aligned with an MCA Country’s Compact and are consistent with the competitive requirements for procurement and assistance applicable to the MCA Country pursuant to its Compact and related documents.

This MOU is not intended to affect the separate and unique missions, mandates, and accountabilities of the Parties. Unless specifically provided otherwise, the cooperation between the Parties as outlined in this MOU or any project- or activity-level MOU is not to be considered or construed as a partnership or other type of legal entity or personality. Each Party is to accept full and sole responsibility for any and all expenses incurred by itself relating to this MOU. Nothing in this MOU is to be construed as superseding or interfering in any way with any agreements or contracts unrelated to this MOU entered into between two or more of the Parties, either prior to or subsequent to the signing of this MOU. Nothing in this MOU is to be construed as an exclusive working relationship nor as an endorsement of a specific private entity. The Parties specifically acknowledge that this MOU is not an obligation of funds, nor does it constitute a legally binding commitment by any Party or create any rights in any third party under this MOU or any project- or activity-level MOU.
II. Objective

The Parties support achievement of the development objectives set forth below that address areas of mutual concern in sectors embodying the core themes of:

- **Governance:** Promoting enhanced government service delivery, engagement with civil society, transparency, rule of law and human rights, child trafficking and protection issues and secured intellectual property rights;

- **Growth:** Enabling economic development through small- to medium-sized enterprise development, digital inclusion, fostering local innovation, job enablement and opportunity, access to credit for those without bank accounts, and fostering utilization of communication and technology tools in businesses;

- **Health:** Advancing global health care and addressing HIV/AIDS with effective technology;

- **Environmental Sustainability:** Promoting a clean and sustainable environment by focusing on climate change and other forms of environmental degradation;

- **Education:** Expanding educational opportunities to enable access to quality education through dynamic, learner-focused technologies and resources;

- **Capacity Building:** Building 21st century and competitiveness skills through education and training in emerging and developing economies;

- **Youth Empowerment:** Building information and communication technology skills among youth through capacity building, tools, and technology; and
- **Disaster Response/Humanitarian Assistance**: Facilitating the provision of assistance, including through collaboration on processes, tools and technologies, to save lives and alleviate human suffering for disaster preparedness, response, and recovery.

Specific joint issues for further consideration of the Parties are expected to include, but not be limited to:

- Enabling improved work conditions and more competitive businesses through the utilization of technology solutions;

- Promoting better and more efficient government by integrating technology into relevant services and processes;

- Developing effective systems for financial transfer modalities to provide safe and reliable methods of money transfer to locations of their choice;

- Strengthening the capacity of local communities to create, bring-to-market, and manage innovative new products to support activities of common interest;

- Facilitating the application of rule of law and strengthened institutions in order to increase the benefits to societies;

- Increasing the skills and systems of governments, companies and communities to improve health, including child, maternal, and reproductive health, the reduction of disease, especially HIV/AIDS, malaria, and tuberculosis, and access to high quality family planning services;

- Reaching an increasing number of youth and other end users through formal education, curriculum reform, vocational and workforce development, and training of trainer models to maximize scale;
• Coordinating information dissemination and resource integration of disaster responders and organizations; and

• Collaborating on training in a pre-disaster context to be called upon when necessary.

III. Designated Points of Contact

Each Party has appointed a primary point of contact and liaison (hereinafter called the “Relationship Manager”) responsible for the management and development of the relationship between the Parties under this MOU as follows:

**USAID:**

U.S. Agency for International Development  
1300 Pennsylvania Avenue, NW  
Washington, DC 20523

Attention: Barbara Addy  
(Primary contact for projects not related to HIV/AIDS activities)  
Senior Advisor of Global Development Alliances, ODP/PSA  
Telephone: +1 (202) 712-5691  
Email: baddy@usaid.gov

Attention: Mary Jordan  
(Primary contact for projects related to HIV/AIDS activities)  
Senior Technical Adviser, Public Private Partnerships, GH/HIV-AIDS/TLR  
Telephone: +1 (202) 712-5232  
Email: majordan@usaid.gov
OGAC:

Primary contact for projects related to HIV/AIDS activities:
Office of the U.S. Global AIDS Coordinator
U.S. Department of State
SA-29, 2nd Floor
2201 C Street, NW
Washington, DC 20522-2920

Attention: British Robinson
Director of Public Private Partnerships
Telephone: +1 (202) 663-2577
Email: robinsonBA1@state.gov

MCC:

Private Sector Initiatives
Millennium Challenge Corporation
875 15th Street, NW
Washington, DC 20005

Attention: Jason Bauer
Director of Private Sector Initiatives
Telephone: +1 (202) 521-3596
Email: bauerj@mcc.gov

Microsoft:

Microsoft Corporation
Global Strategic Accounts
5335 Wisconsin Avenue, NW
Washington, DC 20015

Attention: Corey Griffin
Director of Bilaterals
Telephone: +1 (202) 528-3013
Email: coreyg@microsoft.com
IV. Effective Date, Duration, Amendments, and Termination

Activities under this MOU may commence upon the date of the last signature of all the Parties and are expected to continue for 5 years from that date. However, the Parties may decide, in writing, to extend this period. In addition, this MOU may be modified if all the Parties agree in writing; provided, however, the designated authorized representative of each of the Parties entering into one or more project- or activity-level MOUs may not alter, change, or modify in any such project- or activity-level MOU any of the terms set forth in this MOU. Any Party may terminate this MOU at any time but should endeavor to provide at least 30 days' written notice to the other Parties.
Signed at __________________________ on this __________ day of

MICROSOFT  
CORPORATION

By: [Signature]
Gerri Elliott
Corporate Vice President
Date: 10/22/07

UNITED STATES  
AGENCY FOR  
INTERNATIONAL  
DEVELOPMENT

By: [Signature]
Henrietta Fore
Acting Administrator
Date: October 22, 2007

UNITED STATES  
DEPARTMENT OF STATE,  
OFFICE OF THE U. S.  
GLOBAL AIDS  
COORDINATOR

By: [Signature]
Ambassador Mark R. Dybul
U.S. Global AIDS Coordinator
Date: 10/22/07

MILLENNIUM  
CHALLENGE  
CORPORATION

By: [Signature]
Ambassador John J. Danilovich
Chief Executive Officer
Date: 10-22-07
MEMORANDUM OF UNDERSTANDING
between
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT OF
THE UNITED STATES OF AMERICA
and
THE MINISTRY OF INFRASTRUCTURE AND THE ENVIRONMENT OF
THE KINGDOM OF THE NETHERLANDS
IN THE FIELDS OF
SUSTAINABLE URBAN DEVELOPMENT, WATER MANAGEMENT, AND
INTEGRATED PLANNING AND CROSS SECTOR COLLABORATION

The Department of Housing and Urban Development of the United States of America and the Ministry of Infrastructure and the Environment of the Kingdom of the Netherlands (the “Participants”) envisage

- promoting discussion and strategies on integrated policies and principles for sustainable urban development in the two countries;
- exchanging experience on water management strategies and climate resilience and preparedness;
- exchanging experience and best practices on integrated planning and cross-sector collaboration in the two countries.

They desire to promote international cooperation in the field of sustainable urban development, integrated planning, climate resilience and preparedness, and water management strategies through exploration of solutions to problems of mutual concern and the exchange of information on their policies, research, best practices and programs in this area;

Therefore they have reached the following understanding:

Section 1

To realize the benefits of this Joint Memorandum of Understanding ("Memorandum"), the Department of Housing and Urban Development of the United States of America and the Ministry of Infrastructure and the Environment of the Kingdom of the Netherlands intend to develop cooperative exchange programs as specified below, or as may be subsequently decided upon.
Section 2

The bi-national work under this Memorandum is to be jointly led by the Secretary and Deputy Secretary of the Department of Housing and Urban Development of the United States of America and the Minister of Infrastructure and the Environment of the Kingdom of the Netherlands. Together, they intend to oversee the development of areas of cooperation and to seek the involvement of other experts outside the government working in these and related fields who are concerned with research and policy planning issues in urban development, water management in densely populated areas, the living with water strategy and formal and informal governance.

Section 3

The participants have decided to cooperate on sustainable urban development and water management strategies. The topic area of bilateral cooperation may include the following subjects:

1. Sustainable urban development:
   a. Strengthening national, regional and local economies and international competitiveness of urban areas;
   b. Integrating infrastructure planning and urban planning issues and accessibility of urban areas;
   c. Livability;
   d. Coherence of urban development with water management and ecological dynamics;
   e. The value of urban design and integrated planning in sustainable urban development and water management.

2. Water management strategies and climate resilience and preparedness:
   a. In dense urban areas with more extreme weather patterns;
   b. Climate mitigation actions (green building, urban water management and sustainable urban design);
   c. New innovative flood protection systems and building with nature;
   d. Emergency planning and preparation methods.

3. Integration and Cross-Sector Collaboration
   a. Integrated, cross sector and regional approach in policy making, rules and regulations and investment strategies and methods;
   b. Sustainable urbanization procedures and administrative measures;
   c. Combining informal governance and formal policy to develop adaptive planning strategies;
d. Urban economic development and public–private sector investment partnerships;
e. Private corporate and philanthropic investment with public partners at all levels of
government within sustainability themes;
f. Innovative procedures and investments in the coherence between urban development,
ecological dynamics and water management;
g. Integrated or programmatic governance models for developing, executing and
monitoring water management measures, for instance the Delta Program;
h. To be prepared for urgent matters and to arrange financial security on water strategies;
i. In general and in specific situations as for instance in collaboration with the
‘Hurricane Sandy Rebuilding Task Force’.

4. Other national policy and research issues in urban development, water management strategies
and related issues as may be determined by the two governments.

Section 4
Cooperative activities initiated under this Memorandum are to be conducted on the basis of
equality, reciprocity, and mutual benefit. Such cooperation may be implemented by the
following means, centered on the dual framework and topic areas of interest listed previously:
(a) Organization of the exchange of delegations, including, where appropriate and feasible,
professionals and specialists in the subject areas;
(b) Exchange of information, including policy research studies, program evaluation reports,
and monitoring;
(c) Organization of bilateral conferences, seminars, forums, workshops, prizes, competitions
and planning meetings, if possible at least twice a year, once in each country;
(d) Joint research studies on particular topics; and
(e) Other means of cooperation as may be jointly approved, for example, an exchange of
employees from each organization.

Section 5
Cooperative activities undertaken pursuant to this Memorandum are subject to the applicable
laws and regulations of the United States of America and the Kingdom of the Netherlands and
to the concurrence of both Governments before the initiation of any activities. Exchange of
confidential or personally identifiable information is not contemplated by this Memorandum.
Should the Participants decide to undertake such exchanges, they intend to memorialize the
terms of such exchanges in writing, subject to the applicable laws and regulations of the
United States of America and the Kingdom of the Netherlands.
Section 6
The nature and extent of activities undertaken pursuant to this Memorandum are subject to the availability of personnel and appropriated funds of each government. It is understood that each government bears the cost for its participation in such activities. This Memorandum is an expression of intent only, and it does not obligate funds, personnel, services, or other resources of either Participant, nor does it create any binding obligations under international or domestic law. Each Participant acts independently with respect to the performance of activities under the Memorandum and does not represent that it is an employee or agent of the other Participant. The Memorandum does not give a third party any benefit, legal or equitable right, remedy, or claim under the Memorandum.

Section 7
The governing legal authority, which permits HUD to enter into this Memorandum, is Section 501 of the Housing and Urban Development Act of 1970 (12 U.S.C. § 1701z-1) and Section 604 of the Housing Act of 1957 (12 U.S.C. §1701d-4).

Section 8
Both Participants intend to coordinate public statements and other disclosures with regard to the Memorandum, and no Participant may enter into any publicity regarding the Memorandum unless the Participants consult in advance on the timing and content of any such publicity, announcement, or disclosure.

Section 9
Overall coordination of this bilateral cooperative program rests with the Office of Policy Development and Research of the Department of Housing and Urban Development of the United States of America and with the Directorate-General of Spatial Development and Water Affairs of Ministry of Infrastructure and the Environment of the Kingdom of the Netherlands. Representatives of these offices or their designees should consult with each other and develop plans for specific cooperative activities which should cover the subject, procedures, terms of cooperation to be undertaken, the entities involved, other appropriate matters related to the conditions of such cooperation, and should review implementation of any mutually determined activities. Representatives of these offices should be responsible for appropriate coordination and cooperation within their respective governments.
Section 10
This Memorandum does not create any rights or obligations under international law.

Section 11
This Memorandum is to come into operation upon signature by both Participants. Activities under this Memorandum may commence from the day of signature and continue for a period of five years. This Memorandum may be altered with approval in writing of both Participants. A Participant should endeavor to provide thirty days advance written notice of its intent to discontinue this arrangement. The Participants are to appoint American and Dutch designees to convene and agree to an annual working program. The Participants are to evaluate the outcome and progress on actions every two years. The designated lead should be shared alternatively between the two Participants. If decided by Participants other parties may be invited to participate.

Signed at Washington, DC on this 4th day of March, 2013, in duplicate, in the English and Dutch languages (both texts having equal validity).
FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT OF THE UNITED STATES OF AMERICA:

Shaun Donovan
Secretary
Department of Housing and Urban Development

FOR THE MINISTRY OF INFRASTRUCTURE, AND THE ENVIRONMENT THE KINGDOM OF THE NETHERLANDS NETHERLANDS:

Melanie H. Schultz van Haegen
Minister
Ministry of Infrastructure and the Environment
CDC’s Guiding Principles for Public-Private Partnerships:

A Tool to Support Engagement to Achieve Public Health Goals

April 2014
Business and CDC
CDC’s Guiding Principles for Public-Private Partnerships

I. INTRODUCTION
Public-private partnerships are hardly a new concept, and the federal government prioritizes enhancing its ability to build these types of partnerships as a means to address the nation’s most pressing problems. Federal agencies like the Environmental Protection Agency, the Department of Defense, the U.S. Agency for International Development, and the Veterans Administration actively leverage these types of partnerships. As government budgets shrink, public-private partnerships help federal agencies do more with less, build on the capabilities of others, leverage collective action, improve performance, and realize cost savings.

The purpose of this document is to provide guidance to CDC staff to build mutually beneficial public-private partnerships through a framework that maximizes the health impact of such partnerships. This document replaces previous guidelines for collaborating with the private sector.

Definitions and Policies

**Private sector partners** include: for-profit businesses, professional organizations that represent businesses, philanthropic arms of private corporations, other philanthropic entities, and private individuals and/or groups.

**Public-private partnerships** may involve financial considerations, but they can extend far beyond resource sharing. For the purpose of this document, public-private partnerships are defined 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. Often, a Memorandum of Understanding or Memorandum of Agreement (MOU/MOA) is created. Read more about MOU/MOAs in Section V of this document and by accessing CDC’s “Development and Execution of Memoranda of Understanding and Memoranda of Agreement” Operational Policy. The policy includes a template.

Based on guidance from the White House, partnerships can provide access to more resources, goods, services, intellectual capital and expertise, cutting-edge technology, audiences, networks, physical presence and infrastructure, markets, financial capital, venture funding, and capabilities, creating opportunities for greater health impact, cost reductions, and efficiencies to accelerate health impact. They can also provide public or professional education, applied research or evaluation, or public health services.

Public-private partnerships are powerful tools that can help CDC:

- Extend the reach of messages and programs;
- Speed up response and innovation cycles;
- Connect with organizations that share CDC’s goals;
- Gain insight and perspective from businesses;
- Solve problems through new technology;
- Develop CDC’s workforce;
- Raise awareness about CDC’s lifesaving work.

The guiding principles put forth in this document are meant to facilitate sound planning for programs and serve as a resource for staff operating with a variety of partnership arrangements. This document does not replace or supersede any organizational policies, and staff must maintain awareness of, and abide by, all
appropriate CDC policies. The following are just some of the relationships for which CDC has explicit rules, policies, and procedures:

- Grants and Cooperative Agreements
- Contracts
- Gifts (both directly to CDC and via the CDC Foundation)
- Cooperative Research and Development Agreements (CRADA)
- Material Transfer Agreements
- Non-Disclosure Agreements
- Research Collaboration Agreements
- Conference Co-Sponsorships
- Collaborations on Contests

Note: While this lists the majority of CDC relationships not covered by the guiding principles, it is NOT exhaustive.

II. WHY PARTNER?
Partnering with the private sector helps CDC to:

Increase Support and Reach of CDC’s Work
- Generate broad societal support;
- Reach a large segment of the public;
- Access specific populations (including professional groups);
- Enhance programmatic credibility by involving reputable partners.¹

Facilitate Innovation for the Public Good
- Inspire creative ideas and greater potential for innovation and game-changing solutions through partnership with those who have different experiences and perspectives;¹
- Increase the agility, nimbleness, and efficiency of efforts since partners frequently can adapt and execute in ways that are difficult for the federal government;¹
- Improve decision making and risk management as a result of information sharing among partners.¹

Impact Industry
- Support industry in aligning their efforts to health-for-all principles;⁹
- Assist organizations in an industry to set an example for other organizations;
- Accelerate research and development in appropriate fields;⁹
- Support industry to develop products that are less harmful to society and in ways that are less harmful to workers and the environment;⁹
- Address the needs of at-risk worker populations.

Build Internal Capacity
- Acquire knowledge, expertise, and skills from the private sector to enhance CDC programs and projects.

Common Myths:

“CDC can’t accept money from the private sector.”

While CDC cannot solicit funds from outside sources, the gift policy outlines how to receive gifts offered voluntarily.

“CDC, in general, resists working with the private sector.”

We have a long history of collaboration with private partners including businesses. The recent establishment of a Business Engagement function within the OD is intended to increase agency capacity to partner with the private sector.

“CDC employees cannot participate in discussions about financial gifts.”

CDC employees are prohibited from soliciting gifts; however, it IS appropriate to answer questions and discuss legal mechanisms for granting a gift to CDC when a partner initiates an interest.
III. GUIDING PRINCIPLES FOR PARTNERSHIPS

There are many things to consider when first approaching a partnership opportunity, and it can be a bit overwhelming to decide if, or when, to proceed. The first step is to conduct background research—consider the potential partner’s areas of interest, image and motivation for partnering, track record for social and environmental responsibility, and financial soundness. Detailed questions to assist with this background research can be found in “Building Partnerships: A Best Practices Guide,” published by the 2013 White House Community Partnerships Interagency Policy Committee.

Initial Assessment

At the earliest stages, conducting an initial assessment will help determine potential viability of longer term discussions and negotiations. The following questions may be reviewed at the earliest stages before proceeding with detailed project discussions. They should also be revisited throughout the lifecycle of a partnership:

- Do mutual benefits exist for all potential partners? If so, they must be explicit and transparent.  
  - Would the benefit to society be greater than the benefit to either partner?  
  - Is there a well-defined and substantial public health benefit based on sound science and public good?  

- Is there mission alignment? Could shared objectives and/or mutual programmatic goals be established?  

- Is there a clear, identifiable, substantial leadership role for CDC, and is there a designated lead and champion within the agency?  

- Could partnering with the private entity present a conflict of interest (real or perceived)? (see below for further detail)  

- Would the potential partner receive direct monetary benefit from the partnership? If so, consult the Office of the General Counsel.  

- Do the potential benefits outweigh the risks associated with a partnership? (see Kraak’s benefit-risk decision-making pathway for further assessment)

Additional Considerations

If the initial informal assessment reveals this to be a viable opportunity with demonstrable value to the public’s health, you are ready to more formally consider the following factors:

Impact/Value

- The partnership should have a large impact relative to the resources required.  
- There is opportunity for return on investment for public health, CDC, and its partners.  
- Expected benefits are clearly defined and made explicit by all potential partners.  

Feasibility

- CDC is able and willing to devote staff time and funding to support the partnership process.  
- Activities have been outlined that have a manageable size and scope with specific timelines and milestones (CDC Foundation Guiding Principles for Partner Collaboration).

Conflicts of Interest

- CDC’s independence of scientific judgment, credibility, and reputation is retained. The potential partner has expressed no issues in deferring to CDC’s final judgment on all matters of scientific findings, facts, or recommendations.  
- No conflict of interest or appearance of a conflict exists. Conflicts to be considered include:
o Whether a potential partner has pending business before any agency that would be involved in a partnership, including contracts or grants, the size, timing, or nature of which would give rise to an appearance that the potential partner is trying to influence the outcome of that government action;
o Whether a potential partner is regulated by the agency that would be involved in the partnership;
o Whether a potential partner has recently met with an agency or has such meetings scheduled in the near future concerning other matters on which the potential partner is seeking favorable agency action such that the timing of a partnership arrangement would present the appearance of a conflict of interest.
o Whether such a partnership creates the appearance of favoritism, undermines CDC’s integrity or any CDC decision-making process.

IV. COMMUNICATING VALUE TO THE PRIVATE SECTOR
Once you have determined that a partnership should be pursued, preparing effective communication strategies can ensure clarity of expectations and establish a foundation of trust and open dialogue. This is critical in establishing a platform for transparent communication going forward.

Understanding a Business Audience

In addition to researching individual private entities, it is important to demonstrate awareness of their culture, similar to when engaging with a new population. Awareness of the fundamental differences between the public and private sectors (Table 1) will create more effective interactions. Each partner brings its own unique culture, values, mode of operation, responsibilities, and constituents. Understanding, accepting, and clearly communicating core differences (as early as possible) can lead to more rewarding and effective partnerships where all partners’ needs are addressed. Transparent, deliberate communication is key and will help build trust in the long term.

<table>
<thead>
<tr>
<th>Culture and Values of Private Entities and CDC</th>
<th>Accountability</th>
<th>Core Principles</th>
<th>Organizational Culture</th>
</tr>
</thead>
</table>
| **Private Sector**                            | • Answers to shareholders for financial gains and losses | • Activities should advance the company’s commercial interests  
• Corporate social responsibility priorities usually align with commercial interests | • Innovation  
• The expected timeline for results may be shorter |
| **CDC**                                       | • Answers to American citizens, Congress, the HHS Secretary, and the President for public health impact | • Activities should advance public health impact  
• Maintains transparency of work and processes  
• Scientific and programmatic decisions must remain independent of any partnership | • Adheres to U.S. government systems, procedures, and protocols, which may be perceived as rigid and cumbersome by businesses |

Table 1. Adapted from PEPFAR’s Public Private Partnerships 101 presentation.¹³

Benefits to Partners

The benefits of partnering with a federal agency may not always be obvious, and/or the prospect of dealing with a bureaucracy may be off-putting to the private sector. To assist in articulating the value of a partnership with CDC, consider highlighting some of the following benefits to the private sector.
CDC offers:

- An effective outlet for corporate social responsibility;¹, ⁹
- Increased ability to achieve greater outcomes;¹⁴
- Exposure to new markets, market share, and ability to attract new investors;¹
- Access to specific populations or professional groups;
- Opportunities to create and test new products to meet unmet social or individual needs;¹
- Improved supply chains for products and services;¹
- Improved operational or workforce efficiencies;¹
- Reduced business risks;¹
- Enhanced reputation, brand loyalty, and goodwill.¹

V. HOW TO ENGAGE

Think you are ready for initial discussions? Be sure to do the following before scheduling a meeting:

1. Consider how the contribution of a private partnership will advance CDC’s public health mission;
2. Conduct initial background research about potential business incentives for partner(s);
3. Gain a sense of potential mutual benefits to discuss;
4. Review potential partners using Section III of this document, “Guiding Principles for Partnerships.”

Deciding to Continue

Creating partnerships is a process—the first phase is exploratory, which entails having informal conversations with potential partners and compiling background information about them. This is followed by development, commitment, and then careful support and management of the partnership until its conclusion. After the exploratory phase, you may want to consider developing an MOU/MOA. Part of the value of these documents lies in the process of creating them with partners. At any time, if you are unsure if an MOU/MOA is required and/or the nature of your partnership begins to change, consult your Office of General Counsel designee.

Knowing When to Pull Back

As you get to know each other, and discussions become more specific about a potential project or collaboration, you should continue to review the “Guiding Principles for Partnerships” section of this document. Sometimes, new information can alter the viability of a partnership. This does not imply a mistake or that the potential partner intentionally misrepresented itself. It does, however, require federal employees to pause discussions and take steps to ensure the partnership is still worth pursuing. Leadership from Centers, Institutes, and Organizations (CIOS) should be informed throughout the process and, ultimately, will need to approve partnership agreements. You can also consult the Office of General Counsel along the way to help you consider the value and parameters of a partnership.
Box 1. When Not to Engage

- CDC has an oversight function that would be in conflict (or perceived conflict) with a partnership;¹
- Potential partner represents any product that exacerbates morbidity or mortality when used as directed; ¹¹
- Potential partner's goal is product endorsement or the appearance of product endorsement (CDC co-branding only with the approval of CDC review committee for this purpose); ¹¹
- Potential partner’s main focus is donor recognition. ¹¹

Multiple tools are available to help guide you through the partnership lifecycle. A full tutorial on how to navigate the partnership process is beyond the scope of this document; however, at a minimum, review and ensure that you are following applicable CDC policies listed in Section I. In addition, the following resources provide useful information to help you carry out your partnership work.

Box 2. Helpful Partnership Tools

CDC:
- Renee Saunders, Division of Global HIV/AIDS. The Survivor's Guide to Public-Private Partnerships [PowerPoint slides].

External:
- CDC Foundation. Guiding Principles for Partner Collaboration.
- CDC Foundation. Public-Private Partnerships and Conflict of Interest Guidelines.

I. Introduction ......................................................... 1

II. Types of Projects ................................................... 1
   A. Department Projects Supported by Gifts from NGOs ........ 1
   B. Joint Projects ....................................................... 3
   C. NGO Projects with Assistance from the Department ........ 5

III. Limits on Partnerships ............................................. 6
   A. Must Support Department’s Mission ........................ 6
   B. Endorsements and Advertisements ........................... 6
   C. Curriculum Issues ................................................. 10

IV. Additional Useful Information ................................. 11

Appendix I. Sample Disclaimers ................................. 13

Appendix II. Working with the Ethics Division ............... 14

Appendix III. Phone Numbers ................................. 15
I. INTRODUCTION

Increasingly, government agencies are looking for ways to make the most of their resources by joining nongovernmental organizations (NGOs) in a variety of projects. In recent years partnerships among government agencies, private companies, and nonprofit organizations have received media attention – both positive and negative. These relationships have been praised for their innovation. However, critics have raised concerns about the commercialization of governmental functions and the misuse of the government’s resources and imprimatur.

The purpose of this guidance is to provide practical advice concerning how the U.S. Department of Education (Department) can work with NGOs to further the Department’s mission. Although it covers many topics in detail, we encourage you to seek specific guidance prior to entering into a partnership with an NGO.

II. TYPES OF PROJECTS

Most projects with NGOs fall into one of three categories:

- Department projects supported by a gift from an NGO
- Joint projects with an NGO
- NGO projects with assistance from the Department

Each is discussed below.

A. Department Projects Supported by Gifts from NGOs

These are projects that the Department controls or owns, but an NGO supports the project through a gift either in cash or in kind. The issues that arise from these types of projects tend to revolve around the acceptance of the gift. The following discusses a variety of frequently asked questions concerning gifts.

What's a gift?

A gift is anything of monetary value. A gift may be cash, services, or other in-kind contributions.
May the Department accept gifts?

Yes. The Secretary has statutory authority to act on behalf of the Department “to accept, hold, administer, and utilize gifts, bequests, and devises of property, both real and personal, and to accept donations of services, for the purpose of aiding or facilitating the work of the Department.” 20 U.S.C. Section 3481. The Department has used this authority to solicit and accept gifts of cash and other donations to support the work of the Department.

Are there criteria under which the Department determines whether it will accept a particular gift?

Yes. In determining whether to accept a particular gift, we look at the following factors to avoid the appearance that the Department is favoring organizations that donate funds or other items to the Department or that it is pressuring organizations that do business with the Department to donate to the Department.

1. Under its statutory gift acceptance authority, the Department may only accept gifts that aid or facilitate its work.

2. The Department does not accept gifts from certain organizations with which the Department does not wish to be identified – for example, the manufacturers of tobacco products, firearms, or alcoholic beverages.

3. The Department generally does not accept gifts from a “prohibited source.”

In some circumstances it may be appropriate to accept a gift from a prohibited source because none of the concerns mentioned above is raised. Therefore, the Department may accept a gift offered by a prohibited source when:

- Any actual or potential dealings with the Department by a prohibited source represent a relatively insignificant proportion of that source’s revenues or business;
- The prohibited source does not have a substantial or critical portion of its business regulated or affected by the Department; and
- There is nothing about the timing or circumstances of the gift that raises questions about its propriety.

May the Department solicit gifts?

A prohibited source is anyone who does or seeks to do business with, is regulated by, or has interests affected by the Department. Examples of prohibited sources include: universities, state or local educational agencies, education associations, banks that participate in the federal student loan programs, Department contractors and grantees, a textbook company, etc.
Yes. The Department’s gift acceptance authority permits solicitation of gifts. However, as a matter of policy, the Department does not generally solicit gifts from prohibited sources of the Department. The Ethics Division must clear the solicitation of all gifts.

**What is the procedure for accepting a gift?**

While the Secretary retains authority to accept gifts on behalf of the Department, that authority is currently delegated to the Chief of Staff (COS) who in turn delegated the authority to the Director of Corporate Affairs for the Office of Communications and Outreach (OCO). This delegation is subject to change. Furthermore, the Office of the General Counsel must clear all solicitations and gifts. At present, if you are interested in soliciting or accepting a gift, you should contact the Department’s Director of Corporate Affairs for further guidance.

**May the Department acknowledge a gift publicly?**

Common courtesy dictates that the Department will thank all donors. The Department may include the following statement – or a similar one – in materials relating to an event or project supported by gift funds: “The Department of Education gratefully acknowledges support from ABC Company.” On the other hand, the Department should not include in its acknowledgements extraneous information about the donor or its products. For instance, we would not say “This project was made possible with a gift from ABC Company. For more information on how to order ABC products, call 1–800–555–1234.”

Requests (sometimes demands!) from donors may turn the “gift” into an offer to contract with the Department. For example, the ABC Association states that it will underwrite a portion of the cost of a Department conference if the Department agrees that a senior official will attend the ABC conference the following year. At that point, ABC is not offering a gift – it is trying to negotiate a quid pro quo (by the way, the Department could not agree to such an arrangement.)

**B. Joint Projects**
Sometimes it makes sense for the Department to co-sponsor events and other projects with one or more NGOs. An organization will be considered a “co-sponsor” of an event with the Department when it agrees to play a significant role in the design and/or implementation of the event. For example, an association may work with the Department to plan an agenda, determine the appropriate target audience, and provide speakers for a portion of a conference. The literature announcing the event would identify this association as a co-sponsor of the event along with the Department.

If, on the other hand, an organization’s only role in an event is to underwrite the cost of all or part of the event, then the organization’s contribution must be considered a gift, and handled as discussed above. This distinction is important because of the limits on the Department’s ability to accept gifts.

In deciding whether to enter into a joint project with an outside group, you should keep in mind the following issues:

- Co-sponsoring an event or project means that the Department does not have total control over the event. This is because the private party cannot simply underwrite the expenses associated with the event, but must have a real and visible role in the event.
- Co-sponsoring may raise concerns that the Department is showing preferential treatment to a particular organization, especially if the Department works with the same NGO on many projects and others are seeking similar opportunities. Therefore, the Department may consider providing similar opportunities to other NGOs when appropriate.
- When co-sponsoring an event, you should arrange for the co-sponsor to pay vendors directly and not accept any funds on the Department’s behalf. For example, a co-sponsor could pay a hotel, caterer, or other vendor directly.
- The Department must communicate certain requirements to potential nongovernmental sponsors from the outset. For example, the Department always maintains the right to withdraw from a project that is using the official seal. Also, any rules applicable to event planning must also be observed for co-sponsored events. For example, Department conferences must be held at locations that are accessible to persons with disabilities, and the Department may not arrange for, or advertise, tourist activities as part of an official conference.

May the Department enter into a joint project with a prohibited source?

Yes. Indeed, most NGOs with a substantive interest in education will also be prohibited sources. However, the Department should avoid co-sponsoring an event with an organization that has a sensitive matter pending before the Department. For example, we
should not co-sponsor a conference with an NGO at the same time that the NGO is the subject of a Department audit or investigation.

May the Department enter into a joint project with a non-educational organization?

Yes. However, when there is no obvious relationship between the nongovernmental co-sponsor and the Department’s mission, you should be satisfied that the project is not simply an advertising opportunity for the NGO. Also, it is not appropriate for the Department to have an “official airline” or “official hotel” in connection with government events—even when they are co-sponsored by an NGO. Finally, there are some categories of NGOs that—for policy reasons—the Department has traditionally declined to partner with, including manufacturers of tobacco products, firearms, or alcoholic beverages.

C. NGO Projects with Assistance from the Department

There are many ways in which the Department may cooperate with, and provide assistance to, an NGO without being a co-sponsor of that event or project.

May the Department assist an organization in developing materials for its own use?

When NGOs plan and launch initiatives in education that are compatible with Department programs and initiatives, it may be appropriate for the Department to provide assistance, though the Department does not provide assistance to NGOs to develop products that will be sold. On the other hand, where an NGO seeks to develop a product to be distributed to the public for free, we may provide information and advice because an NGO may be able to distribute information to a much larger audience that the Department can reach.

Example: the McDonald’s of the Tri-State Area, a member of the Department’s Partnership for Family Involvement in Education (PFIE), asked if the Department would assist in the development of a summer reading program. The Department ensured that information credited to the Department about reading in McDonald’s brochures and tray liners was accurate. Working with McDonald’s gave the Department an opportunity to get important information about reading out to millions of children and parents. The Department and PFIE were recognized as having provided assistance, and the PFIE logo was placed on the brochures and tray liners.
III. LIMITS ON PARTNERSHIPS

There are three major limitations:

- Partnerships must further the Department’s mission.
- There are strict limits on endorsements and advertisements.
- There are limits on the Department’s involvement in curricula.

A. Partnerships Must Further the Department’s Mission.

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.

B. Limits on Endorsements and Advertisements

Like all federal agencies, the Department may not specifically endorse the activities or products of NGOs. There are two bases for this limitation—one legal and one policy. The legal basis for the prohibition on endorsements derives from the Standards of Ethical Conduct for Executive Branch Employees. These regulations state, in relevant part, that:

An employee shall not use or permit the use of his Government position or title or any authority associated with his public office to endorse any product, service or enterprise except: (1) in furtherance of statutory authority to promote products, services or enterprises; or (2) as 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.

5 CFR Section 2635.702(c). This rule is designed to implement the general ethics principle that "[a]n employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity. . . ." 5 CFR Section 2635.702.

In addition to the legal constraints discussed above, the Department—through the Secretary's office and through the administration of the ethics program—has had a long-standing policy of declining requests for endorsements. The reasons for this include the fact that it is simply not possible for the Department to respond to the hundreds of requests it receives every year for endorsements. In addition, the endorsement of one NGO may lead to inquiries from the public, including Members of Congress, questioning why one particular NGO has been singled out for praise to the exclusion of others. Finally, the Department is not in the business of dispensing a “seal of approval” for products and services that may or may not satisfy customer expectations.
What do you mean by “endorsement?”

In the context of this guidance, “endorsement” means any Department action that makes a qualitative statement about an NGO or its programs and services. For example, a statement by the Department that “the XYZ Association is excellent” and should receive support from a foundation is an endorsement. Placing the Department’s official seal on a product is another example of an endorsement.

There must be a way for the Department to promote successful programs. What may the Department do to highlight such programs?

There are certain actions that the Department may (and should) take to promote programs and other endeavors. When a Department official visits a particular school or program, participates in a conference, or delivers a commencement address, the Department is suggesting that this school, program or conference merits attention. Although these types of activities are an endorsement of sorts, they are permissible. There are many other ways the Department may highlight successful programs without an explicit endorsement. Some of these are discussed below.

Is it ever permissible to explicitly endorse an NGO or its products?

The Department may single out a particular product or institution for praise when it has specific statutory authority to do so. For example, the Department has an established program for recognizing Blue Ribbon Schools and American Stars of Teaching. In addition, pursuant to statute, the Department has run a series of expert panels to identify promising and exemplary programs in a variety of fields.

What are some examples of impermissible endorsements?

Here are a few examples of impermissible endorsements:

A Department employee, in an official speech, urges the listeners to join a particular professional association.

An employee provides a quote for the book jacket and permits the use of his or her official title.

The Department agrees to put its seal on an instructional CD on keeping guns and drugs out of schools.

The Department invites only one vendor of educational technology products to display its products at a Department conference.

The American Dairy Council and the Department decide to co-sponsor a booklet aimed at encouraging parents to read to their children. The Department agrees to use pictures of children drinking milk and eating ice cream throughout the booklet.

A Department official appears in the promotional materials designed to sell products to school districts.
May the Department prepare and distribute publications that include descriptions of nongovernmental programs and other resources?

The Department may share information about a wide variety of specific programs and resources available in a general subject matter area—it is consistent with its mission to do so. A representative list of programs and resources is considered permissible information sharing rather than an impermissible endorsement. This kind of information sharing is often done through the development and distribution of publications as well as on the Department’s Web site and in newsletters.

A few additional general rules:

1. The language used to describe the programs may not make qualitative judgments about those programs (i.e., it is all right to say “ABC Afterschool program provides recreational activities for children in grades K-5” but not “ABC Afterschool program successfully provides excellent recreational activities”);
2. When products or resources are for sale, the Department publication may not include an order form and generally should not list prices;
3. An appropriate disclaimer should always be used. (See Appendix I.); and
4. Even with its best efforts, the Department runs the risk of omitting an organization. Therefore, cast a wide net in seeking input on the names of programs or resources to mention in publications.

What is an advertisement?

Endorsements and advertisements in this context are similar. Advertisements usually relate to products or services that are for sale—whether by a for-profit or nonprofit entity. And, like endorsements, there’s a fine line between merely providing information and providing advertising space.

How can I tell if something is a prohibited endorsement or advertising?

Here are some things to look for. If the answer to any of the following questions is yes, you may have an endorsement or advertising problem:

1) If a member of the public does not know what the NGO does, will he or she be able to tell from your project? The Department is permitted to acknowledge an NGO it is working with on a joint project, but may not elaborate on the NGO’s products or services. For example, it is permissible to say “Big Candy Company” is our partner, but adding that they make “Gooey Chews” is impermissible advertising.

Example: “Start Early, Finish Strong” is a Department publication that provides many examples of programs aimed at getting children to read. It lists resources for communities trying to develop such programs. The examples and resources cover a wide range, the text of the document does not suggest the Department has made judgments about the relative quality of those included, and an appropriate disclaimer was included. Accordingly, “Start Early, Finish Strong” was considered permissible information sharing rather than an impermissible endorsement.
2) Is the size of either the Department’s or an NGO’s name or logo out of proportion with the actual degree of participation in the project? (See discussion of logos below.)

3) Are members of the public required to spend money to get a reward? For instance, the Department would not participate in a joint project with a fast-food restaurant that required parents to purchase that restaurant’s products in order to participate.

4) Will the project include an order form, or other straight advertising piece, for items a sponsor sells to the public? For example, a phone company offered to provide free fixed value calling cards as a reward for participants in a Department summer reading program. The Department declined the offer because in order to use the card users were required to listen to several minutes of advertising.

5) Is the NGO seeking an exclusive relationship with the Department? The Department does not offer exclusive partnerships. For example, the Department partnered with Pizza Hut for several years on the Read-Write-Now program, and would do the same with Papa John’s.

How do these rules apply to websites and URLs?

Web addresses included in Department publications or correspondences are essentially the same as an address or phone number. Therefore, if including a particular resource in Department materials furthers the Department’s information sharing role, it is permissible to also include a web address. However, because web pages within a website can serve a variety of purposes, specific web address references must be reviewed before they are included in Department materials. Here are some things to look for when reviewing web addresses for inclusion in Department materials:

- Providing a web address directly to an order form for a product or service offered by an NGO is impermissible.
- Linking to any page on a website with the primary and exclusive purpose of marketing a product or service is impermissible advertising.
- Providing a web address to a web page that urges readers to contact their Members of Congress or State legislators about pending legislation violates the anti-lobbying laws.

The Department has an established policy governing links to NGOs from the Department’s website. That policy may be found at [http://www.ed.gov/internal/wwwstds.html](http://www.ed.gov/internal/wwwstds.html)

(Linking to External Content)

When may the Department permit the use of its official seal or other Department logos on materials not published by the Department?
Generally, the Department may not permit use of the official seal or logos on materials produced by an NGO without prior clearance from the Office of General Counsel (OGC) and OCO. A good rule of thumb for determining when the presence of the Department’s official seal is appropriate information rather than an endorsement is that its size and location on the materials reflect the scope of the Department’s participation. For instance, if the Department is a full partner on a project with an NGO, it is appropriate for our official seal to appear in the same size and a similar location to our partner’s logo. On the other hand, if the Department has only provided assistance and advice on a project that is essentially not a government project, the official seal should be fairly small in size, and displayed only in a location that conveys information about the Department’s participation.

In addition to the official Department of Education seal, there are a number of logos associated with Department programs and initiatives, such as No Child Left Behind. However, the Department’s official seal is not program specific, and its presence signifies the participation of the Department as a whole. The purpose of the program logos, on the other hand, is to promote that particular program. Therefore, there may be circumstances where it is appropriate to use a program logo but not the official seal and vice versa.

C. Curriculum Issues

The Department may not “exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system except to the extent authorized by law . . . . 20 U.S.C. 3403(b). Over the years the Department has applied this provision cautiously to avoid creating even the appearance that the federal government is interfering with a state and local function.

Nevertheless, there are situations—including projects with NGOs—when it furthers the Department’s mission to share information with the public, including schools, teachers, parents and students, that includes lesson plans or curricula provided for information only. Any questions regarding this particular issue should be directed to the Division of Elementary, Secondary, Adult and Vocational Education in OGC.
IV. ADDITIONAL USEFUL INFORMATION

Federal Advisory Committee Act (FACA): FACA is a law that governs how the government gets advice from groups of individuals. It is important to make sure that, in developing partnerships and other relationships with NGOs, the Department does not inadvertently violate FACA. If you are concerned about whether your partnership idea raises FACA issues, contact the Division of Business and Administrative Law in the Office of the General Counsel.

Anti-Lobbying: The “anti-lobbying” act and various appropriations riders, taken together, prohibit the use of appropriated funds – including money and human resources – for grassroots lobbying campaigns in connection with proposed legislation, and bar the use of Department appropriations for certain forms of “publicity and propaganda” designed to influence Congress or state legislatures. “Grassroots” lobbying means urging third parties to contact their legislators to support or oppose pending legislation.

As a practical matter, in the context of public-private partnerships, this means that the Department may not:

1. Tell our partners to contact Congress about proposed or pending legislation;
2. Link to partners’ web pages from the Department website when the linked page advocates that viewers contact Congress about pending legislation;
3. Forward e-mail messages received from NGOs to our Department colleagues when those messages urge readers to contact Congress about pending legislation; or
4. Participate in meetings with our nongovernmental partners when the purpose of the meeting is to strategize about how to lobby Congress on pending legislation.

These are just examples. If you have questions about how the anti-lobbying laws apply to your situation, contact OGC’s Ethics Division.

Copyright: In general, any product developed and published by the Federal government is in the public domain. This means that members of the public may use these products without getting our permission to do so. Sometimes, in a public-private partnership arrangement, the NGO is concerned that products it contributes to the joint effort will lose copyright protection by virtue of the partnership with a Federal agency. Generally, this is not the case. However, OGC’s Division of Business and Administrative Law should review all copyright issues.
Are Written Agreements Necessary?

If a joint project or partnership does not involve the expenditure of appropriated funds, a written agreement is not legally required. However, in some cases it is desirable, particularly when the partnership arrangement is either complex or long-term. For instance, the Department entered into a partnership agreement with USA Today under which USA Today agreed to host the Partnership for Family Involvement in Education website. Because this was viewed as a long-term partnership, and because USA Today was planning to expend significant resources to participate, both parties agreed that it was essential to document the agreement in writing. On the other hand, if the Department agrees to work with one NGO that is planning to reprint and distribute a Department publication, a written agreement is probably not necessary. OGC can help you determine whether a written agreement is necessary.
APPENDIX I.

SAMPLE DISCLAIMERS

A. Curricula/Lesson Plans

The U.S. Department of Education does not mandate or prescribe particular curricula or lesson plans. The information in this document is provided only as a resource that educators may find helpful and use at their option.

B. Examples of disclaimers clarifying that information about an NGO is provided for information only:

1. This document contains contact addresses and Web sites for information created and maintained by other public and private organizations. This information is provided for the reader’s convenience. The U.S. Department of Education does not control or guarantee the accuracy, relevance, timeliness, or completeness of this outside information. Further, the inclusion of information or addresses, or Web sites for particular items does not reflect their importance, nor is it intended to endorse any views expressed, or products or services offered.

2. This document contains news and information about public and private organizations for the reader’s information. Inclusion does not constitute an endorsement by the U.S. Department of Education of any products or services offered or expressed.

3. While these resources are relevant to the Department’s mission, they are available from a variety of sources and their presence here does not constitute an endorsement by the U.S. Department of Education.

4. The content of this report does not necessarily reflect the views or policies of the U.S. Department of Education, nor does the mention of commercial products or organizations imply endorsements by the U.S. government. The inclusion of such information is for the reader's convenience and is not intended to endorse any views expressed, or products, programs, models or services offered.
APPENDIX II.

WORKING WITH THE ETHICS DIVISION

In order to help you figure out how to apply these broad rules to your situation, please review the following questions. If you answer "yes" to any of these questions, you should seek additional guidance or clearance from the Ethics Division.

1. Are you planning an event, publication, or initiative in partnership with an NGO?
2. Is an NGO seeking to use the Department’s name or seal on any of its publications or materials?
3. Is an NGO seeking to use the Department’s name in any fundraising effort?
4. Is an NGO seeking to have its name or logo placed on a Department publication?
5. Will the Department be linking to a web page on an NGO’s website from the Department’s website?
6. Is an NGO seeking permission to link to our website?
7. If an NGO is reprinting our materials, is it doing anything more than just acknowledging the Department as the source of the materials, i.e., using the seal or displaying the name of the Department prominently?

If you answered "yes" to any of these questions, you should call the Ethics Division at 202-401-8309.
APPENDIX III.

PHONE NUMBERS

For general partnership guidance:
The Ethics Division in OGC
(202) 401-8309

For guidance publishing any materials:
The Office of Communications and Outreach
(202) 401-0404

For guidance on curriculum questions:
Division of Elementary, Secondary, Adult and Vocational Education in OGC
(202) 401-8292

For guidance on copyright law:
The Division of Business and Administrative Law in OGC
(202) 401-6700

For guidance on the Federal Advisory Committee Act:
The Division of Business and Administrative Law in OGC
(202) 401-6700
VHA PUBLIC-PRIVATE PARTNERSHIPS

1. REASON FOR ISSUE: This Veterans Health Administration (VHA) Directive establishes new VHA policy and clarifies existing policy regarding Public-Private Partnerships (P3) between VHA and non-governmental organizations (NGO).

2. SUMMARY OF CONTENTS: This directive sets forth policy, roles, and responsibilities for developing, maintaining and establishing public-private partnerships with non-governmental organizations. Compliance with this directive will apply to newly formed public-private partnerships with NGO partners, whether they are new partners or existing partners, beginning FY 2016. This VHA directive does not rescind any existing directives related to partnerships.

3. RELATED ISSUES: None.

4. RESPONSIBLE OFFICE: Office of Community Engagement (10A) is responsible for the contents of this Directive. Questions should be referred to 202-461-7008 or CommunityEngagement@va.gov.

5. RESCISSIONS: None.

6. RECERTIFICATION: This VHA Directive is scheduled for recertification on or before the last working day of September 2020.

David J. Shulkin, M.D.
Under Secretary for Health

DISTRIBUTION: Emailed to the VHA Publications Distribution List on 9/16/2015.
VHA PUBLIC-PRIVATE PARTNERSHIPS

1. PURPOSE: This Veterans Health Administration (VHA) Directive establishes new VHA policy and integrates existing practices regarding public-private partnerships (P3) between VHA and non-governmental organizations (NGO). The purpose of this Directive is to promote the growth of responsible, productive, and innovative partnerships at the national, regional and community level by integrating existing practices regarding P3s into this new policy. VA has a number of authorities, including 38 U.S.C. 513, 523, and 6306 to enter into P3s. Section 523 of title 38, United States Code, authorizes VA to develop P3s with NGOs to achieve the effective coordination of the provision of VA benefits and services (and information about those benefits and services) with appropriate programs (and information about those programs) conducted by NGOs. Partnerships already defined by existing regulation or authority, such as gifts, volunteering, grants, contracts, sharing agreements, enhanced-use leases, academic affiliations, and interagency joint ventures, are not covered by this Directive.

2. BACKGROUND:

   a. Veterans, their families, and their survivors exist within the greater community and interact with various organizations for a variety of services and resources. It is crucial for VHA to collaborate and coordinate with other agencies and NGOs in order to increase efficiency and improve outcomes for Veterans. Responsible and productive P3s also bring the added benefits of potential cost savings, improved public relations, and enhanced community investment on behalf of our Veterans. P3s are an important tool for VHA leaders when addressing the varied opportunities in their communities.

   b. The Strategic Plans of both the Department of Veterans Affairs and the Veterans Health Administration highlight the importance of partnerships. VA seeks to enhance and develop trusted partnerships. Additionally, the VHA Strategic Plan puts forward the following objectives for partnerships:

      (1) Leverage current P3s to expand capacity, resources and access for services for Veterans and service members;

      (2) Explore and launch promising new partnerships with public and private partners to enhance services, health professions and wellness education; and

      (3) Participate with federal agencies, states, health professional schools and associations, and NGOs on national strategies to improve health and mitigate threats.

   c. As VHA seeks to fulfill its strategic objective of strengthening collaborations and launching promising new partnerships, guidance is needed for how to go about achieving this goal.

      d. P3s should be entered into after careful and thorough evaluation of the objectives at hand, the involved stakeholders, the efficiencies to be gained, and the benefit to Veterans. While all partnerships contain inherent risk in that some aspects of service
delivery fall outside VA control, the nature of P3s should enable local facilities to expand available services.

3. POLICY: It is VHA policy that development of a P3 by VHA medical facility staff is appropriate when the goals of the NGO are consistent with the Department of Veterans Affairs strategic and priority goals. When common goals are shared among VHA and NGO providers, collaboration should lead to improved coordination of policies, programs and/or service delivery.

4. RESPONSIBILITIES:

   a. **Office of Community Engagement.** Office of Community Engagement (OCE) staff is responsible for:

      (1) Supporting VHA staff by providing training, technical assistance and clarification regarding P3 policies contained in this Directive. This includes advising VA medical facilities and program offices when questions arise about how and whether to initiate, maintain or discontinue specific partnerships;

      (2) Annually, or as otherwise required, gathering information regarding VHA P3s that will be analyzed and shared with VHA in the interest of sharing best practices, developing VHA’s strategic direction regarding partnerships, and promoting the growth of more effective and responsible partnerships; and

      (3) Serving as a VHA liaison and point of contact for community partnership related questions or issues.

   b. **Veterans Integrated Service Network Director.** The Veterans Integrated Service Network (VISN) Director is responsible for:

      (1) Ensuring partnerships at the VISN level develop a process similar to that which is described at the facility level (see below), so that the appropriate assets are allocated to ensure sufficient oversight and execution of partnerships developed at the network level;

      (2) Providing oversight of facility level P3s, ensuring appropriate evaluation mechanisms as defined by the respective facility directors are in place, and ensuring that points of contact data remain current; and

      (3) Submitting data periodically to the Office of Community Engagement (10A) reflecting field operations of P3s within the VISN.

   c. **Medical Facility Director.** The medical facility Director is responsible for:

      (1) Ensuring due diligence is completed before agreeing to collaborate or partner with an outside entity;

      (2) Cataloging P3’s that exist at the facility;
(3) Promoting current partnerships and available community resources, supporting the exploration and development of responsible and productive partnerships, and serving as an on-site resource to review questions about partnerships;

(4) Providing additional oversight of potential community partnerships among the medical facility and NGOs when due diligence efforts determine partnership is a possibility, but could pose excess risk to participating Veterans or VHA. The Director should consult with appropriate program offices, Regional Counsel, local VHA Privacy Officer, or the Office of Community Engagement if the medical Director deems additional review is appropriate;

(5) Ensuring that P3s comply with VHA policy;

(6) Establishing and distributing local medical facility policy and procedures consistent with this Directive; and

(7) Ensuring training is available and completed for new staff performing duties establishing relationships with nongovernmental organizations.

5. REFERENCES:

a. VA Directive XXXX, Developing Public-Private Partnerships with, and Accepting Gifts to VA from, Non-Governmental Organizations

b. VHA Handbook 1620.01, Voluntary Service Procedures

c. VA Directive 0311, Joint Ventures

d. VHA Directive 1400, Office of Academic Affiliations

e. VHA Handbook 1660.04, VA-DOD Direct Sharing Agreements

f. VHA Directive and Handbook 4721, General Post Fund

g. VHA Directive 2011-034, Homeless Veterans Legal Referral Process

h. VHA Handbook 1110.01, VA Fisher House Program

i. VA Guidance for Engaging in Public-Private Partnerships with Non-Governmental Organizations (VAIQ 7381698) http://vaww.pdush.med.va.gov/programs/oce/oceP3Guidance.aspx  NOTE: This is an internal web site that is not available to the public.

6. DEFINITIONS:

a. Due Diligence. Due diligence is the research and analysis of an organization prior to entering into a partnership that involves evaluating benefits and risks of the potential partnership.
b. **Non-Governmental Organization.** Any private, or commercial entity other than a Government agency (Federal, state, local, tribal), including but not limited to corporations, nonprofit organizations or associations, and international and multinational organizations.

c. **Memorandum of Understanding.** Memorandum of Understanding (MOU) is a formal written document between VA and an NGO that describes the agreement and each party’s responsibilities for the agreement’s success.

d. **Public-Private Partnership.** Public-Private Partnership is a voluntary, collaborative, working relationship between VA and one or more NGOs in which the goals, structures, governance, and roles and responsibilities are mutually determined to deliver the best possible services. A copy of the Veterans Health Administration Public Private Partnership Implementation Guideline can found on [http://vaww.pdush.med.va.gov/programs/oce/oceDefault.aspx](http://vaww.pdush.med.va.gov/programs/oce/oceDefault.aspx)  NOTE: This is an internal web site that is not available to the public.
a. Why Enter into a Partnership:

1. Overview. A P3 is a voluntary, collaborative, working relationship between VA and one or more Non-Governmental Organization (NGOs) in which the goals, structures, governance, and roles and responsibilities are mutually determined to deliver the best possible services. When optimized, P3s work to focus the creativity, strengths and resources of allied organizations upon a common goal. Conversely, a poorly conceived P3 may strain already limited capabilities and erode hard earned public good will. The following guidance has been compiled to ensure VHA enters into such endeavors with an understanding of best practices and potential pitfalls of P3s.

2. Suitability. VHA staff should first consider the value a P3 will create keeping in mind that collaboration with an NGO is a tool to enhance and expand healthcare services to benefit Veterans, family members, caregivers, survivors, and other beneficiaries. Four possible reasons for pursuing P3s are to:
a. Advance a shared objective;

b. Enhance impact through resource sharing;

c. Improve programmatic reputation/visibility; and

d. Achieve mutual programmatic goals.

b. **Considerations for Partnership Development:**

1. VHA staff venturing into P3s should:

   (a) Develop a stable foundation for the membership, rationale, and activities of the partnership while allowing sufficient flexibility for these components to develop and evolve in response to external and internal demands;

   (b) Understanding that partnerships go through a life cycle of development, from initial set-up stages through full-scale implementation to maturity; and

   (c) Ensure that services resulting from the P3 are not required to be provided by appropriated funding.

2. The aforementioned considerations may be applied within the context of a P3 in multiple ways and it is recommended that these principles be revisited throughout the life cycle of such endeavors.

c. **Initial Steps:**

1. Partnerships may arise through new opportunities or from preexisting relationships between organizations. The designee as defined by the VA medical facility Director or as outlined in the local partnership procedures should be able to recognize these opportunities and evaluate them based upon on their merits, organizational needs, and current strategic priorities. Following due diligence evaluation of a proposed partner organization will help to ensure that the partnership will work effectively and meet the needs of the partnering VA medical facility, while simultaneously introducing transparency to the partnership process. Paragraph D outlines best practices for assessing a P3 and includes examples of due diligence tools.

2. Common steps that may be beneficial for VA medical facilities to incorporate into their initial process of evaluating a potential partnership include:

   (a) Identifying desired partnership goals or outcomes;

   (b) Determining what service the partner is going to be provided;

   (c) Identifying any barriers to the partnership or risks associated with collaboration, such as sharing personally identifiable information;
(d) Considering the organizations’ past performance; and

(e) Evaluating the merits and potential disadvantages of associating with the specific organizations involved.

d. **Assessing the Viability of a Public-Private Partnership:**

1. Partnerships are developed to maximize the shared efforts of multiple groups. The goal of partnerships is to achieve more than individual organizations are capable of achieving independently. From VHA’s perspective this would include maximizing the efficacy of, and access to, available resources, enhancing programs and services for Veterans, and leveraging community and stakeholder support. However, that is not to say that a partnership will always be the appropriate choice for addressing a given service need. There will be times when a binding contractual action or some other mechanism will prove to be a preferable option. Nevertheless, P3s are a potent instrument available to VHA for addressing the full range and varying needs of a particular Veteran community at the medical facility, Veterans Integrated Service Network (VISN) and national level.

**Participating in a Discovery Meeting.**

2. A discovery meeting is an opportunity to get to know the potential partner and to conduct an initial assessment of the organization’s intentions in partnering with VA. VHA staff has discretion to convene and participate in discovery meetings. During the discovery meeting, VA employees can get answers to “common sense questions” such as who or what organizations will be participating; whether independent action, contracted services, or other mechanisms will prove to be more appropriate options; or if the partnership will enhance healthcare services to Veterans, family members, survivors, or other beneficiaries. VHA staff should ensure that appropriate staff and SMEs are present during discovery meetings to provide an initial assessment of the viability of a potential partnership and address “common pitfalls” such as:

   (a) Miscommunication, whereby one or more parties leaves the meeting believing the other party has agreed to something that, in fact, the other party does not believe it has agreed to; and

   (b) Procurement/contracting conflict of interest: Is the organization currently bidding on a contract with VHA or involved in a procurement or do they have plans to bid on one in the future? If so, VHA staff should not participate in the meeting until they have consulted with leadership or VA legal counsel.

**Evaluating the Partner.**

3. Evaluating and understanding the potential partner organization is a necessary step before entering any productive and responsible partnership. Such an evaluation can help predict the success or failure of a venture by providing an honest assessment of an outside agency’s abilities, assets and track record. Consideration must also be
given to the fact that when VHA partners with an organization, the Department’s reputation becomes associated with the reputation of that organization.

a. Due diligence should be completed before agreeing to collaborate or partner with an outside entity. VHA staff should become familiar with the potential partner’s goals and objectives, look for similarities that overlap with VA and VHA’s goals; and discern whether conflicts exist with VHA priorities and values. Before committing to work with an outside partner, it is highly recommended that VHA staff consider the following basic questions to help understand the potential partner and to assess the merits of the potential partnership.

(1) What type of organization is the potential partner, e.g., Veterans Service Organization (VSO), nonprofit, for-profit, faith-based, etc.?

(2) What are the prospective partner’s mission and goals? Do they align with VHA’s interests, mission, and goals?

(3) Whom does this organization serve (Veterans, caregivers, Service members, family members, survivors, etc.)?

(4) Does the partnership help to address an identified need for Veterans, their families, Survivors, or VHA?

(5) What is the organization’s purpose and motivation for entering into the partnership?

(6) Does the prospective partner have any previous or current grants, contracts, or partnerships with VHA? If yes, does a real or potential conflict of interest exist, or could the appearance of a conflict of interest negatively impact the potential partnership?

(7) Does the prospective partner have the resources necessary to fulfill its contribution to the partnership?

(8) Is the organization fiscally responsible?

(9) What are the expectations of the partnership? What will the organization contribute to the partnership?

(10) What are the risks associated with a partnership with this organization, and if so, are these risks acceptable? What are the potential benefits to Veterans and their families and do they justify an investment by VHA in this partnership?

(11) What information do the potential partners in this effort need and is VHA confident that any risk to Veteran information can be addressed?

(12) How will the VA and the potential partner measure the success of the relationship? What are the expected outcomes and/or potential impact?
b. Other considerations should be addressed to ensure:

(1) Potential affect that the relationship may have on VA’s image or reputation;

(2) Detrimental impact to programs and services

(3) Previous or current interactions between the partner and VHA do not create the appearance of preferential treatment, conflict of interest, or the appearance of conflict.

4. There are a variety of resources available for public use to aid in the assessment of a nongovernmental organization that may be easily assessed on the Internet. Such tools typically operate by making an evaluation based upon a variety of factors including publicly available IRS 990 tax statements, the agency’s governance structure, asset allocation and more. These tools then assign a rating based upon their evaluation criteria.

a. Other due diligence tools includes charity websites such as GuideStar, Charity Navigator, and the Better Business Bureau. In addition, each state requires nonprofits to register before the organizations can engage in activities. The majority of the states have a searchable nonprofit and charity database. For example, the following links are provided for the state of California: http://kepler.sos.ca.gov/ and Maryland: http://www.oag.state.md.us/nonprofits/. Other states have similar links.

b. This information may aid a facility during the evaluation process, however, meeting the standards set forth in these various tools is not the only way to judge whether VHA should partner with an organization. If an organization does not meet certain criteria, yet the potential gains for engaging in the partnership are significant, it is recommended that additional consultation be incorporated in the decision-making process to determine whether to move forward with the partnership. Because there are often numerous factors that affect the decision to collaborate, seeking guidance from multiple and varied sources is advised. VHA Staff may seek additional guidance from facility leadership, local facility Privacy Officer, Regional Counsel, and the VHA Office of Community Engagement.

Evaluating the Partnership.

5. The medical facility Director should ensure business processes related to P3s include due diligence prior to forming the partnership. Further, the medical facility Director should direct program officials to monitor the partnership to ensure fulfillment of the partnership expectations and responsibilities. When considering a P3, each medical facility Director should ensure the process for developing and tracking partnerships addresses the following:

a. What are the potential benefits to each of the proposed non-VHA partners?

b. What is there to be gained by the medical facility or VA at large should this partnership be implemented? Some examples include cost avoidance, increased
flexibility in service delivery, enhanced public interest, increased community investment in VA’s mission, etc.

c. Are there other potential gains in entering into this partnership such as learning opportunities or improved access to other organizations?

d. What are the potential benefits for the entities seeking partnership with VHA and what is their interest in the issue being addressed by the partnership?

e. What are the short and long term benefits of this partnership; will it require a sustained effort?

f. Is there interest within VA, the community, or both to sustain the partnership?

g. What are the costs to VA associated with this partnership, and how do these costs compare to other potential solutions to the issue being addressed?

h. Does the potential partner have a demonstrable track record that conveys that the organization will be capable of delivering upon their commitments?

i. Is there a partnership or some other solution already in place that addresses the identified need?

e. Partnership Development:

1. Robust and successful partnerships are developed in an environment that recognizes the contributions and capabilities each entity brings to the table, and respects each entity’s voice in the process; leadership and clearly defined roles are essential. A partnership is not an employer/employee relationship and participants should be alert to addressing any power dynamics as they arise.

2. Successful partnership development processes in general follow these five steps:

   a. Potential partners come together and explore common needs and the viability of a partnership;

   b. Targets and roles are identified;

   c. The partnership is formalized with detailed assignments, defined responsibilities, and measurable outcomes; and

   d. The partnership objectives has measurable outcomes;

   e. The partnership is carried out as outlined in the agreement.

3. Every partnership must eventually consider issues of continuance, transition and termination.
a. A specified time for this consideration may have should be defined early in the relationship when the coalition decides upon its outcomes and targeted accomplishments.

b. In some cases, a partnership may need to come to an early conclusion due to unforeseen circumstances. Some partnerships may use this time to renew goals and commitments or it may be determined that continued partnership is no longer desirable for the parties involved.

c. It is recommended that during P3 development all parties involved engage in open discussion regarding the termination of the partnership and identify to the extent possible, when and how the partnership will end.

f. When a Memorandum of Understanding (MOU) is Recommended:

1. During the initial stage of a P3, processes are formalized and roles are delineated. Written agreements are used to clarify expectations and minimize the likelihood for future missteps and misunderstandings. There are several documents that can facilitate this process, including a Memorandum of Agreement (MOA), a Memorandum of Understanding (MOU) and a Letter of Intent (LOI). While it should be specified that these documents are not intended to be legally binding agreements (such as formalized contracts), they do provide a common understanding between the parties involved, provide a structure within which to work and help to prevent or alleviate conflict between P3 participants.

2. The Memorandum of Understanding (MOU) remains the most common of these documents. A MOU is an agreement between two or more parties that expresses an intended common line of action but does not amount to a binding legal contract. It is recommended that MOUs contain the following elements:

a. Legal name, address and description of each partner’s agency/organization;

b. Statement of the purpose of the MOU;

c. A clear description of the agreed upon roles and responsibilities each organization or agency will be providing to ensure project success. The roles and responsibilities should align with project goals, objectives and target outputs;

d. Identification of the staff accountable for completing the specific responsibilities;

e. Agreements must be compliant with all relevant Federal, privacy regulations. Consultation with VHA’s Privacy Office is strongly recommended whenever personal identifiable information is involved in a partnership). Note, personal identifiable information should not be included in a MOU.

f. Description of how the collaboration/partnership will benefit the project;
g. Description of the resources each partner will contribute to the project. This may include contributions of staff time or other in-kind contributions, delivery of services, offers of training or expertise, etc. Note- an MOU should not be used when there is any type of cost or obligation on VA involved. Whenever there is a cost involved or the exchange of services it should be considered a contract.

h. A clause that the MOU is non-binding.

i. Description of the duration in which this MOU will remain in effect and termination clause.

j. The MOU must be signed by all partners. Signatories must be officially authorized to sign on behalf of the agency and include title and agency name.

g. **Tracking and Monitoring Partnerships:** The medical facility Director should establish a process for tracking and monitoring community partnerships at the facility. This process does not have to be overly detailed or extensive but should be able to reflect the types of collaborations currently underway and the involvement of the medical facility’s program staff in them. The following information should be used as a foundation for the facility’s tracking process:

1. Organization name.
2. Contact information (NGO, VHA).
3. Program office (mental health, homeless, etc.).
4. Level of due diligence performed and date.
5. Description of the partnership goals, outcomes, or metrics.
6. MoU/ MoA / LoI / LoA date (if applicable).
7. Noteworthy partnership activities.
8. Status (active / inactive).

h. **Sharing Space or Other Resources with Partners:**

1. In some cases, VHA will be asked to contribute resources in the interest of a partnership, such as space at a VA medical facility, use of equipment or supplies, or staff time. For example, an NGO that offers a free class or service that benefits Veterans or their family members may request the use of some space at a VA medical facility on a recurring basis. Sharing these types of resources in the context of a partnership is permissible, but is at the discretion of the medical facility Director or according to whatever process he or she has delegated to review these requests. See VHA Handbook 1820.01.
2. In space sharing situations, as indicated in paragraph 2 above, due diligence of the NGO should be performed prior to permitting an organization to use facility space. It should be noted that the partner’s presence does not constitute an endorsement or referral.

   i. **Endorsements and Referrals:**

   1. Federal regulations (see 5 CFR §2635.702(c) ) state that an employee shall not use or permit the use of his/her Government position or title or any authority associated with his/her public office to endorse any product, service or enterprise except: 1) in furtherance of statutory authority to promote products, services or enterprises (e.g., Veterans Canteen Service); or 2) as 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.

   2. According to these regulations, while VHA staff cannot specifically endorse one NGO’s products or services, VHA staff may offer community resource referrals.

   3. Community resource referrals allow VHA staff to share information about available products or services that may be beneficial to Veterans or their family members. This is not an endorsement as long as VHA staff have made a good faith effort to provide information about equally beneficial and available services to the Veteran.

   4. As an example, Organizations A, B and C all provide free asthma education classes to children of Veterans and their parents. If VHA staff were aware of Organizations A, B and C’s services but only provided the name and contact information of Organization A to Veterans, it could be interpreted as an endorsement. However, VHA staff may provide information about the services of all three organizations without concern about violating the endorsement regulation. If VHA staff were not aware of Organizations B and C, there would not be an issue. Additionally, if Organization A charged for the educational classes but Organization B and C did not, the VHA staff could also share this information with interested Veterans.

   j. **Raising Awareness of Available Community Resources:**

   1. It is important for Medical Centers to maintain awareness of locally available community resources that could benefit Veterans, their families, caregivers or survivors. As previously stated VHA alone cannot meet all of the needs of Veterans or their families but by partnering with others, VHA can enhance and expand its ability to care for Veterans. The availability of resources varies greatly from community to community. For this reason, a medical facility Director should ensure that a process is in place for raising and maintaining awareness about currently available local community resources that benefit Veterans, as well as facilitating the dissemination of this information among community partners on behalf of Veterans. Processes that can support this include: a
website, electronic database, or even recurring meetings to share information among individual VHA staff who regularly work with community partners.

2. The process should ensure that information about local community partnerships is made available and in a format that:

   (a) Is easily updated and disseminated (such as a web site or a regularly occurring town hall or staff meetings);

   (b) Is easily accessible and understandable to medical facility staff and volunteers;

   (c) Ideally, could be available publicly so Veterans and their families can access the information directly;

   (d) Includes input from surrounding CBOCs and/or Vet Centers as appropriate;

   (e) Is informed by partners in the community.

3. For support or guidance in establishing this process, VHA staff are encouraged to contact the Office of Community Engagement at CommunityEngagement@va.gov or at http://vaww.pdush.med.va.gov/programs/oce/oceDefault.aspx. **NOTE:** This is an internal Intranet site that is not available to the public.

k. **Raising the Community Awareness of Veterans Health Administration:**

   While VHA is the largest integrated healthcare center in the United States, its facilities are nestled in communities where are Veterans, their families, caregivers, and survivors live and work. Responsible and productive partnerships not only expand VA’s services to Veterans and their beneficiaries, they are also a direct reflection on the VA. P3s build interpersonal contacts that work to personalize what otherwise might be regarded an isolated outpost of an imposing national system, rather than a health center integrated into its community. Greater familiarity with VA enhances the efficacy of individuals and groups within the community who are committed to the well-being of Veterans by refining their abilities to match up Veteran needs with VA resources.

l. **Examples of Public Private Partnerships:**

   1. The following are common examples of public private partnerships affected by policy contained within VHA Directive 1098:

      a. a farmer’s market held regularly on VA medical facility grounds;

      b. VHA staff working with an organization to coordinate a service that VHA is statutorily authorized to deliver to Veterans or their families; or

      c. An organization offering a free service regularly on VA medical facility grounds and seeking referrals for expanding the free service.
d. A nonprofit partnering with the VHA Homeless Office to provide furnishings for Veterans.

2. Partnerships affected by this policy may be better understood by defining what they are not:

a. A partnership is not a relationship based on “if…then” terms where one party can impose conditions or prescribe the terms of the relationship that the other party would not accept without compensation. Doing so would better describe a grant or contracting relationship.

b. A partnership is not simply a team activity where everyone has exactly the same interest. While VA and its partners are likely to have strong interests in common (e.g. serving Veterans), they are likely to have some divergent interests too. For example, a partnering organization may meet a gap in services for VHA, but Veterans may not be the only recipient for which services are offered.

c. A gift or donation to VHA does not necessarily constitutive a partnership. Policy guidance for the solicitation of assets or funds is defined within VHA Directive and Handbook 4721, General Post Fund. For expanded instructions on gifts and donations, refer to VHA Handbook 1620.01, Voluntary Service Procedures.

3. Examples of what are NOT public-private partnerships as covered and defined by this Directive:

a. An individual volunteer at a VA medical facility;

b. A medical school affiliated with a VA medical facility;

c. VHA staff speaking at a conference;

d. VHA staff attending a networking event and meeting individuals from outside organizations; and

e. A contract with a corporation to provide services to a VA medical facility or program office.

m. VHA Partnership Training:

1. The primary goal of the VHA Directive on Public Private Partnerships is to promote the growth of responsible, productive, and innovative partnerships at the national, regional and community level by integrating existing practices regarding P3s into this new policy. A Talent Management System (TMS) VHA Public Private Partnership training module is designed to provide employees tips and tools for effective partnering.

2. Employees who perform duties establishing public-private partnerships should complete the online training module. A record of the training will be recorded in TMS.
Money received for the government must be deposited in Treasury as miscellaneous receipts. 31 U.S.C. § 3302(b)

Donations, Gifts, and Free Services

What do they want to give?

Money

Gift acceptance authority?

If so, check parameters of statutory authority. Does it allow acceptance of money? Consider:
- Whether authority allows acceptance of conditional gifts. B-319246, Sept. 1, 2010
- Purposes for which gifts may be used. 55 Comp. Gen. 1059 (1976); B-196730, Dec. 10, 1986

If so, check parameters of statutory authority.
- Absent statutory authority, agencies may not augment their appropriations from sources outside the government. B-300248, Jan. 15, 2004
- See also 31 U.S.C. § 1301(a) (purpose statute); 18 U.S.C. § 209 (prohibition on compensation of government employees from any source other than the U.S. government)

Whether authority allows acceptance of conditional gifts. B-319246, Sept. 1, 2010

Purposes for which gifts may be used. 55 Comp. Gen. 1059 (1976); B-196730, Dec. 10, 1986

Other restrictions on use. Gift funds are still public funds. B-274555, Jan. 23, 1997; see also B-275669.2, July 30, 1997; 68 Comp. Gen. 237 (1989); 47 Comp. Gen. 315 (1967); B-211149, Dec. 12, 1985; B-165492, Mar. 18, 1980

Whether donated or appropriated funds may be used to solicit gifts. B-211149, Dec. 12, 1985; B-211149, June 22, 1983

Grant application context – B-255474, Apr. 3, 1995

Some considerations:
- Appearance issues
- Avoidance of favoritism/conflict of interest
- Delegations of authority – who can accept money?
- What if gift of money imposes future costs on government?
- How to document?

Property

Gift acceptance authority?

If agency receives property it doesn’t have authority to retain 
- Talk to GSA

If agency has specific statutory authority to accept voluntary services, check parameters. (Follow similar analysis to acceptance of gifts.)

Consider the following:
- Other specific authorities, such as:
  - Intergovernmental Personnel Act, 5 U.S.C. §§ 3371-3375
    - See B-324214, Jan. 27, 2014, regarding the Antideficiency Act.
  - Students, 5 U.S.C. § 3111
  - Experts and consultants, 5 U.S.C. § 3109

Some considerations:
- Gifts of property from vendors to employees or agency
- Employee wants to make a gift of property to agency or bring in furniture/equipment
- Avoidance of favoritism/conflict of interest
- Delegations of authority – who can accept?
- What if gift of property imposes future costs on government?
- How to document?

Other issues:
- What if an outside organization wants to compensate this person?
- Is the entity asking for anything non-monetary in exchange for the services?
- Who is authorized to sign the agreement?
- Any other ethical concerns? GAO-11-85, Oct. 29, 2010

Services

Gift acceptance authority?

If so, check parameters of statutory authority.

Some considerations:
- Personnel law issues
- Union issues
- Conflicts of interest (institutional, individual, actual, and perceived)
- Whether a function is inherently governmental


See B-308968, Nov. 27, 2007, for some considerations:
- Weigh value of services received with concession offered by contractor
- Who may approve and sign contract
- Ultimate cost to government as a whole
- Open, transparent selection process

Other issues:
- Should you compete?
- Source/appareance
- What if government terminates contract and contractor does not get what was contemplated?

*See Chapter 6 of the Red Book for more cases & details.*