

# **Bond Case Briefs**

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## **Unregistered Municipal Advisory Activity in Public-Private Partnerships.**

Good afternoon everyone. I want to thank The Bond Buyer for organizing this Infrastructure Conference and for inviting me today to talk about some important regulatory safeguards that were put in place a decade ago to help state and local governments make effective infrastructure investments.

But before I begin, I must remind you that my remarks are in my official capacity as Director of the Securities and Exchange Commission's Office of Municipal Securities, but do not necessarily reflect the views of the Commission, the Commissioners, or other members of the staff.

These types of events give me a unique opportunity to speak directly to the municipal securities market about an issue that has framed my tenure with the Commission, first as a staff attorney serving as a principal drafter of the municipal advisor rules and now as the Director of the Office charged with overseeing municipal advisor regulation, namely unregistered entities engaging in municipal advisory activity.[1]

### **Filling a Gap in the Regulatory Landscape**

To begin, I thought I would spend a few moments laying out the municipal advisor regulatory framework.

Until the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Dodd-Frank"), advisors[2] to municipal entities[3] and obligated persons[4] were largely unregulated and were generally not required to register with the Commission or any other federal, state, or self-regulatory entity with respect to their municipal advisory activity.[5]

Leaving the activities of these advisors generally unchecked, however, led to several cases of market abuses and economic damage to municipal entities and obligated persons.[6] For instance:

- Congress found that a number of municipalities suffered losses from complex derivatives products that were marketed by unregulated financial intermediaries;[7]
- The Commission brought action against a financial institution alleging payments by the financial institution to local firms whose principals or employees were friends of public officials in connection with a bond underwriting and interest rate swap agreement;[8] and
- The Commission settled several actions against major financial institutions for their role in a series of complex, wide-ranging bid rigging schemes involving derivatives utilized by municipalities and underlying obligors as reinvestment products.[9]

Dodd-Frank was enacted to generally strengthen oversight of the municipal securities market and to broaden current municipal securities market protections to cover, among other things, previously unregulated market activity.[10] Section 975 amended Section 15B of the Securities Exchange Act of 1934 ("Exchange Act") creating a new class of regulated person required to register with the Commission: municipal advisors.[11]

## Who Are Municipal Advisors?

So, who are municipal advisors? Broadly speaking, municipal advisors assist municipal entities and obligated persons on the terms of bond offerings, investment of bond proceeds, and the structuring and pricing of related products.

A “municipal advisor” is any person (who is not a municipal entity or an employee of a municipal entity) that:

provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or undertakes a solicitation of a municipal entity or obligated person.[12]

Key here is advice. As you may suspect, “advice” is not subject to a bright-line definition.[13] Instead, the determination of whether a person provides advice to, or on behalf of, a municipal entity or an obligated person regarding municipal advisory activity will depend on all the relevant facts and circumstances.[14] For purposes of the municipal advisor definition, advice includes, without limitation, recommendations that are particularized to the specific needs, objectives, or circumstances of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, based on all the facts and circumstances.[15] Advice excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities.[16]

The focus of the advice standard is whether or not, under all of the relevant facts and circumstances, the information presented to a municipal entity or obligated person is sufficiently limited so that it does not involve a recommendation that constitutes advice.[17]

The Exchange Act provides that municipal advisors and any person associated with such municipal advisor has a fiduciary duty to their municipal entity clients, prohibiting municipal advisors from engaging in any act, practice, or course of business that is not consistent with their fiduciary duty.[18] Although the Exchange Act does not provide that municipal advisors are deemed to have a fiduciary duty insofar as their advice is to non-municipal entity obligated person clients, some state fiduciary or agency laws may, depending on the facts and circumstances, apply to municipal advisor engagements with such obligated persons.[19] Municipal advisors do have other obligations to obligated person clients, such as a duty of fair dealing and a duty of care under current Municipal Securities Rulemaking Board (“MSRB”) rules.[20]

Now that I have laid out the regulatory framework, I want to summarize the key takeaways:

First, the Commission applies the term “municipal advisory activities”[21] to a range of activities, including, but not limited to developing financing plans, assisting in evaluating different financing options and structures, and evaluating and negotiating terms.[22]

Second, advice is not subject to a bright-line definition. Advice includes a recommendation regarding municipal financial products or the issuance of municipal securities. The determination of whether a recommendation has been made is an objective inquiry and a key factor that the Commission will consider is whether the recommendation reasonably would be viewed as a suggestion to take action or refrain from taking action.[23]

Third, any person engaging in municipal advisory activity will be considered a municipal advisor and have a fiduciary duty to their municipal entity client, unless an exclusion or exemption applies.

Finally, under federal securities law, a person must register with the Commission and the MSRB prior to engaging in municipal advisory activities. Any person that engages in municipal advisory activity prior to registering with the Commission and the MSRB as a municipal advisor violates Section 15B(a)(1)(B) of the Exchange Act.[24]

## **Observations on Public-Private Partnerships**

The roughly \$4 trillion[25] municipal securities market provides critical support to our nation's infrastructure. The funds raised by our states and local governments in the municipal securities market have helped remove lead from water pipes; built roads and bridges; modernized hospitals; built clean-energy infrastructure, and so much more to ensure that we have the infrastructure needed to access critical services. But for decades now, observers have noted that tight fiscal conditions and rising costs associated with maintaining and building infrastructure have prevented our states and local governments from investing in infrastructure at the levels needed.[26]

Recently enacted legislation has made funding and incentives available for a broad range of infrastructure development[27] and may also serve as a potential catalyst for the private sector to help in closing infrastructure gaps, including through public-private partnerships ("P3").[28]

As everyone in the room is aware, leveraging private capital to finance public infrastructure is not a new tool. Much of our nation's early infrastructure was built through partnerships between the public and private sectors.[29] More recently, P3s have been used as a delivery option for complex highway projects throughout the nation[30] and have been presented as a tool to finance projects in other sectors, such as energy infrastructure, affordable housing, school facilities, and telecom.[31]

Despite their widespread use, there is no universally accepted definition of a P3.[32] P3s are broadly described as any contractual agreement between a public entity and a private entity for the purpose of financing, constructing, operating, managing, and/or maintaining a public asset and related services.[33]

Let's break that down a bit: P3s are long-term contractual arrangements between a public entity and private entity, where the private entity makes a financing commitment expecting to be repaid with future tax revenue or user fees or similar arrangement. The private entity signing and managing the P3 contract is typically a special purpose vehicle (SPV) created for the purpose of the P3 project and having equity investors.[34]

Pretty straightforward: instead of using public resources that may be limited by budget or debt restrictions, private financing steps in as an alternative to building much needed infrastructure, potentially using the same taxes and fees that the municipal entity or obligated person would have used to finance the project if it had decided to finance on its own.

Well, there is more to the story. Definitionally, P3s exist on a spectrum as an alternative form of procurement[35] but also on a spectrum as an alternative form of financing. Financing packages come in all types of configurations: equity, debt, or a combination sourced from both public and private sources, including private activity bonds ("PABs"), federal credit assistance, state, or local funding, which may include the issuance of municipal securities.[36]

Compared to more traditional financings of infrastructure - that is, using federal, state, or local funding, which more likely than not includes the issuance of municipal securities - P3s and other non-traditional methodologies that have been developed to deliver and finance infrastructure needs are a bit more complex.

This complexity has brought with it a range of concerns regarding the use of P3s. Public officials and state and local inspector generals and auditors have studied individual transactions and have issued findings identifying key areas of concern. These concerns include transferring too little or too much risk between the public and private sectors; not using the most efficient and lowest cost financing available to the municipal entity or obligated person; and having very costly long-term impacts to fix short-term budgetary issues.

Public entities have also been exposed to all sorts of contingent liabilities, including compensation clauses, non-compete clauses, and availability payment escalation clauses, leading to potential increased financial and political burdens on the public entity. Uncontrollable external events, oftentimes impacting anticipated revenues, have seen public entities having to make the choice to either terminate, suspend, or take full control over a project, even though the risk of such events was supposed to be borne by other parties.[38]

## **Pathways to Public-Private Partnerships**

In light of these potential hurdles, how does a municipal entity or obligated person go about deciding to finance an infrastructure project using a non-traditional form of procurement?

One way would be for municipal entities and obligated persons to rely on individuals and firms – advisors, consultants, banks, engineers, accounting firms, developers, real estate managers, investment specialists, diversified financial services groups – collectively, what I will be referring to as “P3 Consultants” that have positioned themselves as financial, legal, and technical experts on P3s. Individual or groups of P3 Consultants are purportedly capable of providing tailored advice to municipal entities and obligated persons on the entire P3 lifecycle. However, various reports[39] have identified that P3 Consultants have engaged in concerning behavior, including:

- Failure by P3 Consultants to disclose conflicts of interest between the P3 Consultant and subcontractors hired to provide a VfM analysis, leading to the skewing of project costs in favor of a P3 procurement.
- P3 Consultants with no experience in municipal financing, failing to include a public sector comparator as part of the VfM analysis and resultingly being unable to demonstrate that the procurement would be maximizing VfM.
- P3 Consultants advising municipal entities or obligated persons that P3s that only used private debt and equity funding sources would be considered an “off-balance sheet” financing, despite the fact that projects procured with a mix of public and private funding sources would, under accounting standards be required to be includable on the municipal entities balance sheet.[40]

### *Soliciting a P3 Consultant*

In staff’s review of P3s in the municipal securities market, one of the first questions that we asked ourselves is how does the process get started – how does a municipal entity or obligated person connect with a P3 Consultant and does that raise any regulatory issues?

Municipal entities and obligated persons often solicit a P3 Consultant through a competitive request for proposal/qualification (“RFP/Q”) process, where the municipal entity or obligated person has defined the infrastructure project scope; completed a preliminary VfM, or other process, which compares[41] the costs and benefits of a P3 or other non-traditional procurement method against a traditional procurement method; defined requirements related to construction, operation, and management of the project; and assessed potential financing arrangements. But P3 Consultants may also approach the municipal entity (or obligated person) through an Unsolicited Proposal (“USP”) process.[42]

So, how does the RFP/Q process tie back to our municipal advisor regulatory framework?

Well, responses to requests for RFP/Qs alone do not constitute municipal advisory activity.[43] Persons providing a response in writing or orally to a RFP/Q from a municipal entity or obligated person for services in connection with a municipal financial product or the issuance of municipal securities is exempt from the definition of municipal advisor provided that such person does not receive separate direct or indirect compensation for advice provided as part of such response.[44] However, Unsolicited Proposals that broadly seek input on any infrastructure project may not be a process that is consistent with the RFP exemption to the municipal advisor definition.[45]

We have previously spoken about the parameters and level of formality of the RFP/Q process that would be needed to qualify for the RFP exemption.[46] Staff is of the view that the USP process would need to meet the same standards to qualify any responses for the exemption. Municipal entities, obligated persons, or registered municipal advisors acting on their behalf, should apply a similar degree of formality by identifying a particular objective for the USP process. Otherwise, any person responding to a USP would need to consider if the substance of their proposal requires registration as a municipal advisor.

We have seen instances where P3 Consultants are originating an infrastructure project by identifying public asset gaps, proposing project design recommendations, providing project affordability analyses, and/or discussing the viability of a public infrastructure project in general terms. Without including material specifically tailored to the needs, objectives, or circumstances of the municipal entity or obligated person, this may not rise to the level of municipal advisory activity. However, some Unsolicited Proposals have included subjective qualitative and quantitative criteria specially tailored to the municipal entity or obligated person that includes descriptions of proposed business arrangements (i.e., ground lease, management agreements); market studies that support revenue assumptions and financial, economic and social benefits; advice with respect to sizing and structuring of the financing package, which may include consideration or use of municipal securities or municipal financial products; and models allocating risk transfer between the public and private entity. P3 Consultants should be aware that, depending on the facts and circumstances, such submissions could constitute municipal advisory activity.

Regardless of whether a P3 Consultant has been retained through an RFP/Q process or through a USP process, our overarching observation has been that municipal entities and obligated persons seem to rely heavily on the content of the proposals – and the implied expertise – of the P3 Consultant.

### *The Role of the P3 Consultant*

What services do P3 Consultants provide? Well, services run the whole gamut.

We have observed instances where the P3 Consultant analyzes and makes recommendations on the most cost effective and appropriate financing package for the delivery of the project, including:

- Considering various financing alternatives to raise the necessary capital, which may include, without limitation: federal, state, or local funding, including the use of municipal financial products or the issuance of municipal securities; equity and lender commitments; and/or special facility financing; and
- Assisting with the sizing and structuring of the financing package, which may include consideration or use of municipal securities or municipal financial products and participating in the preparation of disclosure documents.

P3 Consultants should be aware that considering various financing alternatives and assisting with the sizing and structuring could constitute municipal advisory activity.

We have seen P3 Consultants be asked to independently, or in collaboration with the staff of the municipal entity or obligated person and other advisors, draft RFP/Qs for the solicitation of financial and/or technical private sector project delivery partners (“Private Sector Partners”). Assisting a municipal entity or obligated person with drafting – or simply drafting – an RFP/Q is municipal advisory activity requiring registration with the Commission, absent an available exclusion or exemption, because the P3 Consultant (or any other entity) could be providing advice with respect to the parameters of such RFP/Q which includes the issuance of municipal securities or the use of municipal financial products.[47]

## **Takeaways**

The SEC’s mission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. The Office of Municipal Securities remains dedicated to providing information to the municipal securities market to help persons and entities active in the market comply with the important safeguards that were put in place after the last financial crisis by Congress. The Exchange Act makes it unlawful for any municipal advisor to provide advice to or on behalf of, or to undertake a solicitation of, a municipal entity or obligated person without registering with the Commission.[48]

As you continue your partnerships to help meet the nation’s infrastructure needs, I would like you to remember that addressing the risks that unregistered municipal advisory activity pose to municipal entities and obligated persons is a challenge that requires a whole municipal securities market approach.

P3 Consultants and Private Sector Partners who advise municipal entities or obligated persons on the issuance of municipal securities, the use of municipal financial products, and/or the use of debt financing alternatives that are tailored to the specific needs, objectives, or circumstances of the municipal entity during any stage of the P3 lifecycle should remember that they may be engaging in municipal advisory activity requiring registration as a municipal advisor with the Commission and the MSRB. The relevant timeline for advice to obligated persons is slightly different but still includes advice prior to the issuance of municipal securities until they are no longer outstanding.[49]

For other market participants, engaging persons acting as unregistered municipal advisors may have far-reaching consequences for themselves and others,[50] including eroding public trust, significant financial losses and inefficiencies, and undermining the legitimacy of the P3 process.

More information about the Commission’s regulation of municipal advisors is available at the Office of Municipal Securities website.[51] The MSRB also provides educational material on various topics related to municipal advisors at its Education Center website that may be helpful to municipal entities, obligated persons, P3 Consultants, and Private Sector Partners and any other market participant seeking additional information.[52]

Thank you again to The Bond Buyer for the invitation to address you today. I look forward to working with all of you toward our shared goal of regulatory compliance in furtherance of protecting the integrity of the municipal securities market.

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Dave Sanchez, Director, Office of Municipal Securities  
The Bond Buyer Infrastructure Conference

[1] See Dave Sanchez, Director, Office of Municipal Securities, U.S. Securities and Exchange Commission, Closing Remarks – Compliance Conference (Dec. 7, 2023), available at <https://www.sec.gov/newsroom/speeches-statements/sanchez-remarks-compliance-conference-120723>.

[2] See Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sept. 23, 2013), 78 FR 67468, 67472 (Nov. 12, 2013) (“Municipal Advisor Adopting Release”), available at <https://www.govinfo.gov/content/pkg/FR-2013-11-12/pdf/2013-23524.pdf>.

[3] See Exchange Act Section 15B(e)(8) [15 U.S.C. 78o-4(e)(8)] defining “municipal entity.”

[4] See Exchange Act Section 15B(e)(10) [15 U.S.C. 78o-4(e)(10)] defining “obligated person.”

[5] See Municipal Advisor Adopting Release 78 FR at 67472.

[6] *Id.* at 67475.

[7] *Id.* at 67475 n.102 (citing S. Rep. No. 111-176, at 38 (2010)).

[8] *Id.* at 67475 n. 104 and accompanying text.

[9] *Id.* at 67475 nn. 105-106 and accompanying text.

[10] *Id.* at 67626.

[11] See Section 975(a)(1)(B) of the Dodd-Frank Act [15 U.S.C. 78o-4(a)(1)(B)].

[12] See Exchange Act Section 15B(e)(4)(A) [15 U.S.C. 78o-4(e)(4)(A)]. The definition of municipal advisor includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors that provide municipal advisory services, unless they are statutorily excluded. See 15 U.S.C. 78o-4(e)(4)(B). The statutory definition of municipal advisor excludes a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 77b(a)(11) of this title), any investment adviser registered under the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 et seq.], or persons associated with such investment advisers who are providing investment advice, any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps, attorneys offering legal advice or providing services that are of a traditional legal nature, or engineers providing engineering advice. See 15 U.S.C. 78o-4(e)(4)(C). The Commission exempts the following persons from the definition of municipal advisor to the extent they are engaging in the specified activities: accountants; public officials and employees; banks; responses to requests for proposals or qualifications; swap dealers; participation by an independent registered municipal advisor; persons that provide advice on certain investment strategies; certain solicitations. See Exchange Act Rule 15Ba1-1(d)(3)(i) through (viii) [17 CFR 240.15Ba1-1(d)(3)(i) through (viii)].

[13] Municipal Advisor Adopting Release, 78 FR at 67479.

[14] *Id.*

[15] Id. at 67480. See also Exchange Act Rule 15Ba1-1(d)(1)(ii) [17 CFR 240.15Ba1-1(d)(1)(ii)] (advice excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities (including with respect to the structure, timing, terms and other similar matters concerning such financial products or issues)).

[16] See Exchange Act Rule 15Ba1-1(d)(1)(ii) [17 CFR 240.15Ba1-1(d)(1)(ii)]. See also Municipal Advisor Adopting Release, 78 FR at 67479-67480 (Commission providing clarifying guidance regarding “advice” only with respect to municipal advisors and solely for purposes of the municipal advisor definition).

[17] See Municipal Advisor Adopting Release, 78 FR at 67480. See generally Answer to Question 1.1 The General Information Exclusion from Advice versus Recommendation from the Registration of Municipal Advisors Frequently Asked Questions (“MA FAQ”), available at <https://www.sec.gov/info/municipal/mun-advisors-faqs>.

[18] See 15 U.S.C. 78o-4(c)(1).

[19] See, e.g., Arthurs Lestrangle & Co., Inc., Exchange Act Release No. 42148, 1999 WL 1038053 at \* 4 (Nov. 17, 1999) (financial advisor also a fiduciary under Pennsylvania state law).

[20] See MSRB Rules G-17 (fair dealing) and G-42(a)(i) (duty of care).

[21] See Exchange Act Rule 15Ba1-1(e) [17 CFR 240.15Ba1-1(e)].

[22] See Municipal Advisor Adopting Release, 78 FR at 67472.

[23] Municipal Advisor Adopting Release, 78 FR at 67480 and accompanying note 165 (citing FINRA Notice to Members 01-23 (Mar. 19, 2001), and Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated FINRA Rulebook, Exchange Act Release No. 62718A (Aug. 20, 2010), 75 FR 52562 (Aug. 26, 2010); FINRA Regulatory Notice 11-02 (Know Your Customer and Suitability), Jan. 11, 2011, available at <https://www.finra.org/sites/default/files/NoticeDocument/p122778.pdf>).

[24] See 15 U.S.C. 78o-4(a)(1)(B).

[25] Federal Reserve Board, Financial Accounts of the United States - Z.1, Table L.212 (First Quarter 2024), available at <https://www.federalreserve.gov/releases/z1/20240607/html/l212.htm>.

[26] While the federal government contributes with funding, states and local governments carry most of the burden for maintaining and building infrastructure. See generally U.S. Dep’t of the Treasury, Infrastructure Investment in the United States (Nov. 15, 2023), available at <https://home.treasury.gov/news/featured-stories/infrastructure-investment-in-the-united-states>; American Society of Civil Engineers, Failure to Act, Economic Impacts of Status Quo Investment Across Infrastructure Investment Across Infrastructure Systems (2021), available at [https://infrastructurereportcard.org/wp-content/uploads/2021/03/FTA\\_Econ\\_Impacts\\_Status\\_Quo.pdf](https://infrastructurereportcard.org/wp-content/uploads/2021/03/FTA_Econ_Impacts_Status_Quo.pdf) and Bridging the Gap, Economic Impacts of National Infrastructure Investment, 2024-2043 (2024), available at <https://bridgingthegap.infrastructurereportcard.org/wp-content/uploads/2024/05/202-Bridging-the-Gap-Economic-Study.pdf>.

[27] The Infrastructure Investment and Jobs Act (“IIJA”) and the Inflation Reduction Act (“IRA”) make funding available for an array of projects. See Infrastructure Investment and Jobs Act, Pub. L. 117-58 (2021) and the Inflation Reduction Act of 2022, Pub. L. 117-169 (2022).



[28] In terms of private sector involvement in infrastructure development, the IIJA, for instance, provides planning grants for jurisdictions seeking to utilize P3 project procurement, requires projects with an estimated total cost of \$750 million or more seeking either Transportation Infrastructure Finance and Innovation Act (“TIFIA”) or Railroad Rehabilitation and Improvement Financing (“RRIF”) funding to conduct a value-for-money (“VfM”) analysis, and increased the federal cap on tax-exempt private activity bonds (“PABs”) for highway or surface freight transfer facilities. See e.g., IIJA §§ 71001; 70701; 80403 [23 U.S.C. 611; 23 U.S.C. 601; 26 U.S.C. 142(m)(2)(A)].

[29] See John Forrer, James Edwin Kee, Kathryn E. Newcomer and Eric Boyer, Public Administration Review, Public-Private Partnerships and the Public Accountability Question (May/June 2010), 475-484, available at <https://www.jstor.org/stable/pdf/40606405.pdf>.

[30] See Congressional Budget Office, Report on Public-Private Partnerships for Transportation and Water Infrastructure (Jan. 2020), available at <https://www.cbo.gov/system/files/2020-01/56003-C-O-PPP.pdf> (discussing trends in public-private partnerships for transportation and water utilities); U.S. Dep’t of Transp., Report on Highway Public-Private Partnership Concessions in the United States (Dec. 2016), available at [https://www.transportation.gov/buildamerica/sites/buildamerica.dot.gov/files/2019-08/p3-toolkit\\_report\\_on\\_highway\\_p3s\\_122916.pdf](https://www.transportation.gov/buildamerica/sites/buildamerica.dot.gov/files/2019-08/p3-toolkit_report_on_highway_p3s_122916.pdf).

[31] See, e.g., N.J. Senate Bill No. 3565 (introduced Feb. 9, 2023) (proposed establishment of the Energy Infrastructure Public-Private Partnership Program); Colo. Senate Bill No. 23-035 (June 2, 2023) (CO housing authority has power to contract with private entities to facilitate P3s for affordable housing projects); Md. Prince George’s County Public Schools, First-of-Its-Kind Public-Private Partnership Delivers New Schools for 8K+ Students (Sept. 18, 2023), available at <https://www.pgcps.org/offices/communications-and-community-engagement/newsroom/news/newsroom-archives/2023-2024/news-release-first-of-its-kind-public-private-partnership-delivers-new-schools-for-8k-students>; Brenton Foundation and Coalition for Local Internet Choice, The Emerging World of Broadband Public-Private Partnerships: A Business Strategy and Legal Guide (May 2017), available at [https://www.benton.org/sites/default/files/partnerships\\_0.pdf](https://www.benton.org/sites/default/files/partnerships_0.pdf); National Science and Technology Council, National Artificial Intelligence Research and Development Strategic Plan May 2023, available at <https://www.whitehouse.gov/wp-content/uploads/2023/05/National-Artificial-Intelligence-Research-and-Development-Strategic-Plan-2023-Update.pdf>.

[32] In 1999, the U.S. General Accounting Office issued a glossary of the most commonly used terms in P3s to facilitate a better understanding of the terms as they are used. See U.S. General Accounting Office, Public-Private Partnerships, Terms Related to Building and Facility Partnerships (Apr. 1999), available at <https://www.gao.gov/assets/ggd-99-71.pdf>.

[33] See generally National Conference of State Legislatures, Report, Building-Up: How States Utilize Public-Private Partnerships for Social & Vertical Infrastructure (Feb. 16, 2017) (“NCSL Report”), available at <https://www.ncsl.org/transportation/building-up-how-states-utilize-public-private-partnerships-for-social-vertical-infrastructure#:~:text=The%20Legislative%20Role%20in%20Public,policy%20is%20the%20next%20step>; U.S. Dep’t of Transp., Build America Bureau, Public-Private Partnership Concessions for Highway Projects: A Primer (“DOT Primer”) (for an overview of the various contracting, project delivery and financing arrangements of P3s), available at [https://www.fhwa.dot.gov/ipd/p3/toolkit/publications/primers/primer\\_highway\\_concessions\\_p3/](https://www.fhwa.dot.gov/ipd/p3/toolkit/publications/primers/primer_highway_concessions_p3/).

[34] See generally U.S. Dep’t of Transp., Federal Highway Administration, Guidebook on Financing

of Highway Public-Private Partnerships Projects (Dec. 2016) (“DOT Guidebook on Financing”), §2.4, available at [https://www.fhwa.dot.gov/ipd/pdfs/p3/p3-toolkit\\_p3\\_project\\_financing\\_guidebook\\_122816.pdf](https://www.fhwa.dot.gov/ipd/pdfs/p3/p3-toolkit_p3_project_financing_guidebook_122816.pdf).

[35] See, e.g., Dominique Custos & John Reitz, Public-Private Partnerships, 58 Am. J. Comp. L. 555 (2010); NCSL Report; DOT Primer.

[36] See generally DOT Primer; DOT Guidebook on Financing.

[37] See, e.g., Denver International Airport, Great Hall After-Action Report (Aug. 9, 2022), [https://www.flydenver.com/app/uploads/2024/06/greathall\\_AfterActionReport-2.pdf](https://www.flydenver.com/app/uploads/2024/06/greathall_AfterActionReport-2.pdf); Office of the Inspector General, City of Chicago, Report of Inspector General’s Findings and Recommendations: An Analysis of the Lease of the City’s Parking Meters (June 2, 2009), <https://igchicago.org/wp-content/uploads/2011/03/Parking-Meter-Report.pdf>; State of Texas, State Auditor’s Office, Audit Report on The Department of Transportation and the Trans-Texas Corridor, Report No. 07-015 (Feb. 2007), available at <https://sao.texas.gov/reports/main/07-015.pdf>.

[38] See generally supra note 37. See also Denver International Airport (Great Hall Project), City and County of Denver Auditor, Audit Report Denver International Airport Great Hall Construction (Apr. 20, 2023), available at [https://www.flydenver.com/app/uploads/2023/09/greathallconstruction\\_Auditapril2023-1.pdf](https://www.flydenver.com/app/uploads/2023/09/greathallconstruction_Auditapril2023-1.pdf); Kevin DeGood, American Progress, When Public-Private Partnerships Fail: A Look at Southern Indiana’s I-69 Project (Feb. 15, 2018), available at <https://www.americanprogress.org/article/public-private-partnerships-fail-look-southern-indianas-69-project/>; Hearing, California Senate Transportation and Housing Committee, Tolls, User Fees, and Public-Private Partnerships: The Future of Transportation Finance in California? (Jan. 17, 2007), available at <https://archive.senate.ca.gov/sites/archive.senate.ca.gov/files/committees/2015-16/stran.senate.ca.gov/sites/stran.senate.ca.gov/files/01-17-07Background.doc>; Texas State Auditor’s Office, An Audit Report on The Department of Transportation’s Purchase of the Camino Colombia Toll Road (June 2, 2006), available at <https://sao.texas.gov/reports/main/06-041.pdf>. Concerns regarding P3s have been raised outside of the United States as well. See, e.g., Office of the Auditor General of Ontario, Annual Report 2014, available at [https://www.auditor.on.ca/en/content/annualreports/arreports/en14/2014AR\\_en\\_web.pdf](https://www.auditor.on.ca/en/content/annualreports/arreports/en14/2014AR_en_web.pdf); Canadian Centre for Policy Alternatives | Nova Scotia, Many Dangers of Public-Private Partnerships (P3s) in Newfoundland and Labrador (Sept. 2020), available at <https://policyalternatives.ca/sites/default/files/uploads/publications/Nova%20Scotia%20Office/2020/10/HiddendangersofP3s.pdf>.

[39] See generally supra notes 37 and 38.

[40] See generally Governmental Accounting Standards Series, Statement No. 94 Public-Private and Public-Public Partnerships and Availability Payment Arrangements (03/20), available at <https://gasb.org/page/ShowPdf?path=GASBS94.pdf&title=GASB%20Statement%20No.%2094,%20Public-Private%20and%20Public-Public%20Partnerships%20and%20Availability%20Payment%20Arrangements>.

[41] See U.S. Dep’t of Transp., Federal Highway Administration, Value for Money Assessment for Public-Private Partnerships: A Primer, 2-1, [https://www.transportation.gov/buildamerica/sites/buildamerica.dot.gov/files/2019-08/p3\\_value\\_for\\_money\\_primer\\_122612.pdf](https://www.transportation.gov/buildamerica/sites/buildamerica.dot.gov/files/2019-08/p3_value_for_money_primer_122612.pdf).

[42] A USP process refers to a proposal submitted by an offeror (often a P3 Consultant but can be

any private entity) for a P3 project that is not in response to any RFP/Q issued by a municipal entity, obligated person, or municipal advisor on their behalf.

[43] See Municipal Advisor Adopting Release, 78 FR at 67509.

[44] See Exchange Act Rule 15Ba1-1(d)(3)(iv) [17 CFR 240.15Ba1-1(d)(3)(iv)]. See also Municipal Advisor Adopting Release for a discussion on the RFP exemption. Municipal Advisor Adopting Release, 78 FR at 67508-67509.

[45] See generally Answer to Question 2.1 of the MA FAQ.

[46] Id.

[47] See Municipal Advisor Adopting Release, 78 FR at 67509.

[48] See Exchange Act Section 15B(a)(1)(B) [15 U.S.C. 78o-4(a)(1)(B)].

[49] Whether a person that advises clients about conduit financings or other financing options would be required to register as a municipal advisor is dependent on certain facts and circumstances. See Municipal Advisor Adopting Release, 78 FR at 67485. For conduit financings, a person will not be a municipal advisor to an obligated person until (among other things) the obligated person has begun applying to, or negotiating with, a municipal entity to issue conduit bonds on behalf of the obligated person. Id.

[50] As part of its toolbox, the Commission brings enforcement actions against individuals and firms engaging in unregistered municipal advisory activity. A list of unregistered municipal advisor enforcement actions is available at <https://www.sec.gov/about/divisions-offices/office-municipal-securities/unregistered-municipal-advisor-enforcement-actions>.

[51] See U.S. Securities and Exchange Commission, Office of Municipal Securities, available at <https://www.sec.gov/about/divisions-offices/office-municipal-securities>.

[52] See Municipal Securities Rulemaking Board, available at <https://www.msrb.org/>.