

Guide to Identifying and Measuring Private Business Use in Tax-Exempt Bond-Financed Facilities

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I. Introduction

The University of Washington (the "University") frequently finances facilities in whole or in part with proceeds of tax-exempt or other tax-advantaged bonds. Federal tax law places limits on the private business use of such Bond-financed facilities (a "financed facility"). Private business use may arise from leases, management contracts, research agreements and other contracts with the federal government, corporations, and other private or non-profit entities depending on the nature and the duration of the agreement, the identity of the parties, and other factors.

In this Guide, the term "Bonds" or "bonds" includes tax-exempt governmental or 501(c)(3) bonds or other tax-advantaged bonds subject to private use restrictions, such as Build America Bonds.

In order to comply with federal tax law and accurately report private business use, the University needs to measure private business use in every financed facility. A change in use that creates excessive private business use requires timely refinancing of a debt issuance or other action such as voluntary settlement with the IRS. Excessive private business use can result in significant monetary penalties from the IRS. For these reasons, private business use requires periodic review and monitoring by the University.

This Guide is intended to provide the University with an overview of the federal law and guidance regarding private business use and to help the University track private business use in its financed facilities. This Guide is not comprehensive and the examples given are simplified for ease of presentation.

II. What is "private business use"?

Generally, private business use of a financed facility is any use by or for the benefit of a party other than use by a state or local governmental entity or use as a member of the general public. Private business use can arise from a lease, management contract, sponsored research agreement or any other arrangement that gives a private business user special legal entitlements with respect to the use of the financed facility. In short, private business use means:

- Use (directly or indirectly)
- Of a financed facility
- In a "trade or business"
- Carried on by any person (including the federal government and nonprofit organizations) other than a state or local governmental unit

Governmental Bonds. Bonds issued as governmental bonds will become "private activity bonds" and therefore lose their tax status if (1) more than 10% of bond proceeds are used for a "private business use" **and** (2) more than 10% of the debt service on the bonds is directly or indirectly payable from or secured by property used in a private business. The 10%

threshold drops to five percent (5%) if the private business use of the proceeds is unrelated to or disproportionate to the governmental use of the proceeds, however this is rarely a concern for University financed facilities. Additionally, for bond issues above \$150 million, the amount of private business use is effectively capped at \$15 million per issue.

501(c)(3) Bonds. Bonds issued as 501(c)(3) bonds do not constitute tax-exempt “qualified 501(c)(3) bonds” if (1) more than five percent (5%) of the proceeds of the bonds are used for a "private business use" **and** (2) more than five percent (5%) of the debt service on the bonds is directly or indirectly payable from or secured by property used in a private business. Issuance costs financed with bond proceeds are treated as private business use when applying the private business use test and are limited to two percent (2%) of the proceeds of qualified 501(c)(3) Bonds. Effectively, therefore, if any of the proceeds are used for issuance costs, then the private business use limit is reduced by the amount spent on issuance costs.

Taxable Bonds. The University sometimes finances all or a portion of its facilities with taxable bonds. The private business use restrictions do not apply to facilities financed exclusively with taxable bonds.

III. What is general public use?

As stated above, use by members of the general public is not private business use. The following constitutes allowable general public use and not private business use:

- Use by natural persons not engaged in a trade or business.
- Use by nongovernmental persons in their trades or businesses if the financed facility is reasonably available to use on the same basis by natural persons not engaged in a trade or business. Arrangements providing for use that is available to the general public at no charge or on the basis of rates that are generally applicable and uniformly applied do not convey priority rights or other preferential benefits. This might include recharge and cost centers where services are available for a fee to members of the general public and to businesses.

IV. What types of activities generate private business use?

As described above, private business use can arise from a lease, management contract, sponsored research agreement or any other arrangement that gives a private business user special legal entitlements with respect to the use of a financed facility. Each general category of private business also has exceptions, which are described below. **Common examples of private business use and exceptions to private business use are included in Exhibit A of this Guide.**

A. *Leased Space and General Public Use*

The lease of a financed facility by a private business or person generally gives rise to private business use. Common examples include a lease with a private company (or a person for use of a trade or business) for a retail store within a financed facility, or a lease with a private company for access to laboratory space in a financed facility.

Generally, if a lease or other arrangement with respect to a financed facility has a term of use that is greater than 200 days, including all renewal options, then it is considered private business use and not general public use. Certain arrangements with terms of less than 200 days that do not otherwise convey priority rights or other preferential benefits may constitute general public use. The following safe harbors and exceptions permit the University to disregard what would otherwise be considered private business use, so long as the facility was not financed for the principal purpose of the private trade or business use:

- 100 Days Limited General Public Use Arrangements. The financed facility may be used by any person or entity under any arrangement for use (other than as an owner) for a contract term (including renewal options) of no longer than 100 days over the life of the contract, provided that the arrangement would be general public use except that it is not available on the same basis for use by natural persons because generally applicable and uniformly applied rates are not reasonably available to natural persons not engaged in a trade or business.
- 50 Days Negotiated Arm's-length Use Arrangements. The financed facility may be used by any person or entity under any arrangement (other than as an owner) for a contract term (including renewal options) of no longer than 50 days, provided the arrangement is negotiated at arm's-length and the compensation paid for the use is at fair market value. While the regulations are not clear on this point, the University treats any amount of use in one day (e.g. one hour) as a day of use for purposes of this safe harbor.
- Incidental Use Arrangements. The financed facility may be used by any person or entity where the use is incidental if the use is non-possessory (except for vending machines, pay telephones, kiosks and similar uses, for which possessory use is permitted) and the non-possessory uses do not in the aggregate exceed 2½% of the financed facility.

B. Management Contracts

A private management or service contract ("Management Contract") with respect to financed property generally results in private business use of the property if (i) the contract gives the service provider an ownership or leasehold interest in the financed facility (or an interest in the nature of an ownership or leasehold interest), or (ii) the contract provides for compensation for services based, in whole or in part, on a share of net profits from the operation of the financed facility. In Revenue Procedure 2017-13 (the "Revenue Procedure 2017-13") (which amplifies and supercedes Revenue Procedure 2016-44), the IRS has established safe harbors for Management Contracts that, if satisfied, will prevent the Management Contract from generating private business use. The safe harbor includes requirements relating to: (a) general financial terms, (b) term of the contract, (c) control of the property, (d) risk of loss, (e) consistent tax positions, and (f) exercise of rights, and is applicable to contracts entered into or materially modified after August 18, 2017. For contracts entered into prior to August 18, 2017, see the prior version of these Guidelines, created on December 3, 2015, or contact Treasury.

Requirement 1: General Financial Terms.

In general, for a Management Contract not to generate private business use, compensation for services rendered must be reasonable, and not based, in whole or in part, on a share of "net profits" from the operation of the facility. Compensation to the service provider will not be treated as providing a share of net profits if no element of the compensation (including eligibility for, the amount of, and the timing of the payment) takes into account, or is contingent upon, either the managed property's net profits or both the managed property's revenues and expenses for any fiscal period. For this purpose, any reimbursements of the service provider for actual and direct expenses paid by the service provider to unrelated parties ("Reimbursements") are disregarded as compensation. Incentive compensation will not be treated as providing a share of net profits if the eligibility for the incentive compensation is determined by the service provider's performance in meeting one or more standards that measure quality of services, performance, or productivity, and the amount and the timing of the payment of the compensation otherwise meet the requirements of the safe harbor.

Revenue Procedure 2017-13 makes clear that compensation (a) based solely on a capitation fee, a periodic fixed fee, or a per-unit fee; (b) certain types of incentive compensation; or (c) a combination of these types of compensation will not be treated as providing net profits. However, the Revenue Procedure does not provide a clear safe harbor for gross profit arrangements that also require some payment of expenses by the service provider.

In addition, the Management Contract must not, in substance, impose upon the service provider the burden of bearing any share of net losses from the operation of the managed property. An arrangement is permissible if:

- The determination of the amount of the service provider's compensation and the amount of any expenses to be paid by the service provider (and not reimbursed), separately and collectively, do not take into account either the managed property's net losses or both the managed property's revenues and expenses for any fiscal period; and
- The timing of the payment of compensation is not contingent upon the managed property's net losses.

Deferral of payments due to insufficient net cash flows will not be treated as contingent if: (a) the compensation is payable at least annually; (b) the University is subject to reasonable consequences for late payment, such as reasonable interest charges or late payment fees; and (c) the University pays such deferred compensation (with interest or late payment fees) no later than the end of five years after the original due date of the payment.

Requirement 2: Term of the Contract.

The term of the Management Contract, including all renewal options (as defined below), is no greater than the lesser of 30 years or 80% of the weighted average reasonably expected economic life of the managed property. For this purpose, economic life is determined as of the beginning of the term of the contract. If 25% or more of the net proceeds of the Bonds were used to purchase land, the land is given an economic life of 30 years. Renewal option means a provision under which either the service provider or the University has a legally enforceable right to renew the contract. Thus, for example, a provision under which a contract is automatically renewed for one-year periods absent cancellation by either party is not a renewal option (even if it is expected to be renewed).

If a contract is materially modified with respect to any matters relevant to the safe harbor provisions, it is retested as a new contract as of the date of the material modification.

Requirement 3: Control of the Property.

The University must exercise a significant degree of control over the use of the managed property. This control requirement is met if the contract requires the University to approve the annual budget of the managed property, capital expenditures with respect to the managed property, each disposition of property that is part of the managed property, rates charged for the use of the managed property, and the general nature and type of use of the managed property (for example, the type of services). For this purpose, for example, the University may show approval of capital expenditures for a managed property by approving an annual budget for capital expenditures described by functional purpose and specific maximum amounts; and the University may show approval of dispositions of property that is part of the managed property in a similar manner. Further, the University may show approval of rates charged for use of the managed property by either expressly approving such rates (or the methodology for setting such rates) or by including in the contract a requirement that the service provider charge rates that are reasonable and customary as specifically determined by an independent third party.

Requirement 4: Risk of Loss.

The University must bear the risk of loss upon damage or destruction of the managed property (for example, upon force majeure). However, insuring against risk of loss through a third party or imposing upon the service provider a penalty for failure to operate the managed property in accordance with the standards set forth in the management contract will not cause the University to fail to meet this requirement.

Requirement 5: Consistent Tax Positions.

The service provider must agree that it is not entitled to and will not take any tax position that is inconsistent with being a service provider to the University with respect to the managed property. For example, the service provider must agree not to take any depreciation or amortization, investment tax credit, or deduction for any payment as rent with respect to the managed property. Many existing contracts will not have this provision, so it should be included in any new contracts and added to existing contracts upon renewal.

Requirement 6: Exercise of Rights.

To ensure that the University may exercise its contract rights fully, the service provider must not have any relationship with the University that substantially limits the University's ability to exercise its rights under the contract. Thus:

- No more than 20% of the voting power of the Board of Regents of the University (the "Board") may be vested in the service provider and its shareholders, directors, officers, partners, members, and employees;
- The chief executive officer of the service provider or the chairperson of its governing body may not be on the Board; and
- The chief executive officer of the service provider is not the Chair of the Board or the President of the University or any of the University's related parties

Other Exceptions.

In addition, the following arrangements are not treated as Management Contracts giving rise to private business use:

- Incidental Contracts. A contract that is solely incidental to the primary governmental function of a financed facility, including contracts for janitorial, office equipment repair, hospital billing, or similar services.
- Hospital Admitting Privileges. The mere granting of admitting privileges by a hospital to a doctor is not a management contract if those privileges are available to all qualified physicians in the area consistent with the size and nature of its facilities.
- Reimbursement Contracts. A contract to provide for services if the only compensation is Reimbursements to the service provider.
- Eligible Expense Reimbursement Arrangement. A contract to provide for services if the only compensation is Reimbursements plus reasonable related administrative overhead expenses of the service provider.

The University, through coordination with Treasury Office ("Treasury"), will consult with bond counsel before entering into a management contract for a financed facility that does not meet the requirements of IRS Revenue Procedure 2017-13.

C. *Research Agreements*

The University frequently enters into research agreements with the federal government, corporations, and other entities. Depending on the nature of the agreement, identity of the sponsor, and other factors, these agreements may give rise to private business use. The major University units that may have private business use related to research agreements include the College of Engineering (COE), School of Medicine (SOM), College of the Environment (CoEnv), College of Arts & Science (A&S), and Applied Physics Lab (APL) / Office of Research (OR).

Generally, research agreements are evaluated based on a “facts and circumstances” basis to determine whether the agreement gives rise to private business use. Applied research sponsored by the federal government or a private business entity generally results in private business use. However, the Internal Revenue Service (“IRS”) provides **three safe harbors** for sponsored research contracts for basic research that meet certain criteria. For the purposes of the safe harbors, a “sponsor” is any party other than the University (or other state or local government entity) that is sponsoring the research. The term “basic research” means any original investigation for the advancement of scientific knowledge not having a specific commercial objective. For example, product testing supporting the trade or business of a specific nongovernmental person is not considered basic research.

Safe Harbor 1: Research agreements with a corporate sponsor.

A research agreement relating to facilities used for research sponsored by a corporate sponsor will not create private business use so long as:

- The activity consists of basic research;
- The transfer of any license or other use of resulting technology to the sponsor is priced at fair market value (no less than the price that would be paid by a non-sponsoring party for the same intellectual property rights); *and*
- Fair market value is determined at the time the technology is available for use, not earlier.

For example, an agreement giving the sponsor an option to acquire an exclusive license to any resulting technology in exchange for a price specified in the contract would not satisfy the safe harbor requirements.

Safe Harbor 2: Research agreements with an industry sponsor.

A research agreement relating to facilities used pursuant to an industry research agreement will not create private business use so long as:

- One or more sponsors agree to fund basic research;
- The University determines the research to be performed and the manner in which it is to be performed (i.e., the University controls the design and performance of the research study);
- The University retains title to any patent or product incidentally resulting from the basic research; *and*
- The sponsor receives no more than a nonexclusive royalty-free license to use the resulting product.

Note on Corporate vs. Industry Sponsors: The distinction between “corporate” and “industry” sponsors is inconsequential as a practical matter as sponsored research agreements generally can qualify under either Safe Harbor 1 or Safe Harbor 2. Most corporate sponsors may prefer to qualify under Safe Harbor 1, because it provides the corporate sponsor with greater control over the product of the research.

Safe Harbor 3: Research agreements with federal government sponsors.

A research agreement relating to facilities used pursuant to a federally-sponsored research agreement will not create private business use so long as:

- The University determines the research to be performed and the manner in which it is performed;
- The University retains exclusive title to any patent or other product incidentally resulting from the basic research; *and*
- Any party other than the University is entitled to no more than a nonexclusive, royalty-free license to use the product of any of that research.

The IRS guidance does not specifically address the issue of whether technology resulting from a federally-sponsored research agreement can be transferred at fair market value.

Clinical Trials

Clinical trials are typically conducted in furtherance of patient care or to validate products, and the possibility of invention is remote. Therefore, clinical trial arrangements are generally not considered "research" activities and are not analyzed under the research contract safe harbors. Clinical trials may still pose private business use concerns if they are not related to the University's governmental purposes (e.g., education or furthering patient care). To ensure that clinical drug trials meet the University's governmental purposes and do not constitute private business use, clinical trial agreements should include the following provisions:

- Clinical trials are performed on members of the general patient population (either patients that would always independently be treated or new patients brought in for the trial);
- Clinical trials are performed at facilities that serve the general patient population;
- The University is paid an objective fee for performing the trials according to the protocols previously developed by the sponsor;
- All of the data that is collected is given to the sponsor, except for records of the type normally retained by the University for non-clinical trial patients;
- The sponsor does not dictate which facilities are used for the trial;
- The clinical trial is not undertaken for the purposes of discovering patentable inventions or technology and the possibility of such a discovery is remote; and
- The University retains the right to publish the results of the clinical trial.

D. Special Legal Entitlements

In addition to leases, management contracts and sponsored research, other arrangements that convey "special legal entitlements" to a non-governmental person for beneficial use of a financed facility may result in private business use. Common examples of special legal entitlements include priority rights for use of a financed facility and control rights with respect to a financed facility (which may be combined with naming rights).

V. Measuring private business use

Private business use generally is measured by determining how much space in a financed facility is used for a private business use and determining the percentage of the total time the financed facility is used for a private business use. This is referred to as a "time and space analysis." For example, if a bond financed facility costs \$100 to build and 20% of the facility is used for private business use 25% of the time, then five percent of the proceeds of the bonds will be treated as used for a private business use ($\$100 \times 20\% \times 25\%$). Generally speaking, the percentage of space methodology estimates the percentage of private business use based on assignable square feet. When space is used simultaneously for both governmental and private purposes, another approach is to measure private business use based on a percentage of revenue generated by the financed facility. In some cases, it may be preferable to measure private business use by using a combined space and revenue analysis, which is most commonly done for facilities with research agreements.

A. Measurement Period

The time period over which private business use is measured for a particular bond is called the "measurement period." As a general rule, the measurement period begins on the later of the issue date of the bonds or the date the financed facility is placed in service. The measurement period ends on the last maturity date of the bonds or the last date of the reasonably expected economic life of the financed facility, whichever is earlier.

B. *Allocating Qualified Equity to Offset Private Business Use*

To the extent that University buildings are financed with bonds and “qualified equity” (as defined below, but commonly resulting from gifts, University contributions, or taxable bond proceeds), the qualified equity can typically be used to reduce the total amount of private business use allocable to the bonds and allow for additional flexibility for use of the financed facility. Final private activity bond regulations issued on October 26, 2015 (the “Final Regulations”), provide a special allocation rule, the “undivided portion method” for eligible mixed-use projects of governmental and 501(c)(3) issuers. The Final Regulations are effective for bonds issued on and after January 25, 2016, and in some circumstances may be applied to bonds previously issued for mixed-use projects.

Under the undivided portion method, bond proceeds and qualified equity are allocated to undivided portions of a “project” (as defined below). Qualified equity is first allocated to all private business use, with any remaining equity then allocated to governmental use on an annual basis. As a result, if the percentage of the project financed with qualified equity is greater than the percentage of private business use of the project, all of the qualified equity is allocated to private business use, resulting in 0% private business use for that year.

Example:

The University issues \$70x of bonds (the “Bonds”) and finances the construction of a 10-story office building costing \$100x (the “Project”) with proceeds of the Bonds and \$30x of qualified equity (the “Qualified Equity”).

- To the extent that the private business use of the Project does not exceed 30 percent in any particular year, the Qualified Equity is allocated to the private business use
- If private business use of the Project were, for example 44 percent in a year, the Qualified Equity would be allocated to 30 percent (\$30x) private business use and proceeds of the Bonds would be allocated to the excess (14 percent, or \$14x), resulting in private business use of the Bonds in that year of 20 percent (\$14x/\$70x)
- Conversely, if private business use of the Project were 20 percent, Qualified Equity would be allocated to that 20 percent. The remaining Qualified Equity (10 percent, or \$10x) would be allocated to the governmental use in excess of the 70 percent to which the proceeds of the Bonds would be allocated.

Under the Final Regulations, a “project” is defined as one or more facilities or capital projects, including land, buildings, equipment or other property, financed in whole or in part with proceeds of the bonds. “Qualified equity” includes proceeds of bonds that are not tax-advantaged and funds that are not derived from proceeds of a borrowing (gifts, cash, etc.), and such equity must finance the project under the same plan of financing as the bonds. At the time of issuance of bonds for any project, the University should identify any sources of qualified equity that may also be used for the project to ensure appropriate allocation.

C. *Summary of Process for Measuring Private Business Use*

The steps to determine private business use are summarized below. For a step-by-step example of how the University calculates private business use, see **Exhibit B—Private Business Use Analysis for the Sample UW Building**. This is a simplified breakdown of the measurement process and is based on certain assumptions, including: (1) the financed facility is a single building, (2) costs per square foot are equal throughout the facility, (3) only Bond proceeds and qualified equity are used to pay project costs, and (4) common areas in the facility are allocated between uses on a pro rata basis by square footage.

- I. Determine the method used to measure private business use. (*To be determined by the Treasury Office in consultation with Bond Counsel*). Methodology options include:
 - a. Measuring private business use as a percentage of space,

- b. Measuring private business use as a percentage of revenue, or
- c. A combination of A and B.

While there are two methods provided, based on IRS guidelines, the University will attempt to use a consistent methodology. The University generally uses the percentage of space methodology as the default methodology. However, for financed facilities used primarily for research, the University may determine private business use based on the revenues from private research contracts as a percentage of total research revenues, or use a combination of the space and revenue methods.

- II. Identify sources and uses of funds for the financed facility, including qualified equity. *(To be provided by Treasury).*
- III. Identify potential private business use from (a) leases, (b) management contracts, (c) research agreements, and (d) other arrangements that give rise to special legal entitlements (each described further in Section IV above).
- IV. Determine whether potential private business use meets one of the exceptions or safe harbors (described further in Section IV above).
- V. Measure total square footage and percentage of private business use:
 - a. For analysis based on square footage:
 - i. Determine total assignable square footage of financed facility and amount of time annually financed facility is in use.
 - ii. Determine total assignable square footage of space used for private business use and amount of time used for private business use.
 - iii. Perform space/time calculation (square footage x percentage of time used for private business use).
 - iv. Determine percentage of private business use in financed facility for the year.
 - b. For analysis based on revenues, follow the same approach, substituting revenues for square footage.
 - c. If it is not practical to measure private business use arising from research activities based on square footage, an acceptable approach for analyzing private business use in research agreements is as follows:
 - i. Determine amount of total research expenditures in the financed facility in a time period (usually a calendar or fiscal year).
 - ii. Determine the amount of research expenditures that qualifies as private business use (for research under agreements that fall outside of the safe harbors or do not satisfy the clinical trial analysis).
 - iii. Determine the percentage of research expenditures that are private business use for the given time period [(ii)/(i)].
 - iv. Determine percentage private business use for the financed facility by comparing the result in (iii) to total bond proceeds, taking into account other private business use and qualified equity for the financed facility.
- VI. Allocate qualified equity using the undivided portion method described in Section V.B above to determine remaining private business use in the financed facility, if any.

VII. Determine the private business use for the measurement period (generally the life of the Bonds) by averaging the percentages of private business use during each one-year period.

VIII. If private business use threshold is (or may be) exceeded for the measurement period, analyze whether another threshold—the “private security or payment” threshold—is also exceeded. The University should work with bond counsel whenever there is a risk of exceeding the private business use threshold to determine whether other tracking or remediation is required.

II. University Process for Tracking and Measuring Private Business Use

A. How does the University Track Private Business Use?

The Internal Lending Program (ILP) debt policy requires the University to track private business use for tax-exempt bond financed facilities at least every five years. On a more frequent basis, private business use calculations should be updated as material changes in private business use occur (e.g. as leases, management contracts, and/or sponsored research contracts are entered into). Treasury will lead the effort of reaching out to University Colleges and Schools to solicit regular updates on private business use and serves as a resource as questions arise.

The party that manages the financed facility is responsible for monitoring private business use within the facility and providing the relevant information to Treasury. Treasury will follow the process outlined in Section V.C above to calculate private business use in a financed facility after receiving data from the facility manager on all leases, management contracts, other special legal entitlements and sponsored research contracts (note: tracking of sponsored research is further described in Section B below). For example, a School considering a lease with a private company for space within a financed facility will work with Treasury to determine whether the lease gives rise to private use and will provide details about the lease (square footage, duration, value) so that Treasury may calculate the potential impact on private business use in the facility. As agreements that give rise to private use are finalized, Treasury will update the private business use spreadsheets with the relevant details and share the updated spreadsheets with the facility manager.

B. How does the University review research contracts for private business use?

In many of the University’s financed facilities, sponsored research requires annual tracking and reporting back to Treasury. The process for reviewing sponsored research contracts and tracking them for potential private business use is as follows:

1. OSP/CoMotion/School determine whether contract creates private business use:
 - a. Proposed sponsored research agreements are sent to OSP for review.
 - b. OSP reviews contract terms to determine if they could potentially raise private business use concerns; if so, OSP contacts relevant school or college to determine where research will occur.
 - c. If research will occur in a financed facility, OSP works with CoMotion, and as necessary, Treasury, the Tax Office, and tax counsel to determine whether contract will result in private business use.
 - d. CoMotion works with relevant school or college to receive approval on IP terms that raise private business use issues.
2. OSP flags in eGC1 those sponsored research agreements that will result in private business use.
3. School relates those sponsored research agreements that result in private business use to each financed facility.

4. School annually reports dollar value of all sponsored research that results in private business use for each financed facility to Treasury. School also annually reports total research expenditures for each financed facility.
5. Treasury inputs private use from sponsored research contracts into tracking spreadsheet and updates with the annual data.

C. Record Retention

The party that manages a financed facility should retain all records of private business use within the facility. The party may also request a copy of the updated PBU spreadsheets from Treasury. Examples of records that should be retained include:

- Copies of all leases, agreement and research contracts;
- Other agreements with third parties to use bond-financed property;
- Documents generated during compliance review process including floor plans, questionnaires and spreadsheets; and
- Correspondence with Treasury, bond counsel, OSP, Co-Motion or other party regarding any determination of private business use for a particular contract or use of a facility, or any other communication deemed to be relevant to making a private business use determination.

D. Summary of Process and Responsibilities

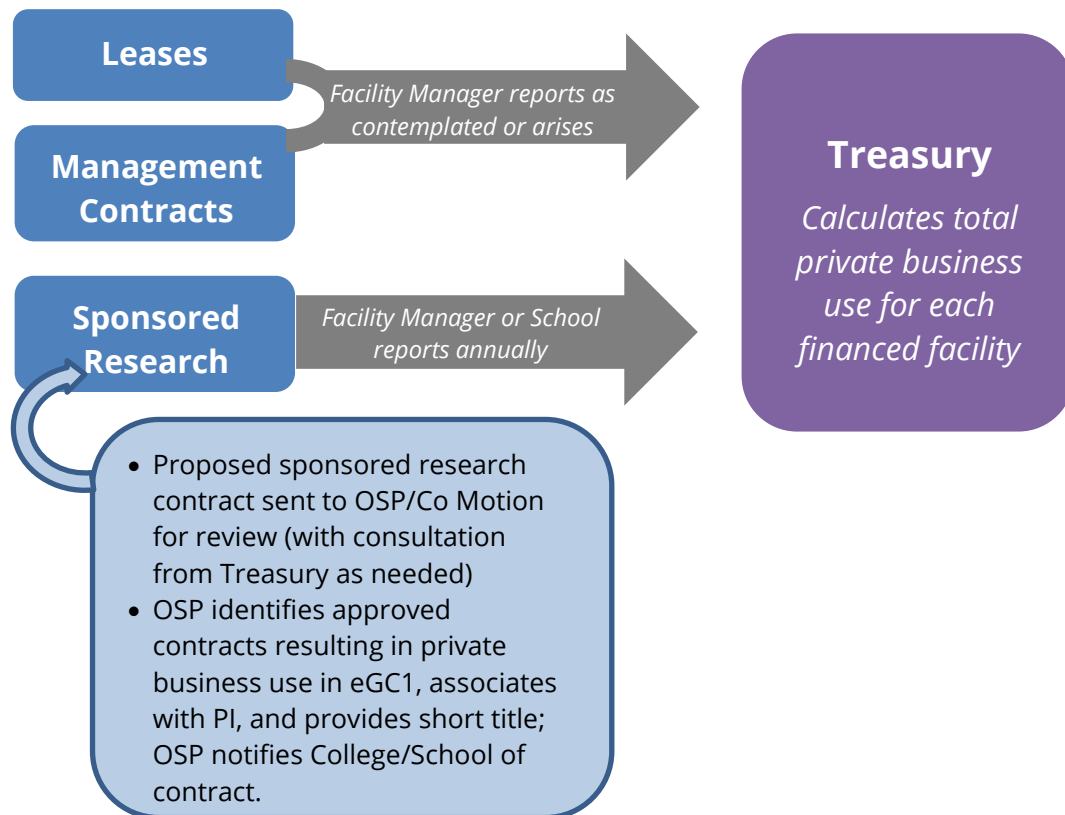


EXHIBIT A

Examples – Private Business Use and Exceptions to Private Business Use

I. Ownership

A. University issued tax-exempt bonds to finance the construction of a parking garage. Three years after the bonds were issued, and while they were outstanding, University sells the parking garage to Company X, a for-profit corporation. Ownership of the parking garage by Company X constitutes private business use.

II. Leases

A. *One-year Lease.* University uses tax-exempt bonds to finance a new dining services building. A private coffee shop leases space from the University pursuant to a 1-year lease. This lease is private business use.

B. *Lease term under 200 days.* University owns and operates a parking garage that was financed with tax-exempt bonds. University expects that a portion of the spaces will be available to the general public, including neighboring businesses, on a first-come, first-served basis for 6-month terms (~182 days). Those with 6-month leases have a priority right to renew their spaces at then current fair market value rates. These leases are with members of the general public, for terms (including renewals) of less than 200 days. This does not constitute private business use.

C. *Lease term with renewals exceeding 200-days.* Same scenario as example “B” but parking leases are for 6-months with an option to renew at the *same rate* for another 6-month period. These leases with neighborhood businesses exceed 200 days because the 6-month lease offers a 6-month renewal option for a combined term of 1 year. This lease will be deemed private business use. The rights to renew in Example B are not treated as renewal options because the compensation for the spaces is re-determined at fair market value at the time of renewal.

D. *100-day exception.* University uses tax-exempt bond proceeds to finance a research facility with specialized research equipment. The University allows outside parties to use a designated space within the facility for conducting research on a first-come, first-served basis and enters into 3-month contracts with a right to renew at then current fair market value rates. The research facility is only available for use by University faculty, researchers from other public universities, and industry researchers. These contracts meet the 100-day exception for private business use.

E. *Failure to meet 100-day exception.* Same scenario as Example “D” but the contracts are for 4 months. These leases do not meet the 100-day exception. They also don’t meet the 200-day exception because the facility is only available to industry researchers (i.e. it is not available for use on the same basis by natural persons not engaged in a trade or business). These contracts will be considered private business use.

F. *50-day exception.* University issues tax-exempt bonds to finance construction of a large auditorium that it will own and operate. The auditorium will be used for University purposes and will also be available to anyone who wishes to use it for a short period of time on a rate-scale basis. University expects that the auditorium will be used by schools, sororities, fraternities, churches, social organizations, and commercial organizations. Corporation C enters into an arm’s length arrangement with University to use the auditorium for 1 week for each year for a 4-year period (a total of 28 days) pursuant to which Corporation C will be charged a specific price reflecting fair market value. Corporation C will not be treated as a private business user because the contract satisfies the 50-day exception.

G. *Failure to meet 50-day exception.* Same scenario as Example “F” but Corporation enters into a contract to use the auditorium for 1 week for each year for a 10-year period (a total of 70 days). On the date the contract is entered into, University has not established generally applicable rates for future years. Therefore, Corporation C may not be treated as using the auditorium as a member of the general public, because its use is not on the same basis as the general

public. Because the term of Corporation C's use is longer than 50 days, the arrangement does not meet the 50-day exception. Corporation C's use of the auditorium will be treated as private business use.

H. *Incidental Use.* University uses tax-exempt bonds to finance construction of a classroom building. University enters into agreements with outside companies for placement of vending machines and pay phones within the facility. This is considered incidental use, and so long as it does not exceed 2.5 percent of the proceeds of the issue, it is disregarded for purposes of the private business use test.

III. Management Contracts

University uses tax-exempt bond proceeds to finance a student dining facility. University enters into a contract with Company Z pursuant to which Company Z will manage the cafeteria in the facility. This is a management contract and may result in private business use if it does not meet the requirements under Revenue Procedure 2017-13.

A. *Net profits.* The contract provides that Company Z's compensation will equal five percent of the net profits of the cafeteria. The management contract results in private business use.

B. *Gross receipts.* The contract provides that Company Z will receive 10 percent of the gross receipts of the cafeteria. Under prior IRS guidance, the management contract did not result in private business use so long as the contract was for five years or less. Under Revenue Procedure 2017-13, while a gross receipt arrangement is generally permissible, more information is needed regarding (a) general financial terms (including the expenses, if any, to be paid by Company Z), (b) term of the contract, (c) control of the property, (d) risk of loss, (e) consistent tax positions, and (f) exercise of rights to determine whether the contract meets the safe harbor requirements.

C. *Modification of Contract.* The management contract between University and Company Z was entered into prior to the applicability date of Revenue Procedure 2017-13 and met the safe harbor requirements of prior IRS guidance. After August 18, 2017, the parties decide to modify the compensation provisions and term of the contract. The modified contract must be analyzed under Revenue Procedure 2017-13 to determine if it meets the safe harbor provisions for private use.

IV. Research Contracts

A. *Industry/Corporate sponsored research.* University finances its Life Sciences building with proceeds of tax-exempt bonds. University and Corporation enter into a research agreement whereby Corporation sponsors research related to a particular bacteria and its effect on the human body. The agreement provides that any resulting technology from the research may be acquired by Corporation at the end of the term of the agreement at the fair market value when it is acquired. The research agreement meets Safe Harbor 1 of IRS Rev. Proc. 97-14 and does not result in private business use.

B. *Industry/Corporate sponsored research.* Same facts as Example "A," but the agreement provides that any resulting technology from the research will be owned by the University and the Corporation will receive a nonexclusive, royalty free license to use the resulting technology. Additionally, the University will have control over the specific research to be performed. The research agreement meets Safe Harbor 2 and does not result in private business use.

The following sample provisions in the UW Office of Sponsored Programs Sample Research Agreement contain language designed to meet the requirements of Safe Harbor 2:

1.1 University Control. Except as otherwise expressly described in the Project Description, the University will have the sole and exclusive authority to conduct, manage, control and direct the Project, to supervise all University personnel

participating in the Project, and to manage any University subcontractors carrying out University responsibilities in the Project; providing, however, Sponsor will have reasonable opportunities during the course of the Project to advise and consult with the Principal Investigator regarding the Project and its progress.

1.2 Sponsor's License. Providing that Sponsor has otherwise performed its material obligations under this Agreement, University hereby grants to Sponsor a fully-paid, non-exclusive, royalty-free, license for Sponsor's internal use only, without right to sublicense or redistribute either commercially or non-commercially, to: (i) the written reports delivered to Sponsor as described in Section 1.4 of this Agreement; and (ii) the data produced by University researchers during the course of performing the Project to the extent such data is reasonably and legally available, providing that Sponsor requests such data within thirty (30) days of receiving the final report and reimburses the University for any additional reasonable costs incurred by the University in reproducing the data. Sponsor understands and agrees that excepting only the foregoing license, University retains ownership of such reports and data.

EXHIBIT B
Private Business Use Analysis for the Sample UW Building

Sample Private Business Use Analysis - Slides

The slides found at the below website provide a detailed breakdown of how the University calculated private business use within a University research facility. The slides describe the facility, the bond financing for the facility, and the sources of private business use within the facility. The slides provide a step-by-step analysis of the calculations within the Sample Private Business Use Spreadsheet, which follows.

Website: https://finance.uw.edu/treasury/sites/default/files/sample_private_use_analysis_11_30_2015.pdf

EXHIBIT C
Frequently Asked Questions

- 1) How do we treat improvements made on only a piece (e.g. wing) of a larger building? E.g. Bio E/Genome includes two wings of a larger, single building (Foegel)?
 - o We can treat it as a portion of the wing and not of the entire building.