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Combining Tax-Exempt Bonds with Public-Private Partnerships under Current Law: Squire Patton Boggs

On February 13, the Trump Administration released its proposal to finance improvements of the nation's infrastructure. This proposal promotes the use of public-private partnership ("P3") arrangements to fund these improvements by expanding exempt facility bonds (a type of tax-exempt private activity bond that can be used to finance a list of specific types of projects, such as airports, sewage facilities, etc.) so that tax-exempt bonds can be used more easily in conjunction with P3 arrangements. For example, many public infrastructure projects, such as convention centers, courthouses, and fiber optic networks, do not fit within the patchwork list of projects that qualify for private activity bond financing, and so they cannot be financed with tax-exempt bonds if the bonds would exceed the private activity limits.

The day after the Trump Administration released its proposal, House Ways and Means Chairman Kevin Brady [made it clear that he does not support an expansion of tax-exempt private activity bonds](#)(\$). If the scope of exempt facility bonds is not expanded to facilitate the more ready use of tax-exempt bonds in P3 financing structures, and Chairman Brady's resistance could make this a likely outcome, P3 arrangements that wish to include tax-exempt bond financing will need to satisfy current law. One way to accomplish this objective is for the private party in the P3 arrangement not to be the owner or long-term lessee of the tax-exempt bond-financed property but instead to use this property under a management contract that complies with [Revenue Procedure 2017-13](#) (which we have analyzed [here](#), [here](#), and [here](#)).

What if the P3 arrangement contemplates that the private party will hold attributes of ownership in the subject property that will result in excessive private business use of the bonds that would finance that property, so that the qualified management contract approach is not a solution? One technique, which is often used to allow the use of tax-exempt bonds to finance professional sports stadiums (which, since the Tax Reform Act of 1986, have not been among the list of projects that can be financed with exempt facility bonds), presents a potential alternative solution.

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By Michael Cullers on March 6, 2018

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