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An Open Letter to the IRS on Revenue Procedure 2016-44: Squire Patton Boggs

Dear Internal Revenue Service:

At the Bond Attorneys' Workshop this past October, [certain of your officials indicated that you will be considering the issuance of clarifications and amendments of Revenue Procedure 2016-44](#) to address concerns that have been raised about particular provisions of this [Revenue Procedure](#) (which, by and large, is an excellent piece of guidance regarding which management contracts will not result in private business use of facilities financed by tax-exempt bonds). These officials indicated that there was no intent to change any law under the safe harbors from private business use for management contracts and that continuity was intended between Revenue Procedure 2016-44 and the safe harbors set forth in [Revenue Procedure 97-13](#) (which is superseded by Rev. Proc. 2016-44).

When you issue these clarifications and amendments of Rev. Proc. 2016-44, please don't forget to address the concern raised by The Public Finance Tax Blog on September 27, 2016.

[As detailed in that post](#), a manager is treated under Rev. Proc. 2016-44 as receiving compensation from the qualified user of the managed facility if the qualified user reimburses the actual and direct expenses (and related administrative overhead expenses) paid by the manager. Revenue Procedure 2016-44 further provides that the reimbursement of actual and direct expenses paid by the manager to unrelated parties is disregarded as compensation for purposes of determining whether the management contract attempts an impermissible sharing of net profits of the bond-financed facility through the payment of compensation that takes into account both the revenues and expenses of the managed facility. However, in direct contrast to Rev. Proc. 97-13, as interpreted by Private Letter Rulings [200222006](#) and [201145005](#), Rev. Proc. 2016-44 expressly provides that an employee of the manager is not an unrelated party to the manager. A literal interpretation of Rev. Proc. 2016-44 could therefore result in the conclusion that a manager of a tax-exempt bond-financed facility shares in the net profits of that facility in the not-uncommon arrangement where the manager is reimbursed for its employee expenses and also receives a percentage of the managed facility's gross revenues.

Subsequent to the post on The Public Finance Tax Blog, you issued Private Letter Ruling [201641002](#) on October 7, 2016, which continues the trend established by Private Letter Rulings [200222006](#) and [201145005](#) that the reimbursement of a manager's direct and actual employee expenses is disregarded as compensation to the manager under Rev. Proc. 97-13. Given your statements at the Bond Attorneys' Workshop that Rev. Proc. 2016-44 was not intended to effect a change in law and that continuity between Rev. Proc. 2016-44 and Rev. Proc. 97-13 was instead intended, please include in your amendments of Rev. Proc. 2016-44 an amendment to treat a manager's employees as unrelated to the manager so that the reimbursement of the manager's direct and actual employee expenses does not result in the conclusion that the manager shares in the net profits of the managed facility if the manager is reimbursed for such expenses and also receives a percentage of the facility's gross revenues.

Sincerely,

Everyone Who Cares About Good Administrative Guidance

Squire Patton Boggs

The Public Finance Tax Blog

By Michael Cullers on November 16, 2016

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