



Amended and Restated as of July 1, 2016

PRIVATE USE POLICY AND PROCEDURES

POLICY

Washington University in St. Louis issues tax-exempt bonds to finance the construction and renovation of various facilities. The Internal Revenue Code places strict limits on the amount of “private use” that can take place in facilities financed with tax-exempt debt. If the amount of private use exceeds applicable limits, the potential penalties are severe: the IRS can declare the bonds taxable retroactive to date of issuance. The information return (Form 990) the University must file annually with the IRS requires the University to report the amount of private use taking place in facilities financed with tax-exempt debt. Additionally, under the tax code there are broad record retention requirements applicable to documentation evidencing use of facilities financed with tax exempt debt (e.g., copies of management contracts, research agreements, etc.). To ensure compliance, the University has adopted its own record retention policy for records applicable to tax exempt debt.¹ Applicable records must generally be retained for the maturity of the debt plus three years. Insofar as this Policy relates to matters of compliance, it should be read in conjunction with the Washington University Bond Financing Compliance Procedure document.

Guidelines to determine whether a party is a private user are set forth on Exhibit A. Guidelines to determine whether an activity or agreement constitutes private use are set forth on Exhibit B.

The amount of private use permitted by the tax code is determined on a per bond issue basis. In very general terms, the limit for debt originally issued prior to January 1, 1996 is 25%, whereas the limit for debt originally issued after January 1, 1996 (which is the case for most University debt) is in effect 3%. The allocation rules to determine compliance with the applicable limitations are complex and require detailed tax, legal and financial analysis.

Due to the magnitude of potential penalties involved and the significant reporting and record retention requirements, private use of facilities financed with tax-exempt debt must be closely monitored. In addition, private use is a limited resource. No new private use² may be conducted unless the same is first determined to be exempt from the requirement to obtain approval or approved in accordance with the procedures identified below. A new private use will not be approved absent a compelling reason to do so that somehow advances an important University objective that cannot be met without incremental private use. For this purpose, the fact that the proposed activity will generate revenue will not in itself be considered compelling, even if the revenue will in turn support a University objective. In no event will a transaction be approved if doing so will cause the University to exceed the applicable limits on private use.

¹ Search for ‘record retention policy’ on www.wustl.edu.

² For the sake of brevity, all references herein to “new private use” or the like should be considered as referring only to any new activity or agreement that is **potentially** private use, and should not be considered as conclusive of whether such activity or agreement is in fact private use until the appropriate analysis is complete.

If a transaction is approved, it must proceed in accordance with the parameters relied on to obtain approval. If the relevant parameters of the transaction as implemented depart from those relied on to obtain approval, further approval must be obtained.

As a general rule, the best and easiest way to avoid any requirement for approval under this policy is to conduct activities that would otherwise constitute private use only in space financed entirely with sources other than tax exempt debt. Contact the University's Accounting Services at 935-7364 to determine if space in question is financed with tax exempt debt.

The following exhibits are attached to and made a part of this Policy:

- A. Guidelines: Private Users
- B. Guidelines: Activities / Agreements that constitute Private Use
- C. Form of Application and Justification Statement

PROCEDURES

The procedures which follow are broken down into the following subheadings:

- A. Steps to determine if approval is required
- B. Procedures to seek approval
- C. Tracking and record retention requirements

This process takes time. A proponent of an activity or agreement that may constitute private use (Applicant) should plan accordingly and allow ample lead time. Please be patient.

The text which follows spells out in greater detail the applicable procedures and should be consulted at length. However, for overview purposes, the following outline may be helpful:

- A. Determine if approval is required:
 - 1. Pursuant to this policy, each of the following is exempt from the requirement to obtain approval (whether or not the transaction constitutes private use): (a) a clinical trial or study agreement with estimated revenue over the life of the agreement (as determined by the Assistant Vice Chancellor for the Joint Research Office of Contracts) equal to or less than the threshold amount (Threshold Amount) from time to time set for this purpose by the Vice Chancellor for Finance, initially \$1 million, and (b) a sales or service transaction (generally any transaction recorded to income budget 72) with revenue equal to or less than the Threshold Amount.
 - 2. If the above exemption does not apply, is the facility / space in question financed with tax exempt debt? If so, at this time the Applicant completes an Application and Justification Statement (Application) (see Exhibit C for form).
 - 3. If the facility / space is financed with tax exempt debt, is the other party involved a private user (see Exhibit A: Guidelines)?
 - 4. If so, does the activity / agreement constitute private use (see Exhibit B: Guidelines)?
 - 5. If so, does a short term exception apply?
 - 6. If not, does a safe harbor exception apply?

If the activity / agreement is not eliminated based on any of the foregoing, approval is required.

- B. If approval is required:

1. After any further investigation and analysis by Accounting Services, the Application is forwarded for approval by the Dean or Vice Chancellor or Executive Vice Chancellor with oversight responsibility.
 2. If approved at that level, the Application is forwarded for approval by the Treasurer.
 3. If approved at that level, and the activity or agreement **does not** involve research, no further approval is required. If it **does** involve research, the Application is forwarded for approval by the Vice Chancellor for Research (VCR).
 4. If approved by the VCR (if applicable), no further approval is required.
- C. Various responsible parties involved must follow record keeping requirements (see page 6 below for details).

The applicable procedures are described in full detail as follows:

A. Steps to determine if approval is required

For any new private use, determine whether approval is required by following the procedures below in the order presented:

1. For clinical trials or studies and for sales or service activity, the University tracks private use pursuant to a methodology that is primarily or in part based on revenue. Pursuant to this policy, each of the following is exempt from the requirement to obtain approval (whether or not the transaction constitutes private use): (a) a clinical trial or study agreement with estimated revenue over the life of the agreement (as determined by the Assistant Vice Chancellor for the Joint Research Office of Contracts) less than the threshold amount (Threshold Amount) from time to time set for this purpose by the Vice Chancellor for Finance, initially \$1 million, and (b) a sales or service transaction (generally any transaction recorded to income budget 72) with revenue equal to or less than the Threshold Amount. Subject to the steps identified below, approval under this policy is required for any (c) clinical trial or study agreement with estimated revenue over the life of the agreement (as determined by the Assistant Vice Chancellor for the Joint Research Office of Contracts) in excess of the Threshold Amount (\$1 million), or (d) any sales or service activity with total estimated revenue in excess of the Threshold Amount (\$1 million). Throughout the fiscal year, the University's Accounting Services will periodically monitor revenue from clinical trial or studies and sales or service activity. The Threshold Amount is subject to adjustment from time to time upward or downward by the Vice Chancellor for Finance, including downward to zero (in which event the foregoing exemption for the requirement to obtain approval under this policy shall no longer apply for any clinical trials or studies or sales or service activities regardless of the amount of revenue). In the case of sales or service activity, the foregoing applies with equal application whether the activity is conducted in a Recharge Center or Specialized Service Facility (RC/SSF)³ or elsewhere.

2. If the exemption set forth in step 1 does not apply, the Applicant should contact the University's Accounting Services at 935-7364 to determine whether the facility and/or space in question has been financed with tax-exempt debt.

Provide as much information as possible including building name, building number (per FIS or space survey), floor number, and room or suite numbers.⁴ If in doubt, contact Accounting

³ Search for 'recharge center' on www.wustl.edu.

⁴ For sales or service activity, also identify the academic or administrative unit that will conduct it and the budget object code to which the activity will be charged.

Services for guidance. If Accounting Services determines that the facility has not been financed with tax-exempt debt, approval under this policy is not required and the transaction may proceed in accordance with otherwise applicable University procedures. Otherwise, at this time to continue the process the Applicant should complete an Application in the form set forth on Exhibit C and submit it to one of the following: (a) at the School of Medicine, Assistant Vice Chancellor and Assistant Dean for Finance (WUSM Finance Office), (b) for academic units at the Danforth Campus, his or her business manager, or (c) for the CFU, to his or her department manager. A copy of each Application and supporting attachments must also be sent at this time to Accounting Services (Campus Box 1004). Accounting Services will login each request and assign a reference number and title.

3. If step 2 does not eliminate the transaction from designation as private use, the Applicant should determine (and Accounting Services should confirm) whether each party who will use or obtain beneficial use of the facility is a private user (see Guidelines on Exhibit A).

For any party exempt from federal income tax under §501(c)(3) of the Internal Revenue Code, request a copy of the determination letter the organization has most recently received from the IRS. This may be omitted for an organization whose exemption is obvious, such as Barnes-Jewish Hospital or American Cancer Society. Resources to determine if an organization is exempt include IRS Publication 78 (<http://www.irs.gov/app/pub-78/>) and the list of charitable organizations maintained by the WU Tax Department (search for 'list of charitable organizations' on www.tax.wustl.edu). For a partnership or LLC, request a copy of organizational documents (partnership agreement, articles of organization, operating agreement, etc.) to determine the identity of each partner or member (if any one member or partner is a private user, the partnership or LLC is itself a private user). Even if a party is exempt from federal income tax, a determination must also be made whether the activity is in furtherance of the exempt mission of that party and in furtherance of the exempt mission of the University (education, research, clinical patient care). For example, use of a facility by American Cancer Society to conduct or sponsor cancer research will be in furtherance of its exempt mission and the exempt mission of the University, but use of a facility by the American Cancer Society to provide relief for the poor will not. To determine the exempt purposes of another organization, obtain an appropriate letter or copy of its mission statement from the organization or its website. Sales and service activity is generally not in furtherance of the exempt mission of the University (or another exempt organization) to the extent the objective is to generate revenue and/or utilize unused capacity of equipment (see Guidelines on Exhibit B).

The Applicant should report his/her findings to Accounting Services for confirmation. If Accounting Services (in consultation as necessary with Tax Reporting and the Office of the Executive Vice Chancellor and General Counsel (OGC)) confirms that each party who will use or obtain beneficial use of the facility is not a private user, approval under this policy is not required and the transaction may proceed in accordance with otherwise applicable University procedures.

4. If step 3 does not eliminate the transaction from designation as private use, the Applicant should determine (and Accounting Services should confirm) whether the proposed activity or agreement constitutes private use (see Guidelines on Exhibit B).

The Applicant should report his/her findings to Accounting Services for confirmation. If Accounting Services (in consultation as necessary with Tax Reporting and OGC) confirms that proposed activity or agreement does not constitute private use, approval under this policy is not required and the transaction may proceed in accordance with otherwise applicable University procedures.

5. If step 4 does not eliminate the transaction from designation as private use, the Applicant should determine (and Accounting Services should confirm) whether a short term exception applies.

Use of a facility by the “general public” is generally not private use.⁵ General public for this purpose means natural persons not engaged in a trade or business. Certain short term uses of a facility by a private user are deemed the same as use of the facility by the general public and hence not private use.

If the University makes a facility available for use by the general public, the following applies. Use of the facility by a private user will not be private use if it is on the same basis as use by the general public. Use by the private user must be at no charge or at rates that are generally applicable and uniformly applied to all users (general public and private user alike). The University is allowed to have different rates for different classes of users, if customary and reasonable (e.g., volume discounts). However, any arrangement for use by a private user for a term of greater than 200 days, including renewal options, is not general public use and will hence be a private use.

If the University does not make a facility available for use by the general public, the following applies. Use by a private business will be private use unless either of two exceptions apply:

A. Under the first exception, the University must make the facility available for use by all private users either at no charge or at rates that are generally applicable and uniformly applied to all private users, and the arrangement must be for a term, including renewal options, not longer than 100 days.

B. Under the second exception, the arrangement must be a negotiated arm’s length arrangement with a specific private user, compensation under the arrangement must be at fair market value, and the arrangement must be for a term, including renewal options, not longer than 50 days.

The requirement that use of the facility must be available “at rates that are generally applicable and uniformly applied” means that the University must adopt a rate schedule applicable to use of the facility and uniformly apply that schedule in making the facility available for use by other parties. It is the responsibility of the relevant School or Department to ensure that a rate schedule is established and enforced.

The Applicant should report his/her findings to Accounting Services for confirmation. If Accounting Services (in consultation as necessary with Tax Reporting and OGC) confirms that the proposed activity or agreement constitutes private use but a short term exception applies, approval under this policy is not required and the transaction may proceed in accordance with otherwise applicable University procedures.

6. If step 5 does not eliminate the transaction from designation as private use, then determine whether a safe harbor applies.

⁵ At a college or university, typical examples of this would include an athletic center, garden, theatre, library or museum that the institution makes available for regular use or admission by the public. This would not include residence halls, laboratories or other research facilities, or classrooms.

A. In the case of an industry sponsored research agreement or material transfer agreement (MTA), the Applicant should determine (and the Office of the Vice Chancellor for Research, through either the Office of Technology Management (OTM) or Office of Sponsored Research Services (OSRS), as appropriate, should confirm) whether a safe harbor set forth in Revenue Procedure 2007-47 applies.⁶ Guidelines for whether a sponsored research agreement or MTA meets such a safe harbor are set forth in Exhibit B. OTM and/or OSRS have developed and maintain templates for industry sponsored research agreements and MTAs to ensure compliance with the safe harbor requirements. An agreement prepared or approved by OTM/OSRS consistent with these templates will be deemed to meet such a safe harbor, without further confirmation. For any other agreement, before proceeding (i.e., before it is signed) the Applicant should submit a copy to OTM or OSRS as appropriate for review and analysis. If OTM/OSRS (in consultation as necessary with Tax Reporting and OGC) confirms that such a safe harbor applies, approval under this policy is not required and the transaction may proceed in accordance with otherwise applicable University procedures.

B. In the case of a research project pursuant to a master research agreement (such as the Biomedical Agreement between the University and Pfizer), refer to the separate private use protocol (if any) approved by each of the Chief Financial Officer and Vice Chancellor for Finance and the Vice Chancellor for Research for that master research agreement (such as the protocol entitled “Protocol for Review of Projects Funded under the 2010 WU-Pfizer Biomedical Agreement”). Any such protocol is only for projects to be funded pursuant to the relevant master research agreement. For such a project, the Applicant should follow the procedures set forth in the relevant protocol to determine whether approval under this policy is required.

C. Revenue Procedure 97-13 sets forth a safe harbor for management agreements that meet certain requirements.⁷ In most cases, the objectives of the University with respect to a management agreement for any of its facilities will not be consistent with the requirements of the safe harbor. If desired, the Applicant may consult Tax Reporting or OGC for guidance on whether a proposed management agreement will meet or can be modified to meet the applicable requirements.

If the exemption in step 1 does not apply and the proposed activity or agreement constitutes private use but no short term exception or safe harbor applies, approval under this policy is required and the transaction may not proceed without it.

B. Procedures to seek approval

To seek approval, the following procedures apply. The burden will be on the Applicant to furnish all information necessary or appropriate for representatives of senior management noted below and their staff to evaluate the activity or agreement including its private use consequences. The proposal will be given attention by these representatives and their staff but will not necessarily be given priority over other projects currently pending.

1. Accounting Services will conduct any necessary further investigation, prepare a preliminary analysis of private use impact (Preliminary Analysis), and submit for approval the Application with supporting Preliminary Analysis to (a) for Applications from any academic unit,

⁶ <http://www.irs.gov/pub/irs-drop/rp-07-47.pdf>

⁷ <http://www.unclefed.com/Tax-Bulls/1997/Rp97-13.pdf>

the Dean with oversight responsibility, or (b) for Applications from the CFU, the Vice Chancellor or Executive Vice Chancellor with oversight responsibility (VC/EVC). If the relevant Dean or VC/EVC disapproves, s/he will notify Accounting Services who in turn will notify the WUSM Finance Office, business manager or department manager (as applicable) and the Applicant.

A. An incoming material transfer agreement (MTA) with gross private use impact in excess of \$250,000 as determined by the Preliminary Analysis shall be submitted for approval to the relevant Dean as aforesaid. However, an incoming MTA with gross private use impact of \$250,000 or less as determined by the Preliminary Analysis shall instead be submitted for approval to the Manager of University Accounting whose approval or disapproval shall be deemed to constitute approval or disapproval by the relevant Dean for purposes of this policy.

2. If the relevant Dean or VC/EVC approves proceeding with the transaction, s/he will return the Application and Preliminary Analysis to Accounting Services who will forward the same to OGC. OGC will prepare an analysis of compliance with covenants set forth in applicable tax compliance agreements and bond documents (OGC Compliance Analysis). The OGC Compliance Analysis will be addressed to Accounting Services and the Treasurer, and will be a confidential communication subject to attorney-client privilege.

3. Accounting Services will then present a request for approval to the Treasurer (to consist of the Application and a copy of the Preliminary Analysis and the OGC Compliance Analysis). If the Treasurer disapproves, s/he will notify Accounting Services who in turn will notify the WUSM Finance Office, business manager or department head (as applicable) and the Applicant.

A. If the activity or agreement **does not** involve a research activity in any way, and the Treasurer approves, no further approval is required. The Treasurer will notify Accounting Services who will in turn notify the WUSM Finance Office, business manager or department head (as applicable) and the Applicant. The Treasurer will return the Application with all required signatures to Accounting Services.

B. If the activity or agreement **does** involve a research activity in any way, and the Treasurer approves, the Treasurer will present a request for approval to the Vice Chancellor for Research (VCR) (to consist of the Application and the Preliminary Analysis). Following approval or disapproval, the VCR will notify (a) the Treasurer, and (b) Accounting Services who in turn will notify the WUSM Finance Office, business manager or department manager (as applicable) and the Applicant. If the VCR approves, no further approval is required. The VCR will return the Application with all required signatures to Accounting Services.

C. Upon return by the Treasurer or VCR (as applicable) to Accounting Services of the Application with all required signatures, and based on the Preliminary Analysis, any new information and actual transaction data, Accounting Services will prepare a final analysis of private use impact (Final Analysis) as soon as circumstances warrant. In the event the Final Analysis varies substantially and unfavorably with the Preliminary Analysis, Accounting Services will promptly notify all parties involved (the relevant Dean or VC/EVC, Treasurer, VCR (if applicable), the WUSM Finance Office, business manager or department head (as applicable) and the Applicant), whereupon steps 1, 2 and 3 above will be repeated as necessary. Otherwise, Accounting Services will retain the Application with all required signatures, the Final Analysis and the OGC Compliance Analysis for recordkeeping.

Determinations by the Dean, VC/EVC, Treasurer and VCR shall be made in their sole discretion and are not subject to appeal.

C. Methodology, tracking and record retention requirements

On an annual basis, in time to file Form 990, Accounting Services will assess the amount of private use in all facilities financed with tax exempt debt during the prior fiscal year. In addition, on an ongoing basis during each fiscal year copies of all documentation that supports the private use calculation will be retained as hereinafter noted to ensure compliance with IRS record keeping requirements.

To track private use on an ongoing basis, it will be necessary for certain University offices and/or personnel to provide documentation of records and/or transactions that are requested by Accounting Services. Accounting Services will review the documentation, prepare an analysis of activities or agreements that contribute to private use, and retain such analysis in its permanent file.

Requirements and analysis methodology specific to the type of activity or agreement are identified below. Categories are described generically and include all agreements, howsoever captioned, within each description. To be included within any category, an activity (or agreement related thereto) may take place within the entire facility or any portion of it. If uncertain as to the scope of the following requirements, consult Accounting Services, OGC or Tax Reporting.

The categories of private use records and related methodology for the annual calculation of private use are as follows:

1. Lease: a lease or other agreement that grants another party the right to use and occupy a facility.

The University includes all private use generating leases in tax exempt space in the annual private use calculation using a square foot basis. Accounting Services reviews annually the lease logs maintained by OGC and University Real Estate office. Copies of new leases that contribute to private use during the year are obtained from the applicable office and retained by Accounting Services.

2. Sale: an agreement for the transfer, sale, exchange or other disposition of a facility to another party.

Accounting Services obtains the building list for tax exempt space from plant accounting and reviews the list annually to identify space (if any) that has been disposed. Copies of any agreements to transfer, sell, or exchange tax exempt property are obtained from the applicable office and retained by Accounting Services.

3. Management Agreement: an agreement granting another party the right to manage or operate a facility.

Accounting Services maintains a list of ongoing management agreements and updates it annually by surveying Resource Management, Facilities Management and Auxiliary Enterprises. Agreements that generate private use are included in the annual private use calculation using a square foot basis. Copies of such agreements are obtained from Resource Management, Facilities Management and/or Auxiliary Enterprises and retained by Accounting Services.

4. Sales or Service Agreement: an agreement that provides another party beneficial use of a facility through the sale of products or provision of services conducted in the facility (this generally includes any transaction recorded to income budget 72).

The methodology for sales or service activity varies depending on whether or not the activity is conducted in a Recharge Center or Specialized Service Facility (RC/SSF). For sales or service activity conducted in a RC/SSF, the University tracks private use pursuant to a methodology that is primarily on a per square foot basis but also in part on a revenue basis. For sales and service conducted elsewhere than in a RC/SSF, the University tracks private use primarily pursuant to a revenue-based allocation methodology. With the assistance of the Tax and Indirect Cost Departments, Accounting Services obtains financial reports detailing income activity and space survey reports to complete the annual private use calculation. These reports and calculations are retained by Accounting Services. Sales and service agreement documents are maintained by the departments or RC/SSF receiving the revenue.

5. Tuition Discount Agreement: an agreement with another party to discount the tuition or other fees for employees of the other party for educational programs offered by the University.

Accounting Services maintains a list of ongoing discounted tuition agreements and updates it annually by surveying the School Analysts with the assistance of the School Business Managers. Agreements that generate private use are included in the annual private use calculation using a square foot basis and utilization basis. Copies of such agreements are obtained from each department and retained by Accounting Services.

6. Sponsored Research Agreement: an agreement to conduct research for another party in a facility.

Accounting Services identifies private use generating research agreements by preparing financial reports of all non-federal research funds with activity for the year private use is being calculated. Federal research fund activity is excluded from these reports based on the University's methodology that funds from government agencies do not generate private use. The list of non-federal research fund activity is further filtered to a collection of agreements occurring in tax exempt space that are individually reviewed for potential private use implications. Industry-sponsored agreements are also screened at inception by OTM and OSRS. Agreements that generate private use are included in the annual private use calculation using a square foot basis. Such agreements are obtained from SPA and retained by Accounting Services. Sponsored research agreements (whether or not they generate private use) are maintained by OTM and OSRS.

7. MTA: an agreement to transfer material from another party to the University for the purpose of conducting research on the material in a facility.

Accounting Services maintains a list of ongoing private use generating material transfer agreements and updates it annually by surveying the personnel using the material with the assistance of OTM. MTAs are also screened at inception by OTM and OSRS and in appropriate cases submitted for approval pursuant to this policy. Agreements that generate private use are included in the annual private use calculation using a square foot basis. Copies of such agreements are obtained from OTM and retained by Accounting Services. MTAs (whether or not they generate private use) are maintained by OTM.

8. Clinical Trial Agreement: an agreement to conduct clinical trials or studies (including drug studies) in a facility for another party.

Many (perhaps most or even all) clinical trial agreements do not in fact generate private use. However, and without conceding that they do, the University calculates private use annually under the assumption that all clinical trial agreements occurring in tax exempt space do contribute to private use. For clinical trial agreements, and based on the foregoing assumption, the University calculates private use primarily on a revenue basis (percentage clinical trial revenue to total patient service revenue) as well as on a square foot basis. Accounting Services identifies applicable clinical trials from financial reports obtained from CCS as well as a listing of all federally funded contracts with industry support. The listings of all revenue generating contracts are retained by Accounting Services. Individual agreements are retained by CCS.

The relevant records to be retained by Accounting Services must be retained for three (3) years beyond final payment of the debt used to finance the relevant facility.

The foregoing Private Use Policy and Procedures are hereby adopted effective the day and year first set forth above.

Amy B. Kweskin, Vice Chancellor for Finance and CFO

Jennifer K. Lodge, Vice Chancellor for Research

Exhibit A

Guidelines: Private Users

Private users include:

1. A for profit business entity.
2. One or more individuals engaged in a trade or business.
3. The U.S. federal government and agencies thereof.
4. A foreign government or state or agencies thereof.
5. An organization exempt from federal income tax under §501(c)(3) of the Internal Revenue Code to the extent the use is not in furtherance of the exempt purposes of the organization or not in furtherance of the exempt purposes of the University (education, research, clinical patient care).
6. A state or local government and agencies thereof to the extent the use is not in furtherance of state governmental purposes or not in furtherance of the exempt purposes of the University (education, research, clinical patient care).
7. A partnership in which one or more partners are private users.
8. A limited liability company (LLC) in which one or more members are private users.

The following are not private users:

9. An organization exempt from federal income tax under §501(c)(3) of the Internal Revenue Code⁸ to the extent the use is in furtherance of the exempt purposes of the organization and in furtherance of the exempt purposes of the University (education, research, clinical patient care).
10. A state or local government and agencies thereof, to the extent the use is in furtherance of governmental purposes and in furtherance of the exempt purposes of the University (education, research, clinical patient care).

⁸ Resources to determine if an organization is exempt include IRS Publication 78 (<http://www.irs.gov/app/pub-78/>) and the list of charitable organizations maintained by the WU Tax Department (search for 'list of charitable organizations' on www.tax.wustl.edu).

Exhibit B

Guidelines: Activities / Agreements That Constitute Private Use

The term “unrelated trade or business” means any trade or business of the University, the conduct of which is not substantially related (aside from the need of the University for income or funds or the use it makes of the profits derived) to the exercise or performance by the University of its exempt purposes (education, research, clinical patient care). Any activity that constitutes “unrelated trade or business” also constitutes private use. An activity is not substantially related to the exempt purposes of the University if it does not contribute importantly to accomplishing those purposes. The size and extent of the activity must be considered in relation to the nature and extent of the exempt purpose the activity intends to serve. To the extent an activity is conducted on a scale larger than is necessary to perform an exempt purpose, the activity does not contribute importantly to accomplishment of the exempt purpose.

Private use of a facility can occur by any of the following, regardless of whether the activity is evidenced by a written agreement, howsoever captioned, of any kind:

1. Lease or other agreement, howsoever captioned, that grants a private user the right to use and occupy the facility.
2. Sale, exchange or other disposition of the facility to a private user.
3. Management or operation by a private user of the facility in a manner that compensates the private user in a manner not within the limitations imposed by Revenue Procedure 97-13.⁹ Consult Tax Reporting or OGC for further guidance on the parameters of this IRS directive.

Private use does not include management arrangements incidental to the primary function of a facility (e.g., custodial services) or activities carried on primarily for the convenience of the University’s faculty, staff and students (e.g., student housing, ATM machines).

4. Sales or service activity, unless based on a facts and circumstances analysis the activity supports the exempt purposes of the University (education, research, clinical patient care).

Sales or service activity in which the University allows a private user to use or have beneficial use of the facility (at any price or no price), without significant involvement by University faculty, staff or students, constitutes private use.

Sales or service activity in which the University allows a party that is not a private user to use or have beneficial use of the facility (at any price or no price) will constitute private use to the extent the activity constitutes unrelated business activity by the University or (if exempt) the other party. This includes sales or service activity to the extent the University utilizes excess or surplus capacity of the facility or associated equipment even if the revenue thereby derived will be used to support an exempt purpose of the University. It also includes sales or service activity that does not contribute importantly to the exempt purposes of the University (education, research, clinical patient care) (for example, sale of commercial products or merchandise, repetitive or routine tests, inspections, analyses or other procedures involving materials or specimens, or the provision of professional or commercial services such as consultant services, creative design services, legal

⁹ <http://www.unclefed.com/Tax-Bulls/1997/Rp97-13.pdf>

services). Sales or service activity will be considered more in furtherance of the exempt purposes of the University to the extent the following facts and circumstances apply:

- A. Students are involved in the performance of the activity in a way that contributes meaningfully to curricular objectives (for example, a practicum course).
- B. The sale or service contributes to professional clinical patient care of patients of the School of Medicine (for example, laboratory testing that contributes to the teaching objectives of the School of Medicine).
- C. The agreement results in the providing of educational services by University personnel.

5. An agreement with a private user to discount the tuition or other fees for employees of the private user for educational programs offered by the University.

6. Research sponsored by a private user, unless the agreement meets a safe harbor pursuant to Revenue Procedure 2007-47.¹⁰

There are two safe harbors, known as the “Corporate-sponsored Research Safe Harbor” and the “Cooperative Research Safe Harbor.” A research agreement that meets the requirements of either safe harbor will not result in private use.

Under the Corporate-sponsored Research Safe Harbor, a sponsored research agreement will not result in private use if all of the following apply:

- A. The research is “basic.” For this purpose, basic research means “any original investigation for the advancement of scientific knowledge not having a specific objective.”
- B. Any license or other use of the resulting technology by the sponsor is permitted only on the same terms as the University would permit the license or other use by any unrelated party that is not a sponsor (that is, the sponsor must pay a competitive price for its use).
- C. The price paid for that use must be determined at the time the license or other resulting technology is available for use. Although the University does not need to permit persons other than the sponsor to use any license or other resulting technology, the price paid by the sponsor must be no less than the price that would be paid by any party that is not a sponsor for those same rights.

A license agreement will generally meet the Corporate-sponsored Safe Harbor if the University grants the sponsor no more than a non-exclusive, royalty free license to the use of the resulting technology and the University commits to grant a non-exclusive, royalty free license to any other party who requests the same (so-called “NERF” license). Such commitment should be documented in the agreement with the sponsor.

Under the Cooperative Research Safe Harbor, a research agreement sponsored by industry or the federal government will not constitute private use if the following requirements are met:

- D. A single sponsor agrees, or multiple sponsors agree, to fund “basic” research to be performed by the University.
- E. The University determines the research to be performed and the manner in which it is to be performed (for example, selection of the personnel to perform the research).

¹⁰ <http://www.irs.gov/pub/irs-drop/rp-07-47.pdf>

- F. Title to any patent or other product incidentally resulting from the research lies exclusively with the University.
- G. The sponsor or sponsors are entitled to no more than a nonexclusive, royalty-free license to use the product of any of that research.

The so-called “march in” rights of the federal government under the Bayh-Dole Act will not cause a research agreement to fail to meet the Cooperative Research Safe Harbor, provided requirements D, E, and F above are met.

In the case of research agreements sponsored by industry, the Office of the Vice Chancellor for Research, through either the Office of Technology Management (OTM) or Office of Sponsored Research Services (OSRS), as appropriate, has designed and utilizes forms to ensure compliance with the safe harbors noted above.

- 7. Material transfer transaction that provides beneficial use of the facility to a private user, or that provides beneficial use of the facility to a party that is not a private user but is in a manner that constitutes unrelated business activity by the University or (if exempt) such other party.

The foregoing notwithstanding, a transfer of material to the University will not constitute private use if all or substantially all of the following facts and circumstances are present:

- A. The University (or one of its researchers) rather than the transferor initiates the transaction.
- B. The transferor does not solicit research.
- C. The transferor does not have control over the research, including establishing parameters, protocols, methods, objectives or timing, and does not have the right to receive status reports or supervise or oversee the research (other than ancillary rights such as to protect trade secrets or technology, or for health, safety or regulatory reasons, such as to ensure proper disposal).
- D. Any documentation is typical of a vendor relationship rather than a sponsored research relationship.
- E. The transferor does not have control or preferential rights to data, results, information, reports or technology beyond the license that is granted.
- F. The University makes no cash payment for the materials.
- G. The materials are not readily available from any source, including the transferor, for a cash purchase or otherwise.

In addition, a transfer of material to the University will not constitute private use if the transaction is documented under an agreement that complies with either of the Corporate-sponsored Research Safe Harbor or Cooperative Research Safe Harbor noted above.

- 8. Clinical trials or studies (including drug studies) sponsored by a private user, unless based on a facts and circumstances analysis the activity supports the exempt purposes of the University (education, research, clinical patient care).

Clinical trials or studies that represent “unrelated business” by the University or that consist of routine or repetitive testing on drugs, products, devices or procedures will generally be considered private use.

Clinical trials or studies will be considered more in furtherance of the exempt purposes of the University to the extent all or most all of the following facts and circumstances apply:

- A. Students are involved in the design of the trial.
- B. The University reserves publication rights.
- C. The purposes of the study include developing hypotheses and/or seeking new information or knowledge beyond just the efficacy of the drug, product, device or procedure under examination.
- D. The trial or study contributes to the clinical patient care of the participants in the trial or study.

A clinical trial or study that takes place solely in facilities the University does not own or lease (e.g., an affiliated hospital) does not constitute private use of a facility for purposes of bonds issued by the University.

University personnel seeking further guidance as to the applicable tax and/or legal principles and/or their application to a specific situation should consult Tax Reporting and/or OGC.

Exhibit C

Form of Application and Justification Statement

Accounting Log In:

Reference: _____
Title: _____

Application and Justification Statement
Policy and Procedures on Private Use

From: _____

Date: _____, 20__

Pursuant to the Washington University *Private Use Policy and Procedures* as amended and restated as of July 1, 2016, the undersigned Applicant requests approval for the activity or agreement described as follows:

Title / study: _____

Private User: _____

Building / location: _____

Floor: _____

Room / Suite#: _____

Building number per
FIS / space survey: _____

Anticipated Term:

Commencement Date: _____, 20__

Expiration Date: _____, 20__

Options to renew / extend: _____

Classification of agreement (subject to confirmation):

- Clinical Trial Service Agreement Management Contract
 Organized Research Lease Material Transfer Agreement
 Other (describe: _____)

Business Manager / Division Manager contact information for account number:

Name: _____ Phone: _____

Description of activity or agreement:

Justification statement:

Attachments:

- Proposed agreement (required if there is one)
- Other: _____

Respectfully submitted, this _____ day of _____, 20____.

Signature: _____

Please submit to Accounting Services at Campus Box 1004.

ACCOUNTING SERVICES CONFIRMATIONS

1. Is the facility / space in question financed with tax exempt debt?
_____ Yes _____ No Date: _____ Initials: _____
2. Is the other party involved a private user?
_____ Yes _____ No Date: _____ Initials: _____
3. Does the activity / agreement constitute private use?
_____ Yes _____ No Date: _____ Initials: _____
4. Does a short term exception apply?
_____ Yes _____ No Date: _____ Initials: _____
5. Does a safe harbor exception apply?
_____ Yes _____ No Date: _____ Initials: _____
6. Prepare analysis of private use impact.
_____ Completed Date: _____ Initials: _____
7. Receipt of OGC Compliance Analysis.

_____ Received Date: _____ Initials: _____

APPROVALS

1. Dean / Vice Chancellor or Executive Vice Chancellor with oversight responsibility¹¹

- Approved. Sign below and return to Accounting Services at Campus Box 1004.
- Not approved. Sign below and return to Accounting Services at Campus Box 1004 who in turn will notify the WUSM Finance Office, business manager or department manager (as applicable) and the Applicant.

Signature: _____¹² Date: _____, 20____

2. Treasurer

- Approved. If the activity or agreement **does not** involve a research activity in any way, no further approval is required. Sign below and return to Accounting Services at Campus Box 1004 for recordkeeping who will notify the WUSM Finance Office, business manager or department manager (as applicable) and the Applicant. If the activity or agreement **does** involve a research activity in any way, sign below and forward to the Vice Chancellor for Research at Campus Box 8027.
- Not approved. Sign below and return to Accounting Services at Campus Box 1004 who will notify the WUSM Finance Office, business manager or department manager (as applicable) and the Applicant.

Signature: _____ Date: _____, 20____

3. Vice Chancellor for Research (if required)

- Approved. No further approval is required. Sign below and return to Accounting Services at Campus Box 1004 for recordkeeping who will notify the Treasurer, the WUSM Finance Office, business manager or department manager (as applicable) and the Applicant.

¹¹ An incoming material transfer agreement (MTA) with gross private use impact in excess of \$250,000 as determined by the Preliminary Analysis shall be submitted for approval to the relevant Dean. However, an incoming MTA with gross private use impact of \$250,000 or less as determined by the Preliminary Analysis shall instead be submitted for approval to the Manager of University Accounting whose approval or disapproval shall be deemed to constitute approval or disapproval by the relevant Dean for purposes of this policy.

¹² See footnote 12 above.

- Not approved. Sign below and return to Accounting Services at Campus Box 1004 who will notify the WUSM Finance Office, business manager or department manager (as applicable) and the Applicant.

Signature: _____ Date: _____, 20____