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Notice 2014-67 Safe Harbors for ACOs and a New Management Contract Safe Harbor for Everyone

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On Friday, Oct. 24, 2014, the Internal Revenue Service released interim guidance, Notice 2014-67, on whether a state or local government entity or an organization described in §501(c)(3) of the Internal Revenue Code of 1986, as amended, that benefits from tax-exempt bond financing will be considered to have private business use of its bond-financed facilities under §141 or §145(a)(2)(B) of the Code as a result of its participation in the Shared Savings Program through an accountable care organization (ACO). In addition the Notice amplifies Rev. Proc. 97-13, 1997-1 C.B. 632, as amended by Rev. Proc. 2001-39, 2001-2 C.B. 38, regarding certain management contracts that do not result in private business use to address Shared Savings Programs and, more generally, to provide a new five-year safe harbor.

Under the Notice, the participation of a qualified user in the Shared Savings Program through an ACO in itself will not result in private business use of the tax-exempt bond financed facility if all the following conditions are met:

- The terms of the qualified user's participation in the Shared Savings Program through the ACO (including its share of Shared Savings Program payments or losses and expenses) are set forth in advance in a written agreement negotiated at arm's length.
- CMS has accepted the ACO into, and has not terminated the ACO from, the Shared Savings Program.
- The qualified user's share of economic benefits derived from the ACO (including its share of Shared Savings Program payments) is proportional to the benefits or contributions the qualified user provides to the ACO. If the qualified user receives an ownership interest in the ACO, the ownership interest received is proportional and equal in value to its capital contributions to the ACO and all ACO returns of capital, allocations, and distributions are made in proportion to ownership interests.
- The qualified user's share of the ACO's losses (including its share of Shared Savings Program losses) does not exceed the share of ACO economic benefits to which the qualified user is entitled.
- All contracts and transactions entered into by the qualified user with the ACO and the ACO's participants, and by the ACO with the ACO's participants and any other parties, are at fair market value.
- The qualified user does not contribute or otherwise transfer the property financed with tax-exempt bonds to the ACO unless the ACO is an entity that is a governmental person, or in the case of qualified 501(c)(3) bonds, either a governmental person or a 501(c)(3) organization.

The Notice also provides that under Rev. Proc. 97-13, a productivity reward for services in any annual period during the term of the contract generally will not be treated as causing the compensation to be based on a share of net profits of the financed facility if:

- The eligibility for the productivity award is based on the quality of the services provided under the management contract (for example, the achievement of Medicare Shared Savings Program quality performance standards or meeting data reporting requirements), rather than on increases in revenues or decreases in expenses of the facility; and
- The amount of the productivity award is a stated dollar amount, a periodic fixed fee, or a tiered system of stated dollar amounts or periodic fixed fees based solely on the level of performance achieved with respect to the applicable measure.

The Notice also adds a new five-year safe harbor contract. Under these arrangements, all the compensation for services must be based on a stated amount, a periodic fixed fee, a capitation fee, a per-unit fee, or a combination of the preceding. The compensation for services also may include a percentage of gross revenues, adjusted gross revenues, or expenses of the facility (but not both revenues and expenses). The term of the contract, including all renewal options, must not exceed five years. Such contract need not be terminable by the qualified user prior to the end of the term. For purposes of this safe harbor, a tiered productivity award as described above will be treated as a stated amount or a periodic fixed fee, as appropriate.

The new safe harbor for ACOs applies to bonds issued on or after Jan. 22, 2015, but also may be applied to bonds issued before Jan. 22, 2015. Similarly the changes made to Rev. Proc. 97-13 applies to contracts entered into or materially modified on or after Jan. 22, 2015, but also may be applied to contracts entered into before Jan. 22, 2015.