Nonprofit Housing Organization Requests Guidance on Low-Income Housing Tax Credit.

B. Susan Wilson of Enterprise, responding to a request (Notice 2013-22) for items to include on the 2013-2014 priority guidance list, has asked the IRS to address issues relating to the low-income housing tax credit, including bond issuance costs, casualty losses, over-income tenants, and the applicability of the economic substance doctrine.

Internal Revenue Service

Attn: CC:PA:LPD:PR (Notice 2013-22)

Room 5203

P.O. Box 7604

Ben Franklin Station

Washington, D.C. 20044

Re: Notice 2013-22 Recommendations for 2013-2014 Guidance Priority List

Ladies and Gentlemen:

We are writing in response to Notice 2013-22, in which the Service invited public comment on items that should be included on the 2013-2014 Guidance Priority List.

Enterprise is a national nonprofit organization that creates opportunity for low- and moderate-income people through affordable housing in diverse, thriving communities. For more than 30 years, Enterprise has introduced neighborhood solutions through public-private partnerships with financial institutions, governments, community organizations and others that share our vision. Enterprise has raised and invested more than $13.9 billion in equity, grants and loans to help build or preserve 300,000 affordable rental and for-sale homes to create vital communities. As a key part of our affordable housing finance work, Enterprise is a leading national syndicator of Low-Income Housing Tax Credits (LIHTC).

Below, we have outlined five guidance issues that we believe impact many transactions and propose solutions that we believe would result in the credit working more efficiently and being more effective. Please note that these are the same items that we submitted last year, but we believe that these issues continue to be important and should be considered in the plan.

Inclusion of Bond Issuance Costs in Eligible Basis: We would like the Internal Revenue Service to reconsider the rule that bond issuance costs, including those associated with construction period bonds, cannot be included in basis.

TAM 200043015, issued on October 27, 2000, concludes that Bond Issuance Costs cannot be capitalized and included in eligible basis since they are not subject to depreciation, but are amortizable costs. However, while these costs are amortizable, a portion of the amortization would then be capitalized and depreciable under Internal Revenue Code Section 168. Therefore, to the extent these costs would ultimately be depreciable, they would also be includible in eligible basis.

In many cases, owners use tax-exempt bonds to fund the construction or rehabilitation of the project. In some cases, the bonds are completely paid off at or soon after completion of the project and in other cases, a portion of the bonds are paid off at or near completion of the project, with the balance remaining outstanding for a longer period of time.

Internal Revenue Code Section 42(d)(1) provides that the eligible basis of a building is its adjusted basis at the close of the first taxable year of the credit period.

Generally, costs incurred in obtaining a loan are capitalized and amortized over the life of the loan. Internal Revenue Code Section 263A provides that indirect costs allocable to the production of real or tangible property are to be capitalized into the basis of the produced property.

Such allocable costs would include points and other financing costs associated with a loan used entirely or in part for construction or rehabilitation of the project, as well as interest incurred during the construction or rehabilitation of the project.

To the extent that these costs are amortizable, the amortization associated with the construction or rehabilitation period would be capitalized under Internal Revenue Code Section 263A.

In those cases where the bond is a source of construction financing, the points and other costs of the bonds should be treated as an allocable cost and the portion relating to the construction and rehabilitation of the project should be capitalized into the basis of the building, pursuant to Internal Revenue Code Section 263A.

Loss of Low Income Housing Tax Credits upon a Casualty Loss: We would like the Internal Revenue Service to reconsider its position that credits are not allowed for a year to the extent that the building or units are not available for occupancy on December 31st of that year, due to a casualty loss that is not part of a presidentially declared disaster area, even though the owner is in the process of a timely restoration of the damaged units or building.

Internal Revenue Code Section 42(j)(4) states that there should be no tax credit recapture resulting from a reduction in qualified basis by reason of a casualty loss to the extent that such loss is restored by reconstruction or replacement within a reasonable period established by the Secretary.

In Revenue Procedure 2007-54, which superseded Revenue Procedure 95-28, the IRS stated that the owner of a building that is beyond the first year of the credit period has suffered a reduction in qualified basis that would cause it to be subject to a recapture or loss of credit will not be subject to recapture or loss of credit if the building’s qualified basis is restored within a reasonable period. However, the Revenue Procedure addressed this relief to casualties that resulted from a disaster that caused the President to issue a major disaster declaration since that was the general topic of the Revenue Procedure and it did not address casualty losses that did not result from such disasters.

In CCA 200134006 and CCA 200913012, the Chief Counsel to the Internal Revenue Service stated that the ability of the owner to claim credits on units while out of service is limited to those casualties resulting from a presidential declared disaster and is not appropriate for a casualty that resulted form some other cause, such as a fire experienced by a specific project, stating that the exception in Revenue Procedure 95-28 was limited to that.

In the latter case, while recapture does not result if the building or units are restored within a reasonable period of time, if not restored by the end of the year, pursuant to CCA 200134006, no credits are allowed for that year. Although credits would resume for the year in which the project is returned to service, these are credits that the owner would have been entitled to had the casualty not occurred. Credits would be lost for any year in which the units are not returned to service by the end of the year, regardless of when the casualty occurred, and these credits are not made up later, as in the 11th year, so it is a permanent loss of credits. This result is somewhat punitive to an owner who suffered a loss through no fault of its own, despite acting prudently to restore the unit or building in a reasonable period.

The distinction provided in CCA 200134006 was based on Revenue Procedure 95-28, which only provided relief in the form of the ability to claim credits during the replacement period if the property was in a location being designated as a major disaster area. However, that distinction is inappropriate. The Revenue Procedure was only dealing with such disaster areas, which is why relief was only given to such an area. In addition, in CCA200134006, it states that "Such an event is quite distinct from the general casualty loss situation confronting property owners." While being in a disaster area can make replacements and restoration more challenging, an owner suffering a casualty loss of any sort has similar challenges.

We request that the Service consider revising its policy and provide the same treatment for casualty losses that are not located in a presidentially-declared disaster area. In general, tax law provides a time period for replacements to be completed for casualties, even if not located in a disaster area. If restored within that time period, there should be no loss of tax credit, even if the building is not restored until after the end of the year. This was the treatment accorded to casualty losses that occurred in a disaster area. There is no reason why the rule should be different in a disaster area than outside of it. The rules for casualty losses are the same.

Application of the Economic Substance Doctrine: We would like the Internal Revenue Service to issue official guidance that the Economic Substance Doctrine does not apply to tax credit transactions, including the low income housing credit, new markets credit, rehabilitation credit, and the energy credit.

The Patient Protection and Affordable Care Act and the Health Care and Education Affordability Reconciliation Act codified the common law economic substance doctrine under which federal income tax benefits of a transaction are disallowed if the transaction does not have economic substance or lacks a business purpose, and imposes significant penalties on taxpayers that enter into transactions that lack economic substance.

The Joint Committee on Taxation description of the economic substance doctrine provides that the doctrine is not intended to disallow tax benefits if the realization of those tax benefits is consistent with the Congressional purpose or plan that the tax benefits are designed to effectuate, such as low income housing, new markets, rehabilitation and energy credit transactions.

The Joint Committee on Taxation's description is an interpretation and is not part of the Statute. Without formal guidance of the inapplicability of this statute to the programs named above, potential investors will perceive this to be a risk, which can interfere with the effectiveness of the programs.

We request that the Internal Revenue provide formal guidance that states that the economic substance doctrine provided by The Patient Protection and Affordable Care Act and the Health Care and Education Affordability Reconciliation Act not apply to low income housing, new markets, rehabilitation and energy credit transactions.

Continued qualification of over-income tenants covered by an extended use agreement after a transfer of project: We would like the Internal Revenue Service to issue formal guidance that would state that any household determined to be income qualified at the time of move-in for purpose of the extended use agreement is a qualified household for any subsequent allocation of Internal Revenue Code Section 42 or allowable through the issuance of tax-exempt bonds pursuant to Internal Revenue Code Section 42(h)(4).

In the Guide for Completing Form 8823 Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition (Revised October 2009), ("The Guide") the Internal Revenue states that "any household determined to be income qualified at the time of move-in for purposes of the extended use agreement is a qualified low-income household for any subsequent allocation of IRC § 42." (p. 4-27)

This is a reasonable position since these tenants may not be evicted without cause and relocation of the tenants will be very costly and inefficient.

Rev. Proc. 2003-82 provides a safe harbor that will allow an owner to treat a unit occupied by a tenant whose income exceeds the maximum qualified income as qualified if "The unit has been a low-income unit under § 42(i)(3)(B), (C), (D), and (E) from either the date the existing building was acquired by the taxpayer or the date the individuals started occupying the unit, whichever is later, to the beginning of the first taxable year of the building's credit period. Further, the safe harbor provided by the Revenue Procedure provides that in order for the unit to be qualified, "The individuals occupying the units have incomes that are at or below the applicable income limitation under 42(d)(4)(B)(i) on either the date the existing building was acquired by the taxpayer or the date the individuals started occupying the unit, whichever is later."

The Revenue Procedure does not state that there would be a different result if an extended use agreement were in effect at the time of the transfer. However, since the purpose of the Rev. Proc. was to provide a safe harbor that would allow tenants to qualify in some situations, it presumably was not intended to cover all situations.

Although The Guide does not have the standing of official guidance from the Office of the Chief Counsel, state agencies and developers rely on it. However, because it is not official guidance, investors and their counsel are reluctant to rely upon it and, in some cases, it forces the owner to relocate tenants that, according to the Service (as stated in The Guide) may not be necessary. This results in additional costs to the owner and displacement of the tenants.

We request that the Internal Revenue Service issue formal guidance that would be consistent with The Guide.

Definition of federally- or state-assisted building for purposes of qualification for exception from ten year rule requirements for the acquisition credit: We would like the Internal Revenue to issue formal guidance on the minimum requirements that a project would need to meet in order to be deemed "a federally- or state-assisted building, which would allow the building to be exempt from the requirement that there be a period of at least ten years between the date the building is being acquired by the taxpayer and the date the building was last placed in service by the previous owner.

The Housing and Economic Recovery Act of 2008 ("HERA") expanded the exceptions from the ten year rule to include federally- or State-Assisted Buildings. HERA defined a federally-assisted building to be "any building which is substantially assisted, financed, or operated under section 8 of the United States Housing Act of 1937, section 221(d)(3), 221(d)(4), or 236 of the National Housing Act, section 515 of the Housing Act of 1949, or any other housing program administered by the

Department of Housing and Urban Development or by the Rural Housing Service of the Department of Agriculture." HERA defined a state-assisted building as a building "which is substantially assisted, financed, or operated under any State law similar in purpose to any of the laws" described under the federal definition.

While HERA provided a broad list of the programs that qualified a building for the exception, they did not define "substantially assisted".

Without a definition or guidance of "substantially assisted", taxpayers are unsure whether a buiding qualifies and investors are reluctant to invest in these credits due to the uncertainty.

We request that the Internal Revenue Service provide guidance as to what would be deemed substantially federally subsidized. Without such guidance, the purpose of creating this exception to the ten year rule will not be achieved.

We appreciate the opportunity to present our recommendations on items that should be included in the 2012-2013 Priority Guidance Plan. We believe that these changes will improve the use of the tax credits to provide affordable housing that is needed in this country. Thank you in advance for your consideration of these suggestions. If you have any questions about any of the items described above, please feel free to contact Susan Wilson at 410-772-2539 or swilson@enterprisecommunity.com or Peter Lawrence at 202-649-3915 or plawrencet@enterprisecommunity.org.

Very truly yours,

B. Susan Wilson

Vice-President

Enterprise Community Investment,

Inc.

Washington, DC