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Robert E. Feldman, Executive Secretary
Attn: Comments
Federal Deposit Insurance Corporation
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Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
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Re: Proposed Revisions to the Community Reinvestment Act Interagency Questions and Answers Regarding Community Reinvestment
OCC: Docket No. ID OCC-2007-0012
FRB: Docket No. OP-1290
FDIC: RIN 3064-AC97
OTS: ID-OTS-2007-0030 (Mark Willis, 212-552-1798)

Dear Sir or Madam:

JPMorgan Chase Bank, N.A. and its bank affiliates (collectively, “JPMorgan Chase”) appreciate the opportunity to comment upon the Proposed Revisions to the Community Reinvestment Act Interagency Questions and Answers Regarding Community Reinvestment (the "Proposal") of the above-named agencies (the "Agencies"). JPMorgan Chase supports the Agencies’ effort to update the Community Reinvestment Act Questions and Answers (the “Qs and As"). Most significantly, however, JPMorgan Chase takes strong exception to proposed new Q and A § ___.23(a)--2, which addresses the Community Reinvestment Act ("CRA") allocation of an institution’s investment in a national or regional fund. This is discussed in more detail below. JPMorgan Chase also believes that, in addition to the revisions contained in the Proposal, further revisions the Qs and As are necessary.

A. Section __23(a)--2 Regarding the Allocation of CRA Investment Credit for Fund Investments Could Lead to the Demise of Multi-Investor, Multi-Geography Funds

1. National and Regional Funds Play a Critical Role in Producing the Nation's Affordable Housing and Other Community Development Activities and the Agencies Should Encourage Investments in Them

JPMorgan Chase believes that national and regional funds with a primary purpose of community development play a critical role in providing affordable housing to low- and moderate-income ("LMI") individuals and families across the United States. Probably the biggest single program responsible for creating affordable housing across the United States is the low-income housing tax credit ("LIHTC") program, and this introduction will highlight some of the enormous contributions national LIHTC funds have made since the program's inception.

Since the Tax Reform Act of 1986 which created the LIHTC program, $75 billion has been in invested in LIHTCs alone, of which multi-investor funds account, conservatively, for 70%-80% of this capital. JPMorgan Chase, including its heritage institutions, has invested over $2 billion in 188 multi-investor LIHTC funds since 1988. In these 188 funds alone, over $13.5 billion in capital was raised, resulting in the creation of 250,000 units of affordable housing, benefiting the communities in which the LIHTC projects are located.

Multi-investor, multi-geography LIHTC funds possess a number of unique benefits over other forms of LIHTC investments, which include:

- A means for smaller localities to attract investment dollars and for such dollars to go where they are needed. Public policy should encourage developers in smaller towns and rural areas to participate in the LIHTC program and receive competitive pricing, which can be accomplished most efficiently by national funds; and

- The ability to spread investments across broader geographical areas. This diversifies risk by protecting the fund (and the investor) against regional downturns in the economy, a phenomenon all too apparent today in the distribution of foreclosures across the county. It also is a mechanism for distributing LIHTC investments in projects in various communities across the nation.

The importance of multi-investor, multi-geography funds is underscored by the fact that these are major products of the top fund syndicators and all of the top ten LIHTC syndicators are national, not regional, syndicators. The five largest national LIHTC fund syndicators over the past three years are: National Equity Fund ("NEF"), Enterprise Community Investment Inc. ("Enterprise"), The Richman Group Affordable Housing Corporation ("Richman Group"), MMA Financial ("MMA Financial") and Centerline Capital Group ("Centerline"). In 2006, these firms raised \$4.494 billion out of a total \$7.74 billion equity raised by the top ten LIHTC firms. In 2005 the same top five raised \$4.633 billion out of \$7.79 billion raised by the top ten LIHTC firms. Below is a brief description of each of these fund syndicators.

<u>NEF.</u> Headquartered in Chicago, NEF has facilitated the development of more than 80,000 homes affordable to LMI individuals and families over the past 20 years. From an initial 1987 NEF fund of \$14.25 million, NEF invested nearly \$666 million in 2006, underpinning the development of nearly 12,000 units of supportive housing, assisted living, public housing and preservation/historic projects, in addition to various family and senior developments across the country. That comprises 139 projects in 2006, or about 1,500 in NEF's first 20 years. NEF has invested more than \$5.5 billion with 550 development partners to help drive the development of affordable housing in 43 states and the District of Columbia.

<u>Enterprise.</u> Headquartered in Columbia, Maryland, Enterprise's mission is to see that all low-income people in the United States have the opportunity for affordable housing and to move up and out of poverty into the mainstream of American life. Enterprise:

- Helped write the legislation that created the LIHTC program in 1986 and is a leading syndicatior of LIHTC equity;
- Since 1986, has raised over \$6.5 billion in LIHTC equity through more than 95 investment funds, and invested in over 1,400 LIHTC properties totaling more than 85,000 affordable housing units;
- In 2006, invested in 8,771 housing units that will ultimately result in an additional 23,000 adults, children and seniors having an opportunity for an affordable home; and
- In 2006, closed or committed \$173 million in LIHTC equity for 1,338 units of sustainable "green" affordable housing in 19 cities.

Richman Group. Headquartered in Greenwich, Connecticut, the Richman Group and its predecessors have been involved in the affordable housing industry since 1979 as a developer, program sponsor, property manager, and asset manager, investing in conventional housing and historic rehabilitations. In total, the Richman Group has raised almost $5 billion in equity capital to support tax credit properties in 52 states and territories, in rural, suburban and urban locations. As of December, 2006, the Richman Group has developed or has under development, either alone or through joint ventures with other developers, 939 properties totaling over 69,000 units of affordable housing.

MMA Financial. Headquartered in Baltimore, MMA Financial is a leader in the tax credit equity market based on its track record, reputation for service, and size. MMA Financial raises equity for and invests in approximately 150 affordable multifamily new construction or rehabilitation projects per year. MMA Financial has built long-term relationships with over 250 affordable housing developers--all with a demonstrated record of accomplishment and expertise for building, rehabilitating and managing affordable housing communities that are safe, attractive, financially feasible and of high quality. MMA Financial:

- Since 1987, has raised $6.3 billion in equity capital from over 100 corporate investors (this includes its activities through predecessor organizations, Boston Financial, Lend Lease and Midland Capital);
- In 2004, was one of only two tax credit syndicators to raise in excess of $1 billion in tax credit equity during the calendar year; and
- As of 2006, is also providing tax credit-based investments in projects that generate renewable energy.

Centerline. Headquartered in New York City, Centerline is one of the nation's leading real estate finance and investment companies. Since 1986, Centerline and its affiliates have raised in excess of $8 billion in capital investing in excess of 1,300 projects located in 47 states, the District of Columbia and Puerto Rico. In 2006, Centerline raised $1.184 billion in equity for affordable housing projects.

Because of the unique nature of national and regional funds and the critical role they play, the CRA regulation simply must do everything possible to encourage these investments. In so doing, care should be taken to ensure first, that CRA credit for investments in the funds is fairly distributed among investors and second, that investors are able to receive full CRA credit and full weight for the entire amount of their investment. Anything less than this will deter institutions from investing in these funds and will ultimately lead to their demise. The Agencies must take the steps necessary to ensure that these funds survive and flourish.

It is in this context that JPMorgan Chase is so troubled by Q and A § __.23(a)--2, which proposes to turn over to fund managers the responsibility of determining the amount and the location of CRA credit that an institution would receive for a fund investment. JPMorgan Chase believes that this subdelegation procedure is inequitable, unworkable and of questionable legality.

2. The Proposal's Delegation of CRA Investment Credit Allocation to Fund Managers is Inequitable and Unworkable

a. Fund Managers Will be Placed in the Untenable Position of Having to Decide the CRA Allocation of Competing Investors

The Proposal's earmarking process is unsupportable in many respects. Because fund managers must respond to the competing demands of their investors, the process will unavoidably lead to inequitable results. Many large institutions have similar assessment areas and compete for projects in the same geographic area. Fund managers simply will not be able to allocate to investors the projects they want and inevitably will be forced to choose one investor over another. For example:

- Bank A and Bank B each have an assessment area in New York City. Bank A is the first bank to propose to invest $5 million and Bank B later proposes to invest $10 million in a fund which will include New York City in its geographic scope. How does the fund manager decide which bank "gets" New York City projects for its allocation?

This example assumes only two competing investors. In major markets, there can be more investors competing for the same allocation. Although in JPMorgan Chase's experience, fund managers have tried to be fair in allocating projects among competing investors, the issue remains as to how fund managers are to decide which investor receives CRA credit for a given project.

The Proposal places an untenable and unfair burden on fund managers. Their interest is in building affordable housing and obtaining the dollars necessary to achieve that purpose. Indeed, JPMorgan Chase has heard from several fund managers that they do not want this responsibility. The Proposal has taken a process which should be above-board and straightforward and turned it into a bartering process behind closed doors. In addition, there is no regulatory authority in place to oversee or review the fund manager's allocation of side letters.

b. Earmarking will Deter Institutions from Investing in Funds unless they are among the First Investors in the Fund

Because most of the larger investors in multi-investor, multi-geography funds are the top financial institutions in the country and have primary assessment areas in the larger metropolitan markets, there will be more demand for such projects in these markets and less demand in smaller ones. Consequently, the use of side letters will be a significant deterrent for institutions to invest in funds if they are not one of the first to claim CRA credit for projects in markets that are located in the institution's assessment area. If they do not invest, the fund will not be able to create as many affordable housing units as it otherwise would have and communities with insufficient demand become the ultimate "loser."

c. Earmarking will Deter Funds from Building Affordable Housing Outside of Localities Where Institutions Can Obtain CRA Credit

Because institutions compete for projects in the larger metropolitan markets, earmarking will deter fund managers from seeking projects outside these assessment areas. Fund managers will be much less likely to include projects in smaller cities and rural areas if there is no demand for them from the institutions investing in the funds.

d. The Priority the Proposal Gives to Side Letters Will Also Lead to Inequitable Results; Some Institutions Risk Losing CRA Credit for Hundreds of Millions of Dollars in Outstanding Investments in Multi-Investor, Multi-Geography Funds for which They did not Receive Side Letters

Not only does the Proposal institutionalize the side letter practice, but it gives priority to it. JPMorgan Chase notes initially that the language regarding prioritizing earmarked investments is unclear as to whether <u>all</u> projects in a fund must be earmarked for earmarking to attain priority. Funds that earmark CRA investment credit do not necessarily have <u>all</u> their projects earmarked because some projects may be in geographical areas where investors do not have assessment areas. This linguistic ambiguity will inevitably lead to inconsistent CRA evaluations because different examination teams will interpret it differently.

Although the Proposal states that the Agencies will employ appropriate "flexibility" in assessing the institution's investments, the actual language in the Proposal belies that statement. With respect to projects, the Proposal states:

> [A] fund may explicitly earmark <u>all</u> projects or investments to its investors and their specific assessment areas. (Note, however, that a financial institution has not demonstrated that the investment meets the geographic requirements of the CRA regulation if the fund "double-counts" investments, by earmarking the same dollars or the same portions of projects or investments in a particular geography to more than one investor.) In addition, <u>if a fund does not earmark projects or investments to individual institution investors</u>, an allocation method may be used that recognizes that each investor

institution has an undivided interest in all projects in a fund; thus, each investor institution may claim its pro-rata share of each project that meets the geographic requirements of that institution. (Emphasis added.)

The Proposal appears to give priority to a fund's earmarking of fund investments over other methods of allocating CRA credit for these investments. If and only if the fund manager does not earmark the investments may another method be utilized. For institutions that have not obtained side letters from fund managers allocating prior fund investments, the Proposal appears to jeopardize how these prior investments will be treated. For example:

- Bank A and Bank B each have an assessment area in New York City. Bank A and Bank B each have invested $10 million in a fund which will include New York City in its geographic scope. Bank A asked for and received from the fund manager a side letter assigning New York City projects for the CRA allocation, because its examiner has previously used this method in calculating CRA credit for fund investments. Bank B did not ask the fund manager for CRA credit for New York City projects because its examiner did not utilize this method for calculating CRA credit for fund investments. Under the proposed Q and A, Bank B receives no CRA credit for its $10 million investment because that "credit" has already been allocated to another institution. Since the fund's projects continue for years--e.g., 15 years for LIHTCs--this inequitable distribution of CRA credit will continue through several CRA exams. Indeed, from the perspective of garnering CRA credit for this investment, the investment was valueless and if as a result Bank B had not made it, fewer communities would have benefited from the additional affordable housing.

  This scenario may occur either because different Agencies utilize different methodologies for calculating fund investment dollars, or even because different examiners within the same Agency utilize different methodologies for these investments.[1]

[1] A complicating factor is that currently, there is no consistent methodology to the way in which examiners award CRA credit for investments in multi-investor, multi-geography funds. Even within the same Agency, different examination teams measure fund investments differently. Some examiners allocate projects in an institution's assessment area based on the institution's pro-rata share in the fund. Other examiners accept side letters from the funds that earmark specific projects in specific locations to that institution for CRA credit and award the entire amount of the investment to these projects. Under the first method, an investor may receive only limited CRA credit for fund investments that are outside its assessment area. Under the second method, the investor will receive CRA for the full amount of the investment, provided that it can obtain a letter from the fund for the specific projects it wants, potentially to the detriment of other investors who may want those same projects. This widely divergent methodology results in inconsistent performance evaluations under the Investment Test and may result in "double-counting" of the same investment by different examination teams. Since the Investment Test counts for 25% of an institution's CRA rating, it is imperative that the Agencies resolve this issue in a manner that is equitable to all fund investors.

This scenario is the exact the situation in which some large institutions find themselves. Several major investors, including JPMorgan Chase, have not used side letters and, under the Proposal, are at risk of losing hundreds of millions of dollars in the aggregate in CRA credit for outstanding investments in multi-investor, multi-geography funds. This inequity would continue for many years until these investments have no book value. This result would be unfair to these institutions.

Lastly, as a practical matter, assuming that multi-investor, multi-geography funds will continue to exist, earmarking will be the only method utilized because those investors who have utilized side letters will continue to do so and those that have not will be forced to ask for them or risk losing CRA credit for their investment.

3. In Any Event, JPMorgan Chase Suggests that the Agencies Review Their Authority to Subdelegate to Unaccountable Third Parties their Statutory Duty to Examine an Institution's CRA Performance

JPMorgan Chase does not understand why the Agencies would relinquish their statutory responsibility to measure and evaluate an institution's CRA performance by subdelegating to private third parties responsibility for deciding whether and how much CRA credit an institution will receive for its investment in a fund. JPMorgan Chase suggests that the Agencies review their legal authority to subdelegate this responsibility.

In enacting the CRA, Congress required the Agencies to “assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods.” The task of evaluating the value and amount of an institution's CRA-eligible investments belongs, by law, to the Agencies, not to private third parties. By permitting fund managers to earmark projects in various geographical areas to fund investors, the managers are, in effect, determining the amount and location of CRA credit that an investor receives under the Investment Test.

A general delegation of decision-making authority to a federal administrative agency does not ordinarily include the power to subdelegate that authority beyond federal subordinates. Under the doctrine of subdelegation, a federal agency may not subdelegate the power delegated to it by Congress to outside entities--private or sovereign--absent affirmative evidence of authority to do so. United States Telecom Ass'n v. Fed. Communications Comm'n., 393 F.3rd 554, 565-566 (D.C. Cir. 2004), cert. denied, 543 U.S. 925, 125 S.Ct. 313, 160 L.Ed.2d 223

(2004)(in holding that the FCC lacked authority to subdelegate to state utility commissions its statutory duty to determine which telephone network elements incumbent local exchange carriers were required to unbundle and make available to competitors, the Court opined that there is no presumption covering subdelegation to outside parties, and rather, case law suggests the opposite--that subdelegation to outside parties is presumed to be improper absent an explicit showing of congressional intent, reasoning that this was necessary to maintain the agency's accountability and to make sure that the agency maintains its national vision, which an outside entity might not share). See also, High Country Citizens' Alliance v. Norton, 448 F. Supp.2d 1235, 1247 (D. Colo. 2006)(the delegation to the State of Colorado of certain federal water rights was prohibited because the National Park Service did not have the authority to subdelegate to outside entities, whether those entities were private or sovereign (emphasis added); Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 796 (9th Cir. 1986)(regarding Secretary of Interior's delegation of authority to Montana Board for determining placement of oil and gas wells on Indian lands, "we are reluctant to read broad authority to subdelegate into these statutes, absent clear proof of legislative intent to relieve the Secretary of a portion of his duties and proof that such delegation would be in the Tribe's best interests").

It is not readily apparent that Congress gave the Agencies the power to subdelegate to third parties the determination of which institution will receive CRA credit in a given locality for fund investments. Fund managers do not share the Agencies' expertise and "national vision" in the CRA and are accountable to no one for their allocations.

Because of the questionable legal authority for subdelegating the Agencies' statutory responsibility to determine CRA performance to unaccountable third parties and because of the multiple Agencies involved, JPMorgan Chase suggests that the Agencies consult an outside source, such as the Department of Justice, for a legal opinion on this matter. JPMorgan Chase notes that the Comptroller of the Currency consulted the Department of Justice in 1994 after the Agencies proposed to use their general enforcement authority against institutions rated in substantial noncompliance with the CRA.

4. The <u>Only</u> Equitable Method of Distributing CRA Credit for Fund Investments is to Use the Location of a Fund's Projects, <u>but Only if the Institution Can Receive Full CRA Credit and Full Weight for the Entire Amount of its Investment</u>

JPMorgan Chase believes that the <u>only</u> appropriate method of allocating CRA credit for national and regional fund investments, which is fair to all investors, is to assign pro-rata credit for each project in which the fund invests based on the pro-rata share of the institution's investment in the fund. This recommendation, however, is conditioned upon the ability of the investor to receive full CRA credit and full weight for all its investments in the fund, regardless of the location of the fund's projects.

The pro-rata share method makes sense for the several reasons. First, legally, investors own a pro-rata share of each investment the fund makes in a project, so the allocation of CRA credit in the proposed manner aligns with the legal ownership of the investor (unlike side letters, which have no legal relationship to the investor's interest). Second, it prevents one institution from "claiming" CRA credit for a particular project or area, to the exclusion of other investors who may also want credit for that project or area. Third, it eliminates any possible "double-counting" of investments for the same project by different institutions.

JPMorgan Chase has two alternative suggestions for addressing how investments in national and regional funds should be counted, both using the pro-rata share approach. Underscoring each suggestion is the public policy mandate that the Agencies must find a way to count investments in fund projects located outside an institution's assessment area or broader statewide or regional area that includes its assessment area. The first suggestion provides that, as long as the fund has at least one project in the institution's assessment area, the institution receives full CRA credit and full weight for these "outside" projects. The alternative suggestion is that if an institution has adequately addressed the community development needs of its assessment area, it receives CRA full credit and full weight for these "outside" projects. These two alternatives are discussed in more detail below.

a. As a Matter of Public Policy, an Institution Should Receive Full CRA Credit and Full Weight for All Dollars Invested in National and Regional Funds, Regardless of the Location of the Fund's Projects, Provided that the Fund Has at Least One Project in the Institution's Assessment Area(s) or Broader Statewide or Regional Area that Includes the Institution's Assessment Area(s)

JPMorgan Chase believes that institutions should receive full CRA credit and full weight for all dollars invested in national and regional funds provided that the fund has at least one project in the institution's assessment area or broader statewide or regional area that includes the institution's assessment area. The primary issue arising from the "pro-rata share" method is when the fund develops a project outside an institution's assessment area or broader statewide or regional area that includes the institution's assessment area. Institutional investors have different assessment areas and the fund’s investments in projects do not necessarily align fully with an institution’s assessment area. Under the current CRA regulation for retail institutions, an institution would not receive CRA credit for that portion of the investment in projects outside its assessment area or broader statewide or regional area that includes its assessment area. This is particularly problematic for institutions with assessment areas smaller than the area that the fund targets for projects.

If the institution cannot be assured that its investment in the fund will receive full CRA credit and full weight, it will have the unenviable choice of (i) not investing in the fund, potentially resulting in the fund having fewer dollars to invest in community development and the institution not having a potentially substantial CRA investment necessary for the Investment Test, or (ii) investing in the fund, but potentially receiving much less CRA credit and less weight than the amount of its investment if the fund cannot deliver projects in the institution's assessment area or broader statewide or regional area that include its assessment area. A simple solution exists to this dilemma.

Because of the unique circumstances inherent in equity investments in national and regional funds and to encourage investment in these funds, a more flexible rule for garnering CRA credit than that applicable to an institution's direct investments is not only appropriate, but necessary. Section ___.23 of the CRA Regulation provides that an institution receives CRA credit for fund investments that benefit (i) its assessment area or (ii) a broader statewide or regional area that includes the institution's assessment area. The missing piece is fund investments that fall outside (i) or (ii).

JPMorgan Chase believes that, as a matter of public policy, an institution should receive full CRA credit and full weight for the entire dollar amount of its investment in a national or regional fund regardless of the location of the fund's projects, provided that the fund has at least one project located in the institution's assessment area or broader statewide or regional area that includes the institution's assessment area.[2]

Agencies' Proposed New Question:

§§___.23 and .23(a)--Investment Test

Scope of Test

§§___.23(a)--2

In order to receive CRA consideration, should an institution be able to demonstrate that an investment in a national or regional fund with a primary purpose of community development meets the geographic requirements of the CRA regulation by benefiting one or more of the institution's assessment area(s) or a broader statewide or regional area that includes the institution's assessment area(s)?

Proposed New Answer for the Alternative Discussed in this Part:

A.2. An institution that invests in a national or regional fund will receive pro-rata credit for each project in which the fund invests based on the pro-rata share of the institution's investment in the fund, subject to the following qualification. If an institution invests in a fund in which some of the fund's projects are inside its assessment area(s) or broader

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2 For LIHTC funds in particular, this treatment aligns the CRA treatment of these funds with the creation by government of the LIHTC program as part of its plan to create housing affordable for LMI individuals. As noted above, these national LIHTC funds are responsible for developing the vast majority of affordable housing units under the LIHTC program in the United States. Although proprietary LIHTC funds have only a single investor and therefore do not encounter the issues multi-investor funds have in allocating investment dollars among themselves, they nevertheless are part of a government plan and warrant similar treatment for their projects located outside an institution's assessment area or broader statewide or regional area that includes an institution's assessment area. In addition to LIHTCs, investments in national New Markets Tax Credit and CDFI funds also fulfill a government plan and warrant similar treatment. Although the focus of JPMorgan Chase's comments is on LIHTC funds, JPMorgan Chase believes that institutions should receive full CRA credit and full weight for their investments in all national and regional funds regardless of the location of their projects as long as the fund has a project located in the institution's assessment area or broader statewide or regional area that includes its assessment area.

statewide or regional area that includes its assessment area(s) and other projects are outside its assessment area(s) or broader statewide or regional area that includes its assessment area(s), then the institution may allocate all or part of the pro-rata share of its investment in projects that are outside its assessment area(s) or broader statewide or regional area that includes its assessment area(s) to one or more of its assessment area(s), provided that the fund has at least one project in an institution's assessment area or broader statewide or regional area that includes its assessment area, in which case the institution receives full CRA credit and full weight for the pro-rata share of its investment in projects located outside the institution's assessment area(s) or broader statewide or regional area that includes its assessment area(s). The value of the allocated investments will be reflected in the core tables for each assessment area.

b. An Alternative Treatment is to Award Full CRA Credit and Full Weight for the Entire Dollar Amount of an Institution's Investment in a National or Regional Fund Regardless of the Location of the Fund's Projects if the Institution Has Adequately Addressed the Community Development Needs of its Assessment Area

As an alternative to the proposal discussed in part A.4.a., JPMorgan Chase suggests that institutions receive full CRA credit and full weight for all dollars invested in national and regional funds provided that the institution has adequately addressed the community development needs of the assessment to which it would like to allocate the dollar value of projects outside the institution's assessment area or broader statewide or regional area that includes its assessment area (see corresponding discussion in Part B.2. below) A pro-rata share approach should be used for all projects, regardless of their location, to determine the dollar amount of CRA credit. Conversely, if the institution has not adequately met the community development needs of the assessment area to which it would like to allocate a part or whole of such investment credit, then it must choose an assessment area where it has adequately met those needs and, failing that, receive no credit for these investments. This proposal derives from the CRA regulation's community development test for wholesale and limited purpose institutions and will ensure that an institution is able to receive full CRA credit and full weight for the entire amount of its investment even if some projects are located outside its investment area or broader statewide or regional area that includes its assessment area.[3]

[3] JPMorgan Chase notes that, for large retail institutions, "adequate" is equivalent to a "low satisfactory" rating under the Investment Test.

In determining if the institution is adequately meeting the community development needs of the assessment area to which it would like to allocate the pro-rata share of the dollar value of projects located outside an its assessment area or broader statewide or regional area that includes its assessment area, JPMorgan Chase suggests the following: if a national or regional fund serves a geographic area that includes an institution's assessment area or broader statewide or regional area that includes its assessment area, and the dollar amount of the fund's projects in that assessment area or broader statewide or regional area that includes its assessment area would allow the institution to meet the test of adequately meeting the community development needs of that assessment area if applied to the institution's investments in that area,[4] then the institution should receive full CRA credit and full weight for its pro-rata share of the dollar value of all fund projects outside its assessment area or broader statewide or regional area that includes its assessment area.

For example, a $100 million fund has projects valued at $10 million located in New Orleans and $90 million in California. An institution with a New Orleans assessment area invests $10 million in the fund. If the institution would adequately meet the community development needs of its assessment area by counting the fund's $10 million worth of projects in New Orleans, then it may receive CRA credit and full weight for its pro-rata share of the remaining $90 million in projects that are outside its assessment area or broader statewide or regional area in addition to its pro-rata share of the $10 million invested in projects in its New Orleans assessment area.

The Agencies have adopted a similar treatment for large retail institutions because of public policy concerns with respect to Hurricanes Katrina and Rita. In response to the widespread damage caused by these hurricanes, the Agencies announced that institutions located outside the disaster areas will receive consideration for activities that revitalize or stabilize the areas, provided that the institutions have otherwise adequately met the CRA-related needs of their assessment areas:

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4 Of course, if the institution adequately meets the community development needs of that assessment area by means other than the fund's projects in that area, then it would also receive CRA credit for the funds projects outside the assessment area or broader statewide or regional area that includes its assessment area. It should also be made clear that an institution may meet the "adequate" test solely by investments in national funds.

> [D]ue to the unprecedented impact from hurricanes Katrina and Rita, examiners have been given additional flexibility when evaluating the geographic aspect of CRA-related activities in these designated disaster areas. Therefore, national institutions located outside the designated disaster areas may receive positive CRA consideration for activities that revitalize or stabilize the designated disaster areas related to hurricanes Katrina and Rita, provided that the institutions have otherwise adequately met the CRA-related needs of their local communities. OCC Bulletin 2006-6 dated February 9, 2006. See also, Board of Governors of the Federal Reserve System, Division of Consumer and Community Affairs, CA-06-5, February 24, 2006)., which provides similar guidance to state member institutions.

JPMorgan Chase believes that, at minimum, as a matter of public policy, the need to preserve and promote the viability of national funds warrants adopting the same treatment regarding activities outside an institution's assessment area as the Agencies adopted for Hurricanes Katrina and Rita.

Agencies' Proposed New Question:

§§___.23 and .23(a)--Investment Test

Scope of Test

§§___.23(a)--2

In order to receive CRA consideration, should an institution be able to demonstrate that an investment in a national or regional fund with a primary purpose of community development meets the geographic requirements of the CRA regulation by benefiting one or more of the institution's assessment area(s) or a broader statewide or regional area that includes the institution's assessment area(s)?

Proposed New Answer for the Alternative Discussed in this Part:

A.2. An institution that invests in a national or regional fund will receive pro-rata credit for each project in which the fund invests based on the pro-rata share of the institution's investment in the fund, subject to the following qualification. If an institution invests in a fund in which some of the fund's projects are inside its assessment area(s) or broader statewide or regional area that includes its assessment area(s) and other projects are outside its assessment area(s) and broader statewide or regional area that includes its assessment area(s), then the institution may allocate all or part of the pro-rata share of its investment in projects that are outside its assessment area(s) or broader statewide or regional area that includes its assessment area(s) to one or more of its assessment area(s), provided that the institution has adequately addressed the community development needs of the assessment area(s) to which it seeks to allocate a part or whole of that pro-rata share of its investment in such projects, in which case the institution receives full CRA credit and full weight for the pro-rata share of its investment in projects located outside the institution's assessment area(s) or broader statewide or regional area that includes its assessment area(s). The value of the allocated investments will be reflected in the core tables for each assessment area.

c. The FFIEC Interpretive Letter dated September 11, 1997 Needs Updating

The FFIEC Interpretive Letter dated September 11, 1997 (the "Letter") needs to be updated in order to address the special case of investments in national and regional funds. The Letter, in relevant part, responds to an inquiry as to whether the CRA regulations treat an institution's investment differently according to whether the institution invests directly in a project or indirectly, such as through a national fund. The Letter states that the CRA regulations do not differentiate between direct and indirect qualified investments and that investments in pooled national funds would be treated in the same manner as direct investments. Although the Letter does not expressly discuss a large retail bank's investments in national funds where fund projects are inside the bank's assessment area, in a broader statewide or regional area, or outside the bank's assessment area, the implication of stating that there is no difference between indirect (fund) investments and direct investments leads to the conclusion that the assessment area distinction applies to indirect investments. JPMorgan Chase suggests that the Letter be updated to reflect the proposed treatment of national and regional funds.

d. The Agencies Should Adopt Uniform Core Tables Identifying CRA Activity

Currently, the tables the Agencies utilize to identify an institution's investment activities vary by Agency and even within the same Agency. In the interest of putting all institutions on a level playing field, JPMorgan Chase suggests that the Agencies publish for comment and adopt uniform tables that accommodate the mix of investment activity that institutions undertake, including: (i) activities within an institution's assessment area (e.g., a single assessment area); (ii) statewide activities; (iii) activities in the broader regional area (covering multiple assessment areas within a state and multi-state geographies inside or outside of an insitutiton's assessment area; and (iv) activities outside all of the above.[5]

B. Further Revisions to the Qs and As Should be Considered

JPMorgan Chase believes that further revisions to the Qs and As in addition to those contained in the Proposal warrant consideration. Most of these proposed revisions cover subjects

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[5] JPMorgan Chase also recommends that the tables for lending and service activities be made consistent across the Agencies to the extent that they are not.

about which the industry has been vocal and have been the source of conversations between the industry and the Agencies for years. They include: (i) revising the meaning of primary purpose to align CRA with governmental policies and community development best practices; (ii) granting CRA credit outside a institution's assessment area if it has adequately addressed the community development needs within its assessment area in order to align CRA with the market and to help address issues raised in Part A.4. above; (iii) re-evaluating how letters of credit should be treated to align CRA with the move in the market to using tax-exempt bonds as well as to reflect the fact that letters of credit represent the same credit risk as loans; (iv) providing a simpler method for proving that financial education seminars reach LMI individuals; and (v) providing CRA credit for grants to arts and culture organizations in LMI communities, consistent with the latest thinking on comprehensive community development. These will be discussed below.

1. The Meaning of Primary Purpose in Mixed-Income Projects in Low-, Moderate-, Middle- and Upper-Income Geographies Should be Changed to Reflect Current Governmental Policies Regarding Affordable Housing

At the very heart of CRA is the charge for financial institutions to provide products and services to LMI families and individuals and to provide lending and other assistance in distressed LMI geographies. The industry’s significant response to this challenge has been to provide both financing and equity products that support affordable housing opportunities in all income segments of communities.

The ability to protect or create affordable housing in middle- and upper-income neighborhoods and to obtain corresponding examination credit, is actively discouraged by the current examination rules which require that the "primary purpose" of a project to be community development. Because this has been interpreted to mean the majority of the units must be reserved for LMI individuals, it is virtually impossible for an institution to receive favorable consideration for mixed-income housing (for example, where a project has 80% of the units at market rate and 20% of the units reserved for LMI individuals) in middle- and upper-income census tracts. This practice is at odds with current development practices of many local and state governments.

Many of the financing agencies, such as Municipal Housing Departments and State Housing Finance Authorities, now favor mixed-income developments. It is not merely that municipal rules sometimes require the inclusion of a percentage of affordable units, but that these localities and financing agencies may prefer development where less than a majority of the project's units is designated for LMI households. The government may favor mixed-income projects and may also favor developments in middle- and upper-income geographies because it perceives that these types of projects in a variety of census tracts will build more sustainable communities than if they were all relegated to LMI geographies. Many experts in community development also agree that mixed-income projects in a variety of census tracts are a key ingredient of community development.

When municipalities require developments to provide for a minimum number of affordable units, in some instances these units may only represent 10 to 20 percent of the total so that the public subsidy is reduced. Additionally, the subsidy portion may be less per unit than what was historically available. Often, this still requires the developer to make up for those additional costs elsewhere within the project. Therefore, the required number of affordable units may reflect a government decision based the number of affordable units that the overall project could reasonably support with available public dollars. The number of affordable units in these situations may not be a majority even if serving LMI individuals and families is the primary purpose of the development.

As an effective means for sustaining levels of affordable housing within these markets, most financial institutions provide loans, equity and, perhaps even grants, to support these projects simply because it directly benefits LMI individuals and families. Exam credit is not given for these projects if they are not located in an LMI census tract because the majority of the units are not reserved for LMI individuals. To better align the CRA regulation with current government policies and practices regarding affordable housing, "primary purpose" should also include lending and investment activities conducted in non-LMI census tracts pursuant to a local, state, federal or tribal government development plan or program. Accordingly, three proposed Qs and As are recommended in this regard.

<u>Agencies' Current Question:</u>

<u>§____.12(i) and 563e.12(h) Community Development Loan</u>

<u>Meaning of Primary Purpose</u>

§§ __.12(i) & 563e.12(h) – 7: What is meant by the term "primary purpose" as that term is used to define what constitutes a community development loan, a qualified investment or a community development service?

Proposed New Answer (underlined language is new):

A7. A loan, investment or service has as its primary purpose community development when it is designed for the express purpose of revitalizing or stabilizing low- or moderate-income areas, providing affordable housing for, or community services targeted to, low- or moderate-income persons, or promoting economic development by financing small businesses and farms that meet the requirements set forth in §§ __.12(h) or 563e.12(g). To determine whether an activity is designed for an express community development purpose, the agencies apply one of two approaches. First, if a majority of the dollars or beneficiaries of the activity are identifiable to one or more of the enumerated community development purposes, then the activity will be considered to possess the requisite primary purpose. Alternatively, where the measurable portion of any benefit bestowed or dollars applied to the community development purpose is less than a majority of the entire activity's benefits or dollar value, then the activity may still be considered to possess the requisite primary purpose if (1) the activity is conducted pursuant to a local, state, federal or tribal government development plan or program; or (2) the express, bona fide intent of the activity, as stated, for example, in a prospectus, loan proposal, or community action plan, is primarily one or more of the enumerated community development purposes; the activity is specifically structured (given any relevant market or legal constraints or performance context factors) to achieve the expressed community development purpose; and the activity accomplishes, or is reasonably certain to accomplish, the community development purpose involved. The fact that an activity provides indirect or short-term benefits to low- or moderate-income persons does not make the activity community development, nor does the mere presence of such indirect or short-term benefits constitute a primary purpose of community development. Financial institutions that want examiners to consider certain activities under either approach should be prepared to demonstrate the activities' qualifications.

JPMorgan Chase's Proposed New Question:

Consideration for Lending and Investments in Mixed-Income Affordable Housing Projects by Geography

§§ __.12(i) & 563e.12(h) – 8: How will a financial institution receive favorable consideration for lending and investment dollars in mixed-income projects which create or preserve affordable housing units in low-, moderate-, middle- and upper-income geographies where less than the majority of the units are reserved for low- and moderate-income individuals?

Proposed New Answer:

A.8 Loans and investments in a mixed income project in a low- and moderate-income geography where less than the majority of the units are reserved for low- and moderate-income individuals will receive CRA consideration for the entire dollar amount lent to or invested in the project if the project meets the purpose test in Question 7 above; such loans and investments in middle and upper-income neighborhoods will receive CRA consideration for the entire dollar amount lent to or invested in the project if the project is part of a local, state, federal or tribal government development plan or program, or, if the project is not part of a local, state, federal or tribal government development plan or program, then such loans and investments will receive pro-rata credit for the percentage of dollars lent to or invested in the project that is affordable to low- and moderate-income individuals.

JPMorgan Chase's Proposed New Question:

Meaning of Local, State, Federal or Tribal Government Development Plan or Program

§§ __.12(i) & 563e.12(h) – 9: What is a local, state, federal or tribal government development plan or program?

Proposed New Answer:

A.9 A local, state, federal or tribal development plan or program is a government-sanctioned plan or program that provides an incentive to develop housing, at least 10 percent of which is affordable to low- and moderate-income individuals, and may be evidenced by the use of public funds, such as subsidies, tax credits or tax abatements, or other benefits, such as a higher floor-to-area ratio than would otherwise be permitted.

2. An Institution Should Receive CRA Credit for CRA Eligible Activities Outside its Assessment Area(s) or Broader Statewide or Regional Area that Includes its Assessment Area(s) Provided that the Institution has Adequately Addressed the Needs of its Assessment Area

The 1995 revisions to the CRA regulation provide that, for wholesale and limited purpose institutions, examiners will consider all activities that benefit the institution's assessment area(s) or a broader statewide or regional area that includes its assessment area(s). The revisions also provide that other activities receive full consideration as long as the institution has adequately addressed the needs of its assessment area. The rationale for giving full consideration as long as the institution has adequately addressed the needs of its assessment area is that limitations placed on considering out-of-assessment area activities "were too restrictive and did not account for the broader business strategies and operations of wholesale and limited purpose institutions, which often serve communities on a nationwide basis." 60 Fed. Reg. 22156, 22167 (May 4, 1995).

Current CRA Q and A §§___.12(i) and 563.12(h) applies the same principle to retail institutions but requires further clarification to ensure that qualified community development activities receive full CRA consideration. An institution should receive full CRA credit and full weight for qualified community development activities outside its assessment area(s) or broader statewide or regional area that includes its assessment area(s) provided that the institution adequately addresses the community development needs of its assessment area. For institutions with multiple assessment areas, activities outside an assessment area should only be considered for an assessment area whose needs are adequately being met by the institution and should not be considered for an assessment area whose needs are not adequately being met by the institution.

Agencies' Current Question:

§§___.12(i) and 563.12(h) Community Development Loan

§§___.12(i) and 563.12(h)--5 Community Development Loan

Must there be some immediate or direct benefit to the institution's assessment area(s) to satisfy the regulations' requirement that qualified investments and community development loans or services benefit an institution's assessment area(s) or broader statewide or regional area that includes the institution's assessment area(s)?

Proposed New Answer (new language is underlined and repeats language from the wholesale bank Q and A:

A.5. No. The regulations recognize that community development organizations and programs are efficient and effective ways for institutions to promote community development. These organizations and programs often operate on a statewide or even multistate basis. Therefore, an institution's activity is considered a community development loan or service or a qualified investment if it supports an organization or activity that covers an area that is larger than, but includes, the institution's assessment areas(s). The institution's assessment area(s) need not receive an immediate or direct benefit from the institution's specific participation in the broader organization or activity, provided that the purpose, mandate, or function of the organization or activity includes serving geographies or individuals located within the institution's assessment area(s).

In addition, a retail institution that, considering its performance context, has adequately addressed the community development needs of its assessment area(s) will receive consideration for qualified investments, as well as community development loans and community development services, by that institution nationwide. In determining whether an institution has adequately addressed the community development needs of its assessment area(s), examiners will consider qualified investments that benefit a broader statewide or regional area that includes the institution's assessment area(s). For institutions with multiple assessment areas, activities outside an assessment area or broader statewide or regional area that includes the institution's assessment area can only be considered for an assessment area whose needs are adequately being met by the institution and cannot be considered for an assessment area whose needs are not adequately begin met by the institution. Examiners will consider these activities even if they will not benefit the institution's assessment area(s).

3. Letters of Credit Should Receive the Same Treatment as Loans Under the Lending Test

Letters of credit are becoming an increasingly important part of community development financing since the use of bond financing automatically allows the use of 4% LIHTCs. Letters of credit, however, currently are not included in the lending tables at the end of performance evaluations but are mentioned only in the text of the lending performance discussion, thus receiving lesser 'weight' than a loan. Additionally, the dollar value of letters of credit is not included in the comparison to Tier 1 capital that is referenced in the community development lending summary discussion by at least one Agency.

Yet, the credit risk of a letter of credit is identical to a conventional loan. Letters of credit are legally binding guarantees by the institution of a debt or other legal obligation of the account party. When the proceeds of a bond issue enhanced by the institution's letter of credit are used for the construction of real estate improvements, standard construction loan procedures govern the disbursement of the bond funds. The bond trustee may only disburse bond proceeds upon written authorization from the letter of credit provider. As with a loan, such authorization is normally preceded by satisfaction of construction loan draw procedures and documentation. In the event of a default and subsequent drawing on the letter of credit, the institution assumes ownership of the mortgage-secured bonds in order to preserve and protect its collateral position.

Moreover, the institution's assumption of the bondholder's risk of loss produces a net positive impact on the cost of funds for project development, even after factoring in letter of credit fees paid to the institution. The interest rate discount available via issuance of tax-exempt bonds is a cost efficient means to finance the creation and sustainability of affordable housing. Bonds that are enhanced with a letter of credit issued by a rated institution bear an interest rate reflective of the credit of the institution rather than the real estate.

In addition to the interest rate advantage, the use of tax-exempt bonds enables utilization of the "as of right" 4% LIHTC. Equity generated from the sale of tax credits does not require a cash return from the real estate. The combination of low interest rates and return-free equity produces the economic feasibility of affordable rents, even in an environment of escalating housing costs. Letters of credit are a critical component of this financing structure.

Thus, letters of credit should be given full consideration with respect to the evaluation of community development lending under the CRA lending test. <u>This alternative financing option</u>

should be given equal consideration to other types of community development loans and included in the performance evaluation lending tables. These types of transactions truly embody an institution's use of its full resources to address the needs of its local communities. JPMorgan Chase suggests that a separate table be created for letters of credit and that examiners receive guidance that CRA-eligible letters of credit are to receive the same CRA credit as other types of CRA-eligible loans.

Agencies' Current Question:

§____.22—Lending Test

§____.22 (a) (2)-1: How are lending commitments (such as letters of credit) evaluated under the regulation?

Proposed New Answer:

A1. Letters of credit can be a critical component in the production of affordable housing. For example, through their issuance, lower cost tax-exempt bond financing is facilitated and eligibility for 4% Low Income Housing Tax Credits is triggered. Credit risk to the institution is not materially different when compared to a conventional mortgage loan, yet letters of credit can provide efficiencies in the production of affordable housing. Therefore, letters of credit will be considered and given the same weight as loans, with regard to an institution's performance in community development lending, provided that a clear community development benefit is shown. Examples include, but are not limited to:

- Letters of credit that enhance tax-exempt bonds issued for the construction of affordable housing;
- Letters of credit in favor of municipalities to guarantee payment and completion of project site work, utility connections, and other project-related requirements; and
- Letters of credit used to purchase forward fixed interest rate locks for permanent financing on affordable housing projects.

4. Alternative Methods of Proving that Financial Education Seminars Benefit Low- and Moderate Income Individuals Should be Recognized

As a practical matter, it is infeasible and problematic to require income information from participants in financial education seminars that are not held in conjunction with a not-for-profit partner with community development as its mission. This is particularly true with seminars held at bank branches and at workplace sites. For an institution bringing to bear its full resources to address the needs of or local communities, this presents a particularly vexing conundrum.

Alternative methodologies can be used to show the benefit to a LMI community. For example, for a financial education seminar held at a large retail store, information can be obtained from an outside, governmental source, like the Department of Labor, that indicates the average hourly wage for workers in this particular industry. That hourly wage can be translated into an annual income that can then be compared to the HUD updated area median family income. As another example, the location of the branch in a LMI community in which financial education seminars are conducted can be used to establish a LMI constituency. Current CRA Q and A §§___.12 (j) & 563e.12 (i)-3 provides that a community development service includes establishing school savings programs and developing or teaching financial education curricula for low- or moderate-income individuals. JPMorgan Chase suggests the following supplement:

<u>JPMorgan Chase's Proposed New Question:</u>

§____.24—Service Test

§____.24 (e)-2: How can an institution alternatively prove that financial education seminars benefit a low- and moderate-income constituency?

<u>Proposed New Answer:</u>

A2. The agencies will presume that any financial education seminar provided in conjunction with organizations with a community development mission serve a low- and moderate-income population. With respect to financial education seminars that are not conducted in conjunction with organizations with a community development mission, alternate methodologies may be used to establish the benefit to a low- and moderate-income population. The methodologies may include, but are not limited to, the following:

- The annualized average hourly wage for workers in a particular industry for financial seminars conducted at a workplace within that industry;
- Financial education seminars conducted in conjunction with a program of a community organization with a community development purpose; and
- Financial education seminars conducted in a branch located in a low- and moderate-income community.

5. Arts and Culture Grants to Organizations Serving LMI Areas Should Receive CRA Credit

According to the Agencies, grants to arts and culture organizations are not currently considered CRA qualified investments. Arts and culture organizations are critical to the development and strength of communities. These organizations nurture and facilitate community development through education and programming. Arts and culture organizations inspire children and youth to serve as agents of change while simultaneously cultivating their leadership skills and fostering a commitment to community service. Moreover, these organizations serve as an essential educational resource to the local communities. Through their involvement with these organizations, children can learn basic literacy skills, as well as enhance their critical and analytical abilities. Many of these organizations are located in underserved communities, or at least are focused on serving the individuals in these areas. Furthermore, arts and culture organizations serve to revitalize and stabilize the communities where they are located. Given these attributes and benefits of many arts and culture organizations, grants to these organizations should be considered CRA qualified investments.

Agencies' Current Question:

§§ __.12(s) & 563e.12(r) Qualified investment

§§ __.12(s) & 563e.12(r) – 4: What are examples of qualified investments?

Proposed New Answer:

A4. Examples of qualified investments include, but are not limited to, investments, grants, deposits or shares in or to:

- Facilities that promote community development in low- and moderate-income areas for low- and moderate-income individuals, such as youth programs, homeless centers, soup kitchens, health care facilities, battered women's centers, arts and culture organizations, and alcohol and drug recovery centers.

JPMorgan Chase is pleased to have had the opportunity to submit these comments. We would be happy to discuss them further with you.

Sincerely yours,