April 11, 2024

Via Electronic Mail

Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, D.C. 20219
Attention: Chief Counsel's Office, Comment Processing

Re: Business Combinations Under the Bank Merger Act
(Docket ID OCC-2023-0017, RIN 1557-AF24)

Ladies and Gentlemen:

PNC Bank, National Association ("PNC Bank") appreciates the opportunity to respond to the Notice of Proposed Rulemaking for Business Combinations under the Bank Merger Act ("BMA")[1] issued by the Office of the Comptroller of the Currency (the "OCC," and the proposed rule, the "Proposal"). The Proposal, along with the policy statement therein (the "Policy Statement"), seeks to clarify the standards that apply to the OCC's review of proposed bank merger transactions.

PNC Bank is the sixth largest commercial bank in the United States by assets and a subsidiary of The PNC Financial Services Group, Inc. ("PNC"). PNC serves the holistic needs of our consumer, small business and corporate and institutional clients of all sizes through its coast-to-coast network of nearly 2,300 branches.[2] In addition, PNC serves customers through nearly 60,000 PNC and partner ATMs nationwide as well as through online and mobile banking platforms and its customer care center. To help make banking more accessible and promote economic empowerment, we deploy a fleet of mobile branches across the country to address specific needs, including rural and underserved communities with limited access to physical bank branches and communities affected by natural disasters or other disruptions. Our business model is focused on building strong relationships with our clients and the communities in which

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[1] 89 Fed. Reg. 10010 (Feb. 13, 2024).

[2] In February 2024, PNC Bank announced plans to open more than 100 new locations by 2028. Through this investment, PNC will build and open new branches in key locations, including Austin, Dallas, Denver, Houston, Miami, and San Antonio, among others, improving the convenience and reach of its coast-to-coast branch network. *See* PNC Bank, *PNC Bank Announces Nearly $1 Billion Investment in Coast-to-Coast Branch Network*, (Feb. 14, 2024), available at https://www.prnewswire.com/news-releases/pnc-bank-announces-nearly-1-billion-investment-in-coast-to-coast-branch-network-302061783.html. In recent years, PNC Bank has closed or consolidated a limited number of branches primarily to optimize our network following the acquisition of BBVA USA (where we had several branches in close proximity) and to address customer behaviors as it relates to the usage of in-store branches.

they – and our employees – work and live. This model is predicated on being truly embedded in the local communities we serve, with Regional Presidents in each of our major markets responsible for delivering the whole bank to that market and, in turn, ensuring that PNC understands and supports each market's local development and banking needs. PNC's commitment to our communities is reflected in our Outstanding rating under the Community Reinvestment Act ("CRA"); in fact, we are proud that PNC has received an Outstanding rating in *every* CRA evaluation since the CRA was enacted in 1977.

As you are aware, in the last three decades alone, PNC has successfully completed at least 65 acquisitions of both bank holding companies and their subsidiary banks and various nonbank entities. These acquisitions have served both to benefit our customers and communities and reduce risk to the financial stability of the United States often by resolving supervisory and financial issues of the acquired institutions.[3] Most recently, in June 2021, PNC acquired BBVA USA, the Birmingham, Alabama based bank subsidiary of Banco Bilbao Vizcaya Argenteria, S.A., a global Spanish bank. The transaction expanded our branch network and operations in the South and Southwest, providing geographic diversification to our banking business, but did not change our relationship-based business model nor our approach to serving our customers and communities. Through the transaction we were able to give our new customers the benefits of many helpful and innovative banking products and services, including Low Cash Mode® and the other financial management tools available in our Virtual Wallet® consumer checking product. Moreover, in connection with the transaction, PNC announced a new $88 billion, 4-year Community Benefits Plan ("Plan") covering both PNC's legacy markets and the new markets brought into our footprint through BBVA USA. Almost halfway through our Plan period and with over $56 billion deployed already, PNC continues to work closely with our community partners across PNC's footprint through a Community Advisory Council to help meet the needs of our communities consistent with our Plan goals.[4]

Given how important PNC's acquisitions have been for our customers, communities, and other stakeholders and, in the case of acquisitions of troubled institutions, the nation, we applaud the OCC's leadership in seeking to enhance the transparency of its bank merger application process. We agree that the lodestar of bank merger policy should be "to promote a diverse and dynamic U.S. banking system" capable of "supporting and balancing the diversity, dynamism, and size of the U.S. economy."[5] However, we regretfully believe the Policy Statement would not achieve this goal and would only serve to further accelerate the unhealthy consolidation at the very top of the banking industry by allowing the biggest banking organizations to continue to grow unchecked.

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[3] For example, in 2005, PNC acquired the troubled Riggs National Corporation after the exposure of several money laundering scandals at Riggs, and in 2008, PNC acquired the troubled National City Corporation ("National City") following the crash of the U.S. housing market. Most recently, PNC Bank sought to acquire significant parts of both Silicon Valley Bank and First Republic Bank from the Federal Deposit Insurance Corporation ("FDIC") after their collapse in early 2023.

[4] *See* PNC Community Benefits Plan, Year 2, *available at* https://www.pnc.com/content/dam/pnc-com/pdf/aboutpnc/CorporateResponsibilityReports/PNC_Annual_Community_Benefits_Plan_Progress_Report.pdf.

[5] *See* Michael J. Hsu, Acting Comptroller of the Currency, Address at the University of Michigan School of Business: What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced (Jan. 29, 2024) (hereinafter "Michigan Address"), *available at* https://www.occ.gov/news-issuances/speeches/2024/pub-speech-2024-6.pdf.

I. Introduction

In our view, a key driver in promoting a diverse and dynamic U.S. banking system is a bank merger policy that is capable of building challengers to the largest Global Systemically Important Banks ("GSIBs") in the United States, JP Morgan Chase & Co. ("JPMC") and Bank of America Corporation ("BofA"). The two largest U.S. retail banking organizations have been organically gaining deposit market share for more than a decade, and last year's bank failures only accelerated the uphill migration of deposits.[6] While PNC benefitted from this movement, the biggest banks benefitted more. In light of these recent deposit trends, many small- to mid-sized banks are increasingly relying on reciprocal and other brokered deposit arrangements to retain deposits; however, these arrangements are not a solution to the competitive imbalance in the U.S. banking system.[7] At the same time, the largest banks are benefitting from their enormous scale, regulators are undoing tailoring efforts (especially for capital and liquidity) for large, non-GSIB banks, and the costs of technology and cybersecurity investments are continuing to rise, making it all the more challenging for small- to mid-sized banks to compete.

Despite this challenging environment, PNC continues to deliver strong, through-the-cycle performance and remains well-positioned to forge new relationships, grow our businesses and gain market share. That said, economies of scale matter in banking more than ever before, and if the U.S. banking agencies do not adopt policies promoting healthy mergers across banks of all sizes, we fear the trend of organic growth of the few, largest U.S. banking organizations will only continue to accelerate until they will be the only ones left holding the dominant share of the U.S. banking market. At the end of the day, consumers and small- and medium-sized businesses will experience the detriments of reduced competition. Scale would allow a firm like PNC to compete more fiercely with the largest firms in markets that are national in scope, which will lead to the benefits of a pro-competitive environment.

As evidenced by Acting Comptroller Hsu's recent remarks, the OCC recognizes this trend. In his speech entitled *What Should the U.S. Banking System Look Like?*, Acting Comptroller Hsu highlighted that the number of OCC supervised institutions has declined since 1984 from 6,500 to about 1,000 while the total asset size of these institutions has grown from $2 trillion to $15 trillion over the same period.[8] What the remarks did not highlight, however, is that the two largest U.S. retail banking organizations with their OCC-supervised national bank subsidiaries hold a combined $7 trillion of assets, or roughly 47 percent of the total assets of banks supervised by the OCC.[9] In fact, since 2019, JPMC and BofA have

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[6] *See* Chart 1 at page 6.

[7] Reciprocal deposit networks allow banks to obtain deposit insurance coverage for their customers deposits in excess of the standard maximum deposit insurance amount by receiving from and placing with network member banks deposits in the same aggregate amount and with the same maturity (if any). *See* Federal Reserve Bank of Dallas, *Reciprocal Deposits Networks Provide Means to Exceed FDIC's $250,000 Account Cap*, (Nov. 28, 2023), available at https://www.dallasfed.org/research/economics/2023/1128 (noting that reciprocal deposits rose to more than $300 billion in the second quarter of 2023, up from almost $157 billion at the end of 2022, with some of the largest proportional increases in reciprocal deposits occurring at banks with assets between $10 billion and $100 billion).

[8] *See Michigan Address*, supra note 5, at 2.

[9] JPMC and BofA total assets are based on National Information Center ("NIC") data as of December 31, 2023. The

together grown by nearly $2 trillion in assets alone, which is more than the size of PNC, U.S. Bancorp ("US Bank") and Truist Financial Corporation ("Truist") combined.[10] Based on their organic growth over the last four years alone, we estimate that the market share of JPMC and BofA will increase from 13.1 and 12.5 percent, respectively, in 2023 to 17.1 and 14.1 percent, respectively, in the next 15 years (by 2038), while at the same time their total deposits are expected to triple from $1.9 and $1.8 trillion, respectively, in 2023 to $6.6 and $5.1 trillion, respectively, by 2038.[11] While we call out here the public track record of JPMC and BofA, we also cannot discount the fact that the third largest U.S. banking organization, Wells Fargo & Co. ("Wells Fargo"), is likely to be released from its asset cap restrictions in the near future and, as a result, will undoubtedly be in a position to capitalize on its size and economies of scale to grow rapidly, further propelling the three largest U.S. banking organizations to controlling a significant percentage of the assets of banks supervised by the OCC and frankly most of the total U.S. market and deposit share.

While the OCC is asking the right macro-level question – *What Should the U.S. Banking System Look Like* – it does not appear that the OCC, or any other U.S. government agency for that matter, believes it owns the responsibility to answer that question. Rather, the OCC calls for the academic community to research the matter and characterizes its traditional role as considering bank merger applications only on a "case-by-case basis under applicable law".[12] We are not disagreeing that this is indeed the OCC's responsibility in evaluating a bank merger application. Though by interpreting or applying the relevant statutory approval criteria in the way proposed and by adopting new non-statutory criteria in its bank merger approval process, the OCC would in fact be playing a decisive role in shaping the future of the U.S. banking system into one that is dominated by JPMC, BofA and perhaps Wells. In other words, the answer to the question – *What Should the U.S. Banking System Look Like* – is in our view directly tied to the formulation and application of bank merger approval criteria.[13]

We urge the OCC to undertake a holistic review of the purpose behind and content of the Policy Statement to ensure it indeed serves to promote a diverse and dynamic banking system – that is not necessarily just more banks in number but one in which customers have choices in a range of offerings from multiple competitors. We are concerned that listing indicators of "easy" and "hard" deals could be misconstrued as precluding healthy bank mergers that, while in the public interest, may require additional review. We understand that

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principal bank subsidiaries of JPMC and BofA (JPMorgan Chase Bank, National Association and Bank of America, National Association, respectively) hold a combined $5.9 trillion of assets or roughly 39 percent of the total assets held by OCC supervised banks.

[10] JPMC and BofA total assets are based on NIC data as of December 31, 2019 to December 31, 2023. PNC, Truist and US Bank total assets are based on NIC data as of December 31, 2023.

[11] Data sourced from S&P Capital IQ and FDIC branch deposit data as of June 30, 2023. Credit unions and non-retail branches were excluded. Forward-looking information based upon 5-Year Compound Annual Growth Rate ("CAGR") of deposits, adjusted to exclude acquired First Republic deposits from JPMC's CAGR.

[12] *See Michigan Address, supra* note 5, at 3.

[13] *See* David Wessel, *Talking to Dan Tarullo About Bank Mergers, Stress Tests, and Supervision* at Brookings (August 10, 2023) , *available at* www.brookings.edu/wp-content/uploads/2023/08/Talking-to-Dan-Tarullo-about-bank-mergers-stress-tests-and-supervision.pdfn.pdf. (noting that "Ironically . . . the combination of tough merger policy and tough regulation might end up redounding to the benefit of the largest institutions and thus increasing overall industry concentration").

was not the OCC's intent.[14] We urge you to update the Policy Statement to take into account trends in the industry, in particular trends in dominating concentration of the largest banks, and provide clear guideposts to allow banks of all sizes to consider and design mergers that will in fact strengthen competition and financial stability through promotion of more effective competitive challengers to the few, largest U.S. banking organizations. The Policy Statement should expressly recognize that healthy mergers, including larger deals and acquisitions of institutions in troubled condition, are critical to having a dynamic and competitive U.S. banking sector. If the OCC adopts a final Policy Statement that contains an implicit bias against bank mergers, we run the risk that JPMC and BofA will continue to dominate the industry and consolidate market share at an accelerating pace, as they have for the last 10 years.

Should the OCC decide to finalize the Policy Statement, we would urge the OCC to revise the Policy Statement by:

- Clarifying that there is indeed a "middle category" of merger applications comprising the majority of applications, which the Policy Statement does not preclude from being approved even if, as Acting Comptroller Hsu has noted, they may "require varying degrees of scrutiny;"[15]
- Removing any non-statutory indicators of approval that are based on arbitrary asset thresholds (*i.e*., the institution resulting from the merger will have total assets of less than $50 billion and the target's combined total assets are less than or equal to 50 percent of the acquirer's total assets) because they could be misconstrued as suggesting that the application would not be eligible for approval, which we understand was not the OCC's intent;
- Adopting clear and timely processing times for reviewing and acting on BMA applications so as to ensure transparency of the BMA application process for all parties and prevent delays in approval for reasons unrelated to the BMA statutory factors; and
- Highlighting not just the *reduction of risk* to the stability of the U.S. banking or financial system but also the *benefits* to financial stability of approving BMA applications by a sound acquirer of a troubled target institution, which in our view would qualify as a "healthy" bank merger.

II. Promotion of Challengers to the Few Largest U.S. Banking Organizations Is Essential for Achieving a Diverse and Dynamic U.S. Banking System

U.S. bank merger policy should promote a diverse and dynamic U.S. banking system that is capable of building more effective competitive challengers for the few largest U.S. banking

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[14] Victoria Guida and Michael Stratford, *POLITICO Pro Q&A: Acting Comptroller of the Currency Michael Hsu*, Politico, (March 11, 2024) *available at* https://subscriber.politicopro.com/article/2024/03/politico-pro-q-a-acting-comptroller-of-the-currency-michael-hsu-00146159 (Acting Comptroller Hsu clarifying that many proposed mergers will fall in between the "consistent with approval" and "unlikely to approve," and the scrutiny required of such deals "depends on the attributes of what's being put on the table").

[15] *See Michigan Address, supra* note 5, at 15.

organizations. The organic growth of JPMC and BofA over the last decade as amplified by recent events and regulatory changes demonstrates that scale matters. Foremost, customers value size, especially during times of stress. Scale helps accelerate deposit share growth, including organically through the establishment of new branches and investments in new digital banking products and services that customers desire. Scale also funds necessary investments in technology, including investments in technology and staff to combat fraud and cyber-crimes and maintain top notch compliance with an ever-growing and complicated web of state and federal laws. Further, scale funds investments in marketing, which is crucial for reaching customers and ultimately runs full circle back to accelerating deposit share growth.

This plays out in the story of competition in the U.S. banking market over the past few decades, which has seen a slow but steady march of activity towards the largest U.S. banks. Indeed, in the last decade alone (2013-2023), total retail deposits held by the top two largest U.S. banking organization increased from $900 billion to over $1.8 trillion, an increase of 105 percent.[16] That growth propelled the combined retail deposit market share of these two firms from 16 percent in 2013 to more than 20 percent in 2023 as illustrated in Chart 1 below. Importantly, all the growth in market share for these two firms – more than 400 basis points – came organically except for JPMC's recent acquisition of First Republic Bank. And the third largest U.S. banking organization, with a share of U.S. retail deposits of 8.8 percent, is certainly expected to seek additional growth when the current supervisory asset cap is lifted.

Chart 1: Retail Deposit Share Analysis Comparison[17]

	Top-10 Retail Deposit Share	Change In Deposit Share Since 2013	Key Growth Driver
Chase	10.9 %	313bps; FRC; 343bps	Organic and Acquired First Republic
BofA	9.4 %	95bps	Organic
Wells	8.8 %	(73)bps	Organic
CapOne	3.2 %	36bps	Organic
PNC	3.0 %	23bps	Acquired BBVA
Truist	2.7 %	87bps	Acquired SunTrust
US Bank	2.7 %	34bps	Acquired Union Bank
TD Bank	2.4 %	35bps	Organic
Citi	2.3 %	(15)bps	Organic
Fifth Third	1.3 %	18bps	Acquired MB Financial

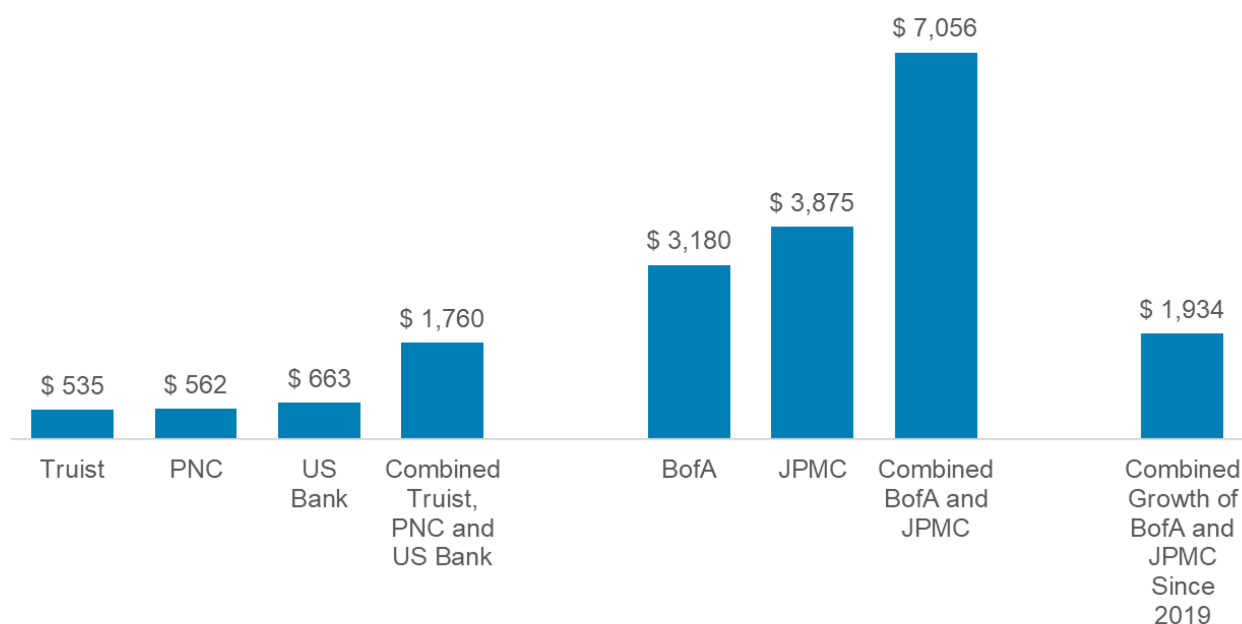
[16] Retail deposit data sourced from S&P Capital IQ and FDIC branch deposit data as of June 30, 2023. Branch deposits were capped at $500 million to isolate retail deposits except for digital deposits. Credit unions and non-retail branches were excluded from the total.

[17] *Id.*

The trend in growth holds beyond retail deposits. The two largest U.S. retail banking organizations hold a combined $7 trillion of assets, or roughly 47 percent of the total assets of banks supervised by the OCC.[18] And that total is $2.7 trillion higher than the combined assets of the next two largest U.S. retail banking organizations.[19]

Looking at asset growth for the two largest U.S. banking organizations over the last 10 years is in some ways even more stark, with their total assets increasing by over $2.5 trillion since 2013.[20] And in a four-year span from year-end 2019 to year-end 2023 alone, the two largest U.S. banking organizations grew their combined assets from $5.1 trillion to $7.1 trillion, an increase of nearly $2 trillion.[21] As illustrated in Chart 2, that is more than the total size of PNC, Truist and US Bancorp combined.

Chart 2: Asset Size and Growth Comparison ($bn)[22]



As the size of the two largest U.S. retail banking organizations continues to increase, the distinct advantages they have over other banks due to economies of scale is only accelerating. This advantage is particularly pronounced in the area of branch network expansion. For example, from 2019 to 2023, the two largest U.S. banking organizations opened a combined 1,056 branches or 20 percent of the total amount of branches opened by all U.S. insured depository institutions in that period.[23] To put that in perspective, the two largest U.S. banking organizations opened as many

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[18] *See supra* note 9.

[19] JPMC, BofA, Wells Fargo and Citigroup Inc. total assets are based on NIC data as of December 31, 2023.

[20] JPMC and BofA total assets are based on NIC data from March 31, 2013 to December 31, 2023.

[21] *See supra* note 10.

[22] *See supra* note 10.

[23] Branch openings and closures are based on S&P Capital IQ data as of June 30, 2023.

branches as the next 42 largest branch openers combined.[24] What's more, these firms have announced plans to open even more branches, with the nation's largest firm intending to add more than 500 new branches by 2027.[25] (For context, that is close to the number of branches PNC acquired in its last merger transaction). The second largest firm recently announced that it would enter nine new markets and four states in the coming years.[26] While these organizations have closed some branches in the same period to optimize their branch networks, new branches have been strategically placed to expand into new markets.[27]

Overall, the largest U.S. banking organizations capture deposits and market share through branches at a rate that is about twice that of their next level competitors. As illustrated in Chart 3 below, U.S. banking organizations with assets over $1 trillion hold a 45 percent share of all U.S. deposits, even though they only have a 19 percent share of U.S. branches. This gives them a deposit share to branch share ratio of 2.4. In contrast, U.S. banking organizations with total assets between $250 billion and $1 trillion only hold a 12 percent share of all U.S. deposits and a 9 percent share of U.S. branches, resulting in a deposit share to branch share of 1.3. As the data demonstrates, as banks increase in asset size, so does their ability to generate deposits and grow market share, and this is because of the benefits of scale from marketing, from technology and the perceived safety and soundness that size confers. So as the few largest U.S. banking organizations aggressively expand their branch network at a pace that is frankly impossible for other banks to match, as indicated above, we would expect their ability to grow deposits to accelerate over time unless the agencies promote the development of more effective competitive challengers to JPMC and BofA. As BofA's CEO recently noted, the largest banks are only just "beginning to see the benefits of national scale."[28]

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[24] *Id.*

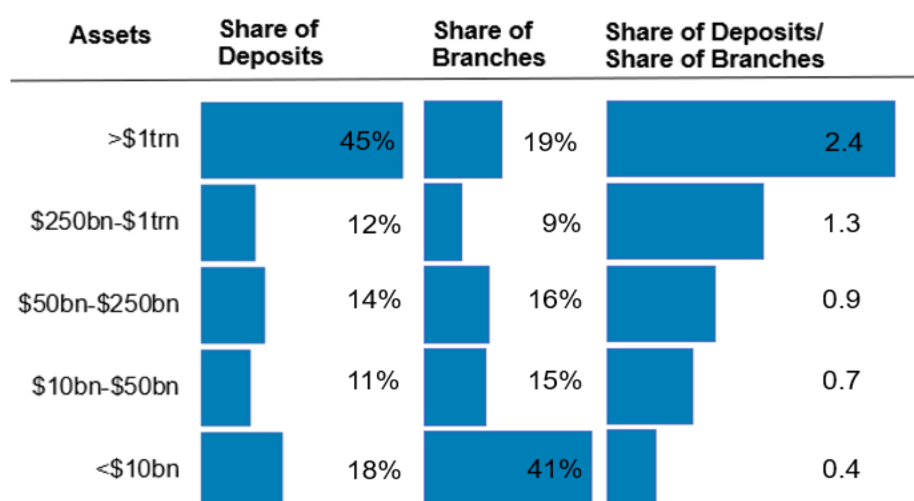
[25] David Benoit, *America's Biggest Bank Is Growing the Old-Fashioned Way: Branches* (Feb. 6, 2024), *available at* https://www.wsj.com/finance/banking/jpmorgan-chase-bank-branches-expansion-cc7973dc?mod=Searchresults_pos2&page=1.

[26] *Id.*

[27] *See* Orla McCaffrey, *J.P. Morgan Chase Says It's Running Out of Branches to Close* (December 5, 2023), available at https://www.americanbanker.com/news/jpmorgan-chase-says-its-running-out-of-branches-to-close (noting that despite branch closures designed to optimize branch networks JPMC's branch count has increased in recent years with plans to continue to build around 150 new branches a year).

[28] *See* Benoit, *supra* note 25.

Chart 3: Deposit Share vs. Branch Share Comparison[29]



As customers conduct more and more of their banking online, technological innovations to better serve customers have become critical to growth, and the costs of cyber and fraud detection are projected to increase significantly in the coming years. As illustrated in Chart 4, the four largest U.S. GSIBs anticipate investing $44 billion in their technology platforms in 2024, outpacing the total investment of the next 20 largest banks *combined* by $7 billion.[30] As an executive at the largest U.S. banking organization put it, "[o]ur capacity for investment is unmatched . . . Our competitors have not and cannot invest at the levels that we do. And these investments represent significant future operating leverage for years to come."[31]

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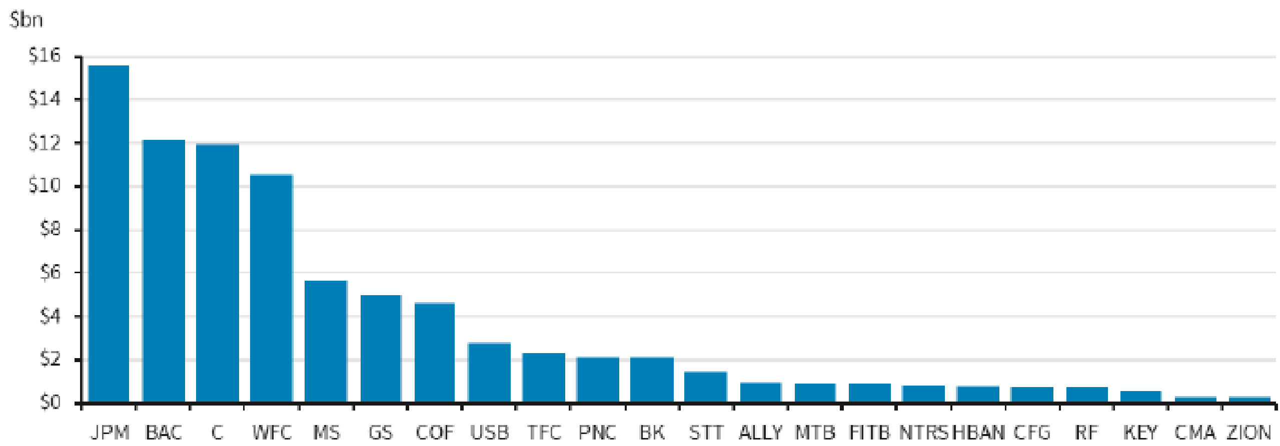
[29] *See* Barclays Equity Research, *Bank Stock Outlook, Forecasting and Valuation,* 64 (June 5, 2023).

[30] *See* Barclays Equity Research, *U.S. Large-Cap Banks State of the Industry,* 104 (Mar 14, 2024).

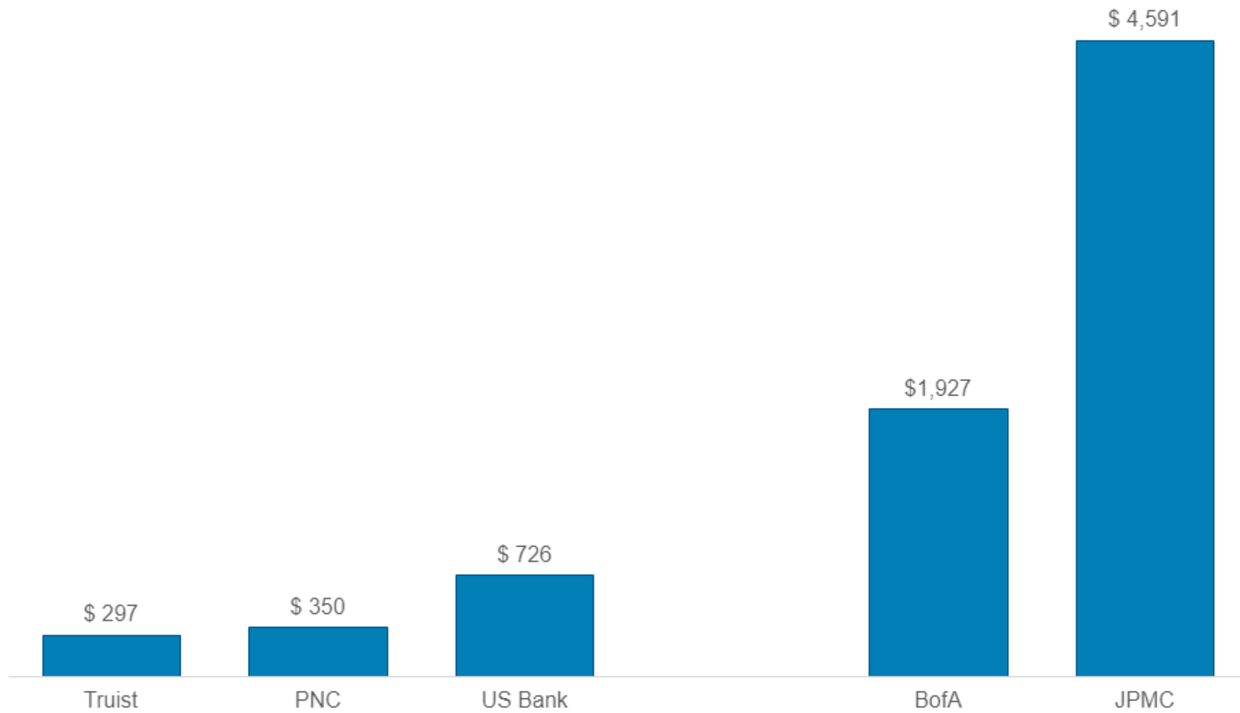
[31] JPMorgan Chase & Co, *2023 Investor Day – Consumer & Community Banking (Transcript),* 6 (Mar 22, 2023), available at https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/events/2023/jpmc-investor-day-2023/JPM-Investor-Day-2023-Final-Transcript_Consumer-Community-Banking.pdf.

Chart 4: 2024 Technology Spend Comparison[32]



Finally, marketing spend is a crucial contributor towards growth. In 2023 alone, as illustrated in Chart 5, the two largest U.S. banking organizations spent over $4.9 and $1.9 billion, respectively, in marketing; PNC, U.S. Bank, and Truist spent well under $1 billion each.

Chart 5: 2023 Marketing Spend Comparison[33]



[32] *See* Barclays Equity Research, *supra* note 30, at 104.

[33] Marketing spend is based on Form 10-K SEC filings for fiscal year 2023.

All this comes at a time when regulators are seeking to undo the tailoring of key prudential regulations for Category III and IV banking organizations, in particular in the areas of capital and liquidity, thus increasing regulatory compliance costs for such firms. Taken together, if the OCC's goal is to ensure a future with meaningful competition in the banking sector, additional consolidation is needed to provide more effective competitive challengers for the two largest U.S. retail banking organizations.

III. The Policy Statement Should Promote Healthy Bank Mergers of All Sizes

a. *The Policy Statement Should Promote Healthy Bank Mergers that Benefit the U.S. Economy.*

In light of these recent trends, it is critical that any new bank merger policy statement be formulated to promote healthy mergers of banks of all sizes, including challengers to the few largest U.S. banking organizations, consistent with applicable law.[34] We are concerned, however, that the Policy Statement is inconsistent with this objective. As an initial matter, the OCC should undertake a holistic review of the purpose behind and content of the Policy Statement and consider whether it in fact serves to promote a diverse and dynamic banking system. For example, by appearing to favor only mergers where the resulting institution would have less than $50 billion in total assets, the Policy Statement would effectively exacerbate the domination of the few largest U.S. banking organizations, in particular JPMC and BofA, by making it more difficult for other banks to combine and compete more effectively. We know the OCC comprehends this dilemma and urge it to clear up any confusion the Policy Statement may have introduced.

Indeed, Acting Comptroller Michael Hsu acknowledged that the growth, including through mergers, of large banking organizations would reduce the concentration among the largest banks, but raised concerns that such mergers would result in a "very different-looking banking system with different abilities to support the diversity, dynamism, and size of the economy."[35] We believe these concerns are unwarranted. With over 8,000 banks and credit unions in the U.S., the vast majority of which are community banks who have played a vital role in serving their local communities for many decades,[36] it is unlikely that mergers of those banks squeezed in the middle – ranging from midsize banks to the largest regional banks – would have an adverse impact on the banking system's ability to support the U.S. economy. Moreover, there is no evidence that merger policy that would support the development of GSIB-challengers would alter the ability of community banks to continue to serve their unique role in supporting their local businesses and communities.

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[34] The only current size-based restrictions on bank mergers are the nationwide and statewide deposit concentration caps on bank holding companies, insured depository institutions, and savings and loan holding companies and the financial sector concentration limit based on total consolidated liabilities. *See, e.g.,* 12 U.S.C. §§ 1842(d)(2)(A) (nationwide 10 percent deposit cap on bank holding companies); *id*. at 1842(d)(2)(B) (statewide 30 percent deposit cap on bank holding companies); *id.* at 1852(b) (10 percent concentration limit on U.S. financial companies).

[35] *See Michigan Address*, *supra* note 5, at 13.

[36] *See, e.g.,* Federal Deposit Insurance Corporation, Community Banking Study (Dec. 2020), available at https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf.

b. *The Policy Statement Should Clarify the Middle Ground Between "Easy" and "Hard" and Eliminate the $50 Billion Asset and Merger of Equals Language.*

The Policy Statement describes two types of BMA applications: the first category meets the thirteen indicators deemed to be consistent with approval, and the second category meets any one of six indicators that are unlikely to be consistent with approval unless and until the applicant has addressed or remediated the concern. The Policy Statement fails to clarify that there is indeed a category in the middle that may require "varying degrees of scrutiny."[37] While such transactions may not be straightforward to approve, these middle category deals, after a thorough review by the OCC, will likely prove to be healthy mergers that would benefit the banking industry and the U.S. economy as a whole. We urge the OCC to update the Policy Statement to address this middle category of transactions and clarify that they too may be consistent with approval while perhaps requiring varying levels of scrutiny.

The Policy Statement also includes at least two indicators of approval that are based on arbitrary asset thresholds that are not consistent with applicable law. Specifically, the Policy Statement provides that the OCC would view BMA applications as "consistent with approval" where the resulting institution has less than $50 billion in total assets (the "$50 billion asset indicator") or where the target's assets are less than or equal to 50 percent of the acquirer's assets (the "merger of equals indicator").

The $50 billion asset indicator is a new consideration that did not exist previously in the Comptroller's Licensing Manual, and it is not clear how the OCC arrived at this threshold, let alone how it determined in the first instance that such a bright line asset threshold was appropriate. The OCC has not stated how this factor relates to any of the BMA statutory factors of financial stability, financial and managerial resources, and convenience and needs of the community.[38] In addition, a view that a merger triggering the $50 billion asset indicator is presumptively a risk to the stability of the U.S. banking or financial system would depart significantly from prior practice. In fact, the OCC has approved many mergers resulting in banks of a much greater size than $50 billion in assets without finding that any of the transactions represented a risk to the stability of the U.S. banking or financial system.[39] If the events from last spring are influencing the OCC's thinking here, we point out that the failure of a few poorly managed institutions with greater than $50 billion in asset in 2023, does not suggest that asset size alone should be an indicator of risk to the financial stability of the United States. Moreover, given the uncertainty around how the OCC will evaluate BMA applications that meet most but not all of the indicators consistent with approval, we are

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[37] *See Michigan Address*, *supra* note 5, at 15.

[38] The Policy Statement does not purport to address the statutory factors regarding competition or anti-money laundering.

[39] *See, e.g.,* OCC Corporate Decision #2021-01 (May 14, 2021) (approving the application by PNC Bank to merge with BBVA USA and finding, among other things, that the OCC considered the risk of the transaction to the stability of the United States banking or financial system); OCC Conditional Approval #1298 (October 14, 2022) (conditionally approving the application by U.S. Bank to merge with MUFG Union Bank, N.A. and finding, among other things, that "the Proposed Transaction presents increased potential risk to the stability of the U.S. Banking or financial systems but, with proper mitigants, the financial stability factor is consistent with approval" and that "[i]n some important ways, the Proposed Transaction may also have countervailing positive impacts on financial stability," such as application of "U.S. Bancorp's stronger enterprise government framework" and "stronger technology systems" to the resulting bank).

concerned the $50 billion asset threshold could be construed by some as a *de facto* prohibition of mergers that exceed that threshold rather than just an indicator of an application that may require additional scrutiny.

The merger of equals indicator raises similar concerns. It is not at all clear how this factor relates to financial stability, financial and managerial resources, or convenience and needs of the community. While this concept previously existed in the Comptroller's Licensing Manual, it was in the context of determining whether a particular transaction was eligible for the streamlined application process or whether the applicant was encouraged to have an exploratory call or meeting with the OCC prior to commencing acquisition negotiations or executing the agreement.[40] But the proposed Policy Statement elevates this factor from a procedural consideration to a substantive one, creating uncertainty as to whether mergers of banks close in size could still be approved. We do not believe the asset size of a target alone should predicate whether a deal is treated as unlikely to be consistent with approval. As the OCC is aware, PNC itself has previously engaged in a merger of equals when it acquired the troubled National City in the 2008 financial crisis. With National City facing a steeply declining mortgage and home equity loan portfolio following the crash of the U.S. housing market and a downgraded credit rating of just above junk status, PNC was able to step in to purchase National City, thereby rescuing its customers and communities from an impending failure.

We urge the OCC to eliminate the $50 billion asset and merger of equals indicators. As you are aware, Congress has adopted only two kinds of statutory caps on growth – the 10 percent national and 30 percent statewide deposit concentration limits under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and, more recently, the 10 percent financial sector liability concentration limit under section 622 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[41] Congress has not adopted a limit on bank mergers involving depository institutions with more than $50 billion in assets. We do not believe the OCC actually views the $50 billion trigger as disqualifying over 50 banks from pursuing healthy bank mergers. Eliminating these indicators would clear up any potential confusion and help advance the OCC's goal of providing the industry with greater transparency as to how it would in fact evaluate BMA applications.

c. *The Policy Statement Should Provide Clarity on Process and Timing*.

In addition to eliminating the two asset threshold indicators, the Policy Statement should address a major element of uncertainty in the current bank merger application process: opaque BMA application processing considerations and timelines. Industry participants are currently in the dark as to the OCC's expectations for how long it will take to review and make a decision on an application. Indeed, the regulatory process has in recent transactions taken well over a year. We, therefore, urge the OCC to adopt clear and timely processing procedures and timelines for reviewing and acting on BMA applications to ensure transparency for all parties to a transaction

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[40] Office of the Comptroller of the Currency, *Comptroller's Licensing Manual: Business Combinations,* 27, 67 (Jan. 2021), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/pub-lm-business-combinations.pdf.

[41] *See supra* at note 39.

and prevent delays in approval for reasons unrelated to any one BMA statutory factor. If regulatory approval is too uncertain, boards of acquirers and targets may be unwilling to pursue pro-competitive merger transactions. This will hurt banks, consumers, and ultimately the economy.

d. *The Policy Statement Should Place Additional Weight on Mergers of Troubled Targets*.

The Policy Statement indicates the OCC will consider the supervisory record and current condition of the target, including whether the target is in troubled condition and whether the resulting institution will have sufficient managerial resources to manage the resulting institution. Further, the OCC will weigh the impact on financial stability posed by denial of a proposed transaction, particularly where the target is in troubled condition. We appreciate these considerations given our own experience in acquiring targets with supervisory challenges, including targets in troubled condition, and the benefits we have seen firsthand for the impacted customers and communities as well as broader financial stability. We therefore urge the OCC to place additional positive weight on the willingness of any qualified institution to seek to acquire a target in troubled condition and the benefits of approving such a transaction. Acquisitions of troubled targets by healthy institutions with the capability to acquire and integrate successfully are beneficial by definition, with an end result benefitting customers, communities, the U.S. financial system and the U.S. economy. The Policy Statement should be revised to actively promote the acquisition of any institution at risk of failing before it actually fails.

IV. Conclusion

Thank you for the opportunity to comment on the Proposal. We share the OCC's desire to foster competition in the banking sector, increase transparency as to how BMA applications are evaluated, and ultimately shape the future of the U.S. banking system in a manner that benefits consumers, serves as a catalyst to American businesses, and supports the U.S. economy. We urge the OCC to recognize that the proposed Policy Statement does more than just reflect the process the OCC currently uses in evaluating bank merger applications. By interpreting bank merger approval criteria in the ways proposed or inventing new criteria that is not consistent with the statute, the Policy Statement could, at a minimum, create confusion for parties contemplating a bank merger transaction and, at worst, play a role in accelerating the consolidation of the U.S. banking system into one dominated by a small handful of the largest banks.

If you have any questions regarding our comments, please do not hesitate to contact me.

Sincerely,

William S. Demchak
Chairman, President, and Chief Executive Officer
The PNC Financial Services Group, Inc.