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November 16, 2021

Re: Response to Request for Additional Information Regarding Application by U.S. Bancorp to Acquire MUFG Union Bank, N.A.

Chris Wangen
Assistant Vice President, Supervision, Regulation, and Credit
Federal Reserve Bank of Minneapolis
90 Hennepin Avenue
Minneapolis, MN 55401

Dear Ms. Wangen:

On behalf of U.S. Bancorp (the "Applicant"), Minneapolis, Minnesota, enclosed please find a response (the "Response Submission") to the letter dated November 3, 2021, from the Federal Reserve Bank of Minneapolis ("Reserve Bank") requesting additional information on the application by the Applicant to acquire all of the issued and outstanding shares of common stock of MUFG Union Bank, National Association ("Union Bank") pursuant to Section 3 of the Bank Holding Company Act of 1956, as amended. Each item or question is repeated in the Response Submission, followed by U.S. Bancorp's response or by reference to an exhibit in which the response is contained.

The Response Submission is divided into a non-confidential portion and a confidential portion. For the confidential portion, which has been marked "Confidential Treatment Requested," U.S. Bancorp respectfully requests confidential treatment pursuant to the Freedom of Information Act, 5 U.S.C. § 552(b), and the Board's regulations thereunder, 12 C.F.R. Part 261 (collectively, "FOIA"), on the grounds that the information contained in the confidential portion has been actually and customarily kept confidential by the Applicant and, where relevant, Union Bank and this information is being provided to the Board and the Reserve Bank under an assurance and expectation of privacy.[1] Disclosure of this information would reveal to competitors the internal strategies, transactions, and competitive position of the Applicant and, where relevant, Union Bank, and would place the Applicant and Union Bank at a competitive disadvantage with respect to competitors who do not publicly reveal such information. Accordingly, we respectfully request that the confidential

[1] *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 and 2366 (2019).

portion not be made available for public inspection or copying. In addition, we request that any memoranda, notes, or other writings of any kind whatsoever by an employee, agent, or other person under the control of the Board or the Reserve Bank that incorporate, include, or relate to any of the matters referred to in the confidential portion not be made part of any public record and not be disclosed to any person.

In the event of a FOIA request, we respectfully request notice of such request, as well as a reasonable period of time to respond prior to any release of materials by Board staff or Reserve Bank staff. This request for notice and an opportunity to respond also extends in the case of any part of the confidential portion (including any such memoranda, notes, or other writings by Board staff or Reserve Bank staff) being the subject of a FOIA request or a request or demand for disclosure by any governmental agency, Congressional office or committee, court, or grand jury.

* * *

If you have any questions regarding this Application, please contact me, Lee Meyerson or Spencer Sloan.

Very truly yours,

Adam J. Cohen

Adam J. Cohen

Enclosures

cc: Ms. Alison M. Thro
Board – Legal

Ms. Linda Anderson
Reserve Bank

Ms. Erin Grace
Ms. Shannon Mulligan
U.S. Department of Justice, Antitrust Division

Ms. Patricia Roberts
OCC

Mr. Al Pina
National Minority Community Reinvestment Co-Operative

Ms. Marcia Griffin
HomeFree-USA

Mr. John Gamboa
California Community Builders

Ms. Dina Harris
National Faith Homebuyers Program

Dr. Ruben Guerra, PhD
CA Black & Latino Business CRA Council

Mr. Marcos Morales
Hogar Hispano, Inc.

Ms. Jules Dunham Howie
Director, UPC Westside CDC

Mr. Kelvin W. Perry
Black Chamber of Commerce of Greater Kansas City

Mr. Steve Figueroa
Inland Empire Latino Coalition

Mr. Darrel Sauceda
LA Latino Chamber

Ms. Bertha Garcia
Ventura CCDC

Mr. Joey Quinto
CA Journal for Filipino Americans

Mr. Jose Antonio Ramirez
Central CA Latino PAC

Mr. Adam Briones
California Community Builders

Mr. James Chosy
Ms. Cristina Regojo Gedan
Ms. Sarah Flowers
U.S. Bancorp

Ms. Wendy M. Goldberg
Sullivan & Cromwell

RESPONSE SUBMISSION OF U.S. BANCORP

to the

REQUEST FOR ADDITIONAL INFORMATION OF NOVEMBER 3, 2021

from the

FEDERAL RESERVE BANK OF MINNEAPOLIS

relating to the proposal to acquire

MUFG UNION BANK, NATIONAL ASSOCIATION

November 16, 2021

Submission in Response to the Request for Information dated November 3, 2021
("Response Submission")[1]
November 16, 2021

Each item contained in the Request for Information dated November 3, 2021 is repeated below, followed by U.S. Bancorp's response.

1. **Indicate whether any applicable state community reinvestment laws must be considered by the Board pursuant to section 3(d)(3) of the BHC Act, and if so, discuss USB's and US Bank's record of compliance with such laws.**

The Applicant has identified Connecticut, the District of Columbia, Illinois, Massachusetts, New York, Washington and West Virginia as the states which have state community reinvestment laws relevant to the Board's required considerations under Section 3(d)(3) of the BHC Act (12 U.S.C. § 1842(d)(3)).[2] As discussed below, none of these state community reinvestment laws are applicable state community reinvestment laws for purposes of the Board's consideration of the Application under Section 3(d)(3) of the BHC Act.

- *Connecticut*: Conn. Gen. Stat. § 36a-32 provides that, in connection with the examination of a "bank," the Connecticut Banking Commissioner "shall assess the record of the performance of the bank in helping to meet the credit needs of its entire community, including low and moderate-income neighborhoods." A "bank" to which this community reinvestment law applies is defined as any "bank" (itself defined to mean a bank chartered or organized under the laws of Connecticut, or a national bank having its principal office in Connecticut) or "out-of-state bank that maintains in the state [of Connecticut] a branch…"[3] Because neither U.S. Bank nor Union Bank are chartered or

[1] Capitalized terms used but not defined herein have the meanings set forth in the Application to the Board of Governors of the Federal Reserve System pursuant to Section 3 of the Bank Holding Company Act, dated October 6, 2021, relating to U.S. Bancorp's proposed acquisition of MUFG Union Bank, N.A. (the "Application").

[2] *See* Conn. Gen. Stat. § 36a-30 *et seq*.; D.C. Code § 26-431.01 *et seq*.; 205 ILCS 735/35-10; Mass. Gen. Laws. ch. 167, § 14; N.Y. Comp. Codes R. & Regs. tit. 3 § 76.5; Rev. Code Wash. § 30A.60.010; W. Va. Code §§ 31A-8B-1 *et seq*.

The Applicant notes that various other laws in these and other states (i) require certain banks to file copies of reports prepared and filed with federal banking agencies under the Community Reinvestment Act of 1977 with the applicable state banking agency, (ii) include reference to a bank's record of performance under the Community Reinvestment Act of 1977, or its record of meeting the credit needs of its communities, as a factor for a state banking agency's consideration when such banking agency is acting on an application by certain banks to that banking agency, (iii) require certain minimum performance ratings under the Community Reinvestment Act of 1977 as an eligibility criterion for the bank's acceptance of public funds, and/or (iv) include miscellaneous other references to community reinvestment compliance. Although the Applicant complies with such laws where applicable, such laws do not impose affirmative obligations on a bank to meet credit needs of local communities and are not "State community reinvestment laws" relevant to the Board's consideration for purposes of Section 3(d)(3) of the BHC Act. *See* Senate Report No. 103-240, p. 15 (March 23, 1994) ("Additionally, in considering acquisitions of banks, the Federal Reserve must review a bank holding company's subsidiary banks compliance with state community reinvestment laws. These measures are intended to ensure that banks operating across state lines continue to meet their obligations to the communities they serve in all the states in which they conduct business.").

[3] Conn. Gen. Stat. § 36a-30(a)(1); Conn. Gen. Stat. § 36a-2(4), (12) and (28).

organized under Connecticut state law, have their principal office in Connecticut, or maintain a branch in Connecticut, such state statute is not an applicable state community reinvestment law for purposes of the Board's consideration of the Application under Section 3(d)(3) of the BHC Act.

- *District of Columbia*: D.C. Code § 26-431.03 provides that each "financial institution" has a "continuing and affirmative obligation to meet the credit needs of its local communities, including low-income and moderate-income area," and D.C. Code § 26-431.04 requires that each "financial institution" submit a community development plan stating the financial institution's plans for meeting the credit and financial services needs of the residents of the District. A "financial institution" to which this community reinvestment law applies is defined as a bank (and certain other institutions) "which is regulated, supervised, examined, or licensed by the Department of Insurance, Securities, and Banking ["DISB"]; which has applied to be regulated, supervised, examined, or licensed by the [DISB]; which is subject to the regulation, supervision, examination, or licensure by the [DISB]; or which is engaged in an activity covered by the District of Columbia Banking Code."[4] Because neither U.S. Bank nor Union Bank are regulated, supervised, examined, or licensed by the DISB, have applied to be regulated, supervised, examined, or licensed by the [DISB], or are engaged in an activity covered by the District of Columbia Banking Code (*e.g.*, neither U.S. Bank nor Union Bank maintain a branch in D.C.), such state statute is not an applicable state community reinvestment law for purposes of the Board's consideration of the Application under Section 3(d)(3) of the BHC Act.

- *Illinois*: 205 ILCS 735/35-10 provides that each "covered financial institution" has a "continuing and affirmative obligation to meet the financial services needs of the communities in which its offices, branches, and other facilities are maintained," and also provides that the Illinois Secretary of Financial and Professional Regulation "shall assess the record of each covered financial institution in satisfying its obligation" to meet the financial services needs of its communities. A "covered financial institution" to which this community reinvestment law applies is defined as "a bank chartered under the Illinois Banking Act," certain other Illinois-chartered or licensed non-bank entities, and "any other financial institution under the jurisdiction" of the Illinois Department of Financial and Professional Regulation. Because neither U.S. Bank nor Union Bank are chartered under Illinois law or under the jurisdiction of the Illinois Department of Financial and Professional Regulation, such state statute is not an applicable state community reinvestment law for purposes of the Board's consideration of the Application under Section 3(d)(3) of the BHC Act.

- *Massachusetts*: Mass. Gen. Laws. ch. 167, § 14 provides that the Massachusetts Commissioner of Banks "shall assess the record of each supervised bank in satisfying their continuing and affirmative obligation to help meet the credit needs of the communities in which offices and branches are maintained, including areas contiguous thereto and low and moderate income neighborhoods." A "bank" to which this

[4] D.C. Code § 26-431.02(7); D.C. Code § 26-551.02(18)

community reinvestment law applies is defined as "association or corporation chartered by the commonwealth [of Massachusetts]…or an individual, association, partnership or corporation incorporated or doing a banking business in the commonwealth [of Massachusetts] subject to the supervision of the commissioner."[5] Because neither U.S. Bank nor Union Bank are chartered under Massachusetts law or doing a banking business in Massachusetts subject to the supervision of the Massachusetts Commissioner of Banks, such state statute is not an applicable state community reinvestment law for purposes of the Board's consideration of the Application under Section 3(d)(3) of the BHC Act.

- *New York*: New York Banking Law regulations provide that the New York Department of Financial Services "from time to time" will "conduct community reinvestment evaluations of each banking institution to which [such regulation] applies."[6] A "banking institution" to which this community reinvestment law applies is defined as "a New York State-chartered commercial bank" and certain other New York-chartered non-bank entities.[7] Because neither U.S. Bank nor Union Bank are chartered under New York law, such state law is not an applicable state community reinvestment law for purposes of the Board's consideration of the Application under Section 3(d)(3) of the BHC Act.

- *Washington*: Rev. Code Wash. § 30A.60.010 provides that, "[i]n conducting an examination of a bank chartered under *Title 30 RCW," the Washington Director of Banks "shall investigate and assess the record of performance of the bank in meeting the credit needs of the bank's entire community, including low and moderate-income neighborhoods." Because this state statute provides for community investment examination only of banks chartered under Washington state law, and neither U.S. Bank nor Union Bank are chartered under Washington state law, such state statute is not an applicable state community reinvestment law for purposes of the Board's consideration of the Application under Section 3(d)(3) of the BHC Act.[8]

- *West Virginia*: W. Va. Code § 31A-8B-4 provides that, "[i]n connection with its examination or investigation of a banking institution or bank holding company," the West Virginia Commissioner of Banking "shall (a) [a]ssess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods…and (b) Take such record into account in its evaluation of [certain applications to the West Virginia Commissioner of Banking]." "Banking institutions" or "bank holding companies" which are subject to the examination or investigation by the West Virginia Commissioner of Banking (and thus to which this community reinvestment law applies) include only "state banks" chartered under the laws of West Virginia or holding companies that control a West Virginia bank or have their principal place of business in West Virginia.[9] Because neither U.S. Bank nor Union Bank are

[5] Mass. Gen. Laws. ch. 167, § 1

[6] N.Y. Comp. Codes R. & Regs. tit. 3 § 76.5(a).

[7] N.Y. Comp. Codes R. & Regs. tit. 3 § 76.2(d).

[8] *See also* Rev. Code Wash. § 30A.60.010(2).

[9] *See* W. Va. Code § 31A-2-4(a); W. Va. Code § 31A-1-2(s); W. Va. Code § 31A-8A-7; W. Va. Code § 31A-8A-1. *See also* W. Va. Code R. § 106-12-1.

subject to the examination or investigation by the West Virginia Commissioner of Banking, and do not have an application before the West Virginia Commissioner of Banking, such state statute is not an applicable state community reinvestment law for purposes of the Board's consideration of the Application under Section 3(d)(3) of the BHC Act.

2. **The Preliminary Statement to the application asserts that "Union Bank does not operate a 'branch' at the PurePoint Operations Center (or otherwise in the state of Arizona) for purposes of the National Bank Act, the Federal Deposit Insurance Act[,] or the Riegle-Neal Act." Discuss in further detail whether the office meets the definition of "branch" under the BHC Act. As part of your discussion, indicate whether deposits are received, checks are paid, and/or money is lent at Union Bank's Arizona office.**

As noted in the Application, Union Bank does not operate a "branch" at the PurePoint Operations Center for purposes of the Federal Deposit Insurance Act. The BHC Act defines the term "branch" as a "domestic branch" as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1813). Section 3 of the Federal Deposit Insurance Act defines a "domestic branch" as "any branch bank, branch office, branch agency, additional office, or any branch place of business…at which deposits are received or checks paid or money lent."

Union Bank does not receive any face-to-face or mail-in deposits at the Arizona PurePoint Operations Center. The PurePoint Operations Center performs back-room operations associated with PurePoint Financial web activity, for which receipt of any mail-in and mobile deposits are supported and handled by Union Bank's third-party vendor, FIS.

Union Bank also does not pay checks or otherwise perform any check processing at the Arizona PurePoint Operations Center. Any ACH processing associated with PurePoint Financial web activity is similarly supported and handled by Union Bank's third-party vendor, FIS.

The banking products and services offered by Union Bank's PurePoint Financial division include only savings and certificate-of-deposit deposit accounts. PurePoint Financial does not offer any loan products or services. Accordingly, no money is lent from the PurePoint Operations Center.

The activities conducted from the PurePoint Operations Center primarily consist of supporting customer servicing requests received through PurePoint Financial's case management tools and digital channels. For example, staff at the PurePoint Operations Center support the processing of new accounts designated for further administrative review, assist with new account set-up for personal trust customers, and perform certain monitoring and reviews of accounts designated for escalation by FIS. Direct customer-service interaction with PurePoint Financial customers is handled by Client Support Services staff, who are not located in Arizona.

The Applicant notes that federal banking agencies have long held that a back office operations facility that does not attract customers does not qualify as a "branch."[10]

[10] *See*, *e.g.*, 12 C.F.R. §§ 208.2(c)(1) and 208.2(c)(2)(v) (defining a "branch" for purposes of the Federal Reserve's Regulation H in a manner substantially similar to the BHC Act's definition of "branch," as a "place of business that

3. **Provide a copy of the executed versions of the following documents, including all schedules, when available. If currently unavailable, provide a draft if possible (to the extent not already provided), and clarify when USB expects the agreement to be finalized:**

    a. **The Sellers' Disclosure Schedule defined in Article 3 of the Share Purchase Agreement among Mitsubishi UFJ Financial Group, Inc., MUFG Americas Holdings Corporation, and USB, dated September 21, 2021 ("Share Purchase Agreement");**

For a copy of the Sellers' Disclosure Schedule, please see Confidential Exhibit A to this Response Submission.

    b. **The Transitional Services Agreement, as defined in Section 5.22 of the Share Purchase Agreement;**

The Transitional Services Agreement is expected to be executed and delivered by the parties thereto on the closing date of the Acquisition, and will be substantially in the form provided as Confidential Exhibit 10 to the Application. The contents of Schedules A and B to such form agreement remain subject to development and negotiation by the parties and will be provided to the Federal Reserve upon finalization.

    c. **The Reverse Transitional Services Agreement, as defined in Section 5.22 of the Share Purchase Agreement;**

The Reverse Transitional Services Agreement is expected to be executed and delivered by the parties thereto on the closing date of the Acquisition, and will be substantially in the form provided as Confidential Exhibit 11 to the Application. The contents of Schedules A and B to such form agreement remain subject to development and negotiation by the parties and will be provided to the Federal Reserve upon finalization.

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receives deposits, pays checks, or lends money," and providing that a "branch" does not include a "facility to which the bank does not permit members of the public to have physical access for purposes of making deposits, paying checks, or borrowing money"); 1992 WL 813436, November 18, 1992 (interpreting the meaning of "domestic branch" under the Federal Deposit Insurance Act, which definition is directly incorporated to the BHC Act definition of "branch," and finding that "[t]he FDIC Legal Division staff has long held the opinion that a back office operations facility owned by a state chartered nonmember bank is not a branch of that bank. A back office operations facility does not provide the traditional banking functions of receiving funds from and disbursing funds to customers. It is clear that when the basic definition of branch was crafted over 40 years ago, it was meant to apply to facilities that were established to directly serve a bank's customers by providing traditional banking services."); 59 Fed. Reg. 61,034, 61,037 (November 29, 1994) (interpreting the meaning of "branch" under the McFadden Act, 12 U.S.C. § 36, which defines a "branch" in identical terms to the Federal Deposit Insurance Act's definition of "branch," and finding that "courts have held that a branch, in addition to performing a core activity of receiving deposits, paying checks, or lending money, must also be a bank facility whose location provides a convenience to the public that gives the bank a competitive advantage in obtaining customers…It follows from this that an office that does not serve customers in person cannot be a branch, for a bank does not compete for customers at such a location. Therefore, the OCC has long held that a nonpublic, back office…is not a branch.")

d. The Registration Rights Agreement, as defined in Section 5.22 of the Share Purchase Agreement; and

The Registration Rights Agreement is expected to be executed and delivered by the parties thereto on the closing date of the Acquisition, and will be substantially in the form provided as Confidential Exhibit B to this Response Submission.

e. The Bank Merger Agreement, as defined in Section 2.8 of the Share Purchase Agreement.

For a copy of the executed Bank Merger Agreement, please see Confidential Exhibit C to this Response Submission.

4. With respect to the Excluded Assets and Liabilities Transfer described in Section 5.14 of the Share Purchase Agreement:

a. Provide a copy of the finalized Excluded Assets and Liabilities Purchase and Assumption Agreement described in Section 5.14(a), including Schedule 4, when available. If currently unavailable, clarify when USB expects the agreement to be finalized; and

The Excluded Assets and Liabilities Purchase and Assumption Agreement is expected to be finalized and executed by the parties thereto by mid- to late-November 2021, and will be provided to the Federal Reserve upon completion. A draft copy of the P&A Agreement, and a copy of Schedule 4 to the Purchase Agreement, was included in Confidential Exhibit 4 to the Application.

b. Provide a list of all Excluded Assets and Liabilities, as defined in Section 5.14(a).

A list of all Excluded Assets and Liabilities will be included in the schedules to the P&A Agreement, which will be provided to the Federal Reserve once finalized by the parties, including detailed schedules of excluded deposits, equity interests, letters of credit, loans, real property, derivative contracts, transferred contracts and investment securities, in each case as of June 30, 2021. Such detailed schedules will be further updated prior to the closing(s) of the Excluded Assets and Liabilities Transfer pursuant to the P&A Agreement.

5. Discuss how the indemnification provisions in Sections 5.9, 5.20, and 8.1 of the Share Purchase Agreement comply with section 18(k) of the Federal Deposit Insurance Act and the implementing regulations of the Federal Deposit Insurance Corporation.

The FDIC has adopted regulations (12 C.F.R. Part 359) pursuant to its authority under Section 18(k) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(k)) that generally limit and/or prohibit, in certain circumstances, the ability of insured depository institutions and depository institution holding companies to pay or provide certain forms of benefits to "institution-affiliated parties," including certain "prohibited indemnification payments."

The term "prohibited indemnification payment" for purposes of the FDIC's Part 359 regulations includes an indemnification payment (or an agreement to make an indemnification payment) by any insured depository institution or an affiliated depository institution holding company to an institution-affiliated party of such insured depository institution or depository institution holding company in order to pay or reimburse such institution-affiliated party for:

- any civil money penalty or judgment resulting from any administrative or civil action instituted by any federal banking agency, or

- any other liability or legal expense with regard to any administrative proceeding or civil action instituted by any federal banking agency which results in a final order or settlement pursuant to which such institution-affiliated party:

    - Is assessed a civil money penalty;

    - Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

    - Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution.[11]

As discussed below, the indemnification provisions in Sections 5.9, 5.20 and 8.1 of the Purchase Agreement comply with, and do not constitute "prohibited indemnification payments" under, the FDIC's Part 359 regulations. The policy goals underlying the FDIC's Part 359 regulations are to safeguard the assets of regulated financial institutions and preserve their safety and soundness by limiting the obligations of such financial institutions to defend, pay penalties imposed on or reimburse their institution-affiliated parties (*i.e.*, the directors, officers, employees, controlling and certain other stockholders and certain independent contractors and other persons) who have been found to have violated the law and thereby have potentially harmed the financial institution with which they were affiliated.

In contrast, the indemnification provisions in Sections 5.9 and 8.1 of the Purchase Agreement reflect normal and customary commercial transaction indemnification agreements between the sellers (MUFG and MUFG Americas) and the completely unrelated and unaffiliated buyer (U.S. Bancorp) with respect to the entity that U.S. Bancorp is purchasing in an arms-length transaction.[12] The indemnities serve to allocate responsibility between the sellers and buyer for pre-and post-closing taxes, as well as responsibility for breaches by either party of their representations and warranties in the Purchase Agreement and for various identified pre-closing potential liabilities. As is customary in purchase agreements of this type, the indemnification agreements require the sellers to indemnify the buyer group (including its subsidiaries, affiliates and representatives, which after the closing would include Union Bank and its subsidiaries) because the damages covered by the indemnity might occur at different levels within the buyer

[11] 12 C.F.R. § 359.1(l)(i)–(iii).

[12] *Cf.* Sections 5.9 and 8.1 of the Share Purchase Agreement, dated as of November 15, 2020, between Banco Bilbao Vizcaya Argentaria, S.A. and The PNC Financial Services Group, Inc. (reflecting substantially similar indemnification provisions as the corresponding provisions of the Purchase Agreement).

group.[13] The reciprocal applies to the buyer's obligation to indemnify the seller group (which after the closing excludes Union Bank and its subsidiaries).[14]

The indemnification requirements under these Sections 5.9 and 8.1 of the Purchase Agreement apply only from "and after the [c]losing" of the Acquisition. From and after the closing of the Acquisition, neither MUFG nor MUFG Americas will be a depository institution holding company, nor will either be an affiliate of U.S. Bancorp and its affiliates (including Union Bank and its transferred subsidiaries). Thus, any indemnification payments made from and after the closing of the Acquisition by MUFG or MUFG Americas in respect of matters under Sections 5.9 and 8.1 of the Purchase Agreement would not constitute payment by an insured depository institution holding company to a current or former institution-affiliated party of the holding company or an *affiliated* insured depository institution,[15] and in fact would not constitute payment by *any* depository institution holding company.[16] Accordingly, the indemnification provisions for payments by MUFG or MUFG Americas in Sections 5.9 and 8.1 of the Purchase Agreement do not require any depository institution holding company to make, and are not an agreement for any depository institution holding company to make, "prohibited indemnification payments" for purposes of the FDIC's Part 359 regulations. Moreover, the indemnification provisions for payments by U.S. Bancorp in Sections 5.9 and 8.1 of the Purchase Agreement do not provide for U.S. Bancorp to make indemnification payments to any current or former institution-affiliated party of U.S. Bancorp and thus do not require U.S. Bancorp to make, and

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[13] For example, Section 5.9(a)(i) of the Purchase Agreement provides for certain indemnification payments to be made by MUFG Americas and its affiliates to U.S. Bancorp and its affiliates (including Union Bank and its transferred subsidiaries) and their respective representatives in respect of certain tax matters (e.g., taxes of MUFG Americas and its affiliates, other than Union Bank and its transferred subsidiaries, taxes arising out of the transfer of the Excluded Assets and Liabilities, a reduction in the balance of net deferred tax assets included in the tangible book value of Union Bank, and incremental taxes incurred by U.S. Bancorp or its affiliates due to the disallowance of net deferred tax assets included in the tangible book value of Union Bank).

Section 8.1(b) of the Purchase Agreement provides for certain indemnification payments to be made by MUFG to U.S. Bancorp and its affiliates (including Union Bank and its transferred subsidiaries) and their respective representatives in respect of losses relating to (i) breaches or inaccuracies of representations and warranties in the Purchase Agreement, (ii) breaches or default in the performance of covenants under the Purchase Agreement, (iii) certain transaction expenses, (iv) the Excluded Assets and Liabilities, and (v) certain other specified matters as described in Confidential Exhibit 3 to the Application.

[14] For example, Section 5.9(a)(ii) of the Purchase Agreement provides for certain indemnification payments to be made by U.S. Bancorp to MUFG Americas and its affiliates in respect of certain post-closing tax matters.

Section 8.1(c) of the Purchase Agreement provides for certain indemnification payments to be made by U.S. Bancorp to MUFG and its affiliates (excluding Union Bank and its transferred subsidiaries) and their respective representatives in respect of losses relating to (i) breaches or inaccuracies of representations and warranties in the Purchase Agreement, and (ii) breaches or default in the performance of covenants under the Purchase Agreement.

[15] *See* 12 C.F.R. § 359.1(l) (defining "prohibited indemnification payment" to mean a payment or agreement to make a payment "by any insured depository institution or *an affiliated depository institution holding company* for the benefit of any person who is or was an IAP of *such* insured depository institution or holding company") (emphasis added).

[16] *See* 12 C.F.R. § 359.3 (applying the prohibition against making or agreeing to make "prohibited indemnification payments" only to insured depository institutions and depository institution holding companies); *see also* 12 C.F.R. § 359.1(l) (defining "prohibited indemnification payment" to mean a payment or agreement to make a payment "by any insured depository institution or…[a] *depository institution holding company*…") (emphasis added).

are not an agreement for U.S. Bancorp to make, "prohibited indemnification payments" for purposes of the FDIC's Part 359 regulations.

Further, most (if not all) matters for which Sections 5.9 and 8.1 provide for indemnification between the MUFG group, on the one hand, and the U.S. Bancorp group, on the other hand, would not constitute civil money penalties or judgments resulting from an administrative or civil action instituted by a federal banking agency, or other liability or legal expense with regard to an administrative proceeding or civil action instituted by a federal banking agency, and thus the indemnification payments made in respect of such matters would not be "prohibited indemnification payments" for purposes of the FDIC's Part 359 regulations.[17]

The purpose of Section 5.20 of the Purchase Agreement is to continue to provide the present and former directors and officers of Union Bank with substantially similar indemnification and insurance coverage after the closing to the coverage that they currently have, and subject to similar limitations. The indemnification provisions in Section 5.20, which are customary in most public and private acquisitions of banking organizations,[18] are expressly limited to payments "permitted or required by applicable Law." Accordingly, U.S. Bancorp is not obligated by Section 5.20 of the Purchase Agreement to make, or cause Union Bank to make, an indemnification payment to the extent that any such indemnification payment would not be permitted by the FDIC's Part 359 regulations.

6. Discuss how the Transitional Services Agreement complies with sections 23A and 23B of the Federal Reserve Act, 12 U.S.C. §§ 371c and 371c–1, and the Board's Regulation W, 12 CFR part 223. In your discussion, clarify whether Union Bank or US Bank may be required to pay for, or will be liable for, services received by an affiliate under the Transitional Services Agreement, including Sections 3.3(c), 3.4, and 5.1(b) of the agreement.

Section 23A of the Federal Reserve Act (12 U.S.C. § 371c) and the applicable provisions of the Board's Regulation W thereunder (12 C.F.R. Part 223, Subpart B) generally restrict a member bank from engaging in a "covered transaction" with an "affiliate" if the aggregate amount of the member bank's covered transactions with such affiliate would exceed 10% of the capital stock and surplus of the member bank (and apply certain other limits, safety and soundness

[17] To the extent that any indemnification payments to be made by MUFG to U.S. Bancorp and its affiliates (including Union Bank and its transferred subsidiaries) and their respective representatives in respect of losses relating to certain other specified matters as described in Confidential Exhibit 3 to the Application would otherwise be "prohibited indemnification payments" if paid by a depository institution or depository institution holding company to its institution-affiliated parties, any such payments would not be made by any depository institution or depository institution holding company, as described above, and thus would not be prohibited by the FDIC's Part 359 regulations.

[18] *Cf.* Sections 5.9 and 8.1 of the Share Purchase Agreement, dated as of November 15, 2020, between Banco Bilbao Vizcaya Argentaria, S.A. and The PNC Financial Services Group, Inc. (reflecting substantially similar indemnification provisions as the corresponding provisions of the Purchase Agreement); Section 6.8 of the Agreement and Plan of Merger, dated as of December 13, 2020, by and between Huntington Bancshares Incorporated and TCF Financial Corporation; Section 6.7 of the Agreement and Plan of Merger, dated as of February 7, 2019, by and between SunTrust Banks, Inc. and BB&T Corporation.

requirements, and collateral requirements on certain covered transactions between a member bank and its affiliates).

Section 23B of the Federal Reserve Act (12 U.S.C. § 371c–1) and the applicable provisions of the Board's Regulation W thereunder (12 C.F.R. Part 223, Subpart F) generally require that certain transactions, including all covered transactions, between a member bank and an affiliate be on market terms and conditions.

The Applicant notes that the forms of Transitional Services Agreement and Reverse Transitional Services Agreement were each negotiated by MUFG and U.S. Bancorp, which are not and have never been affiliates, as part of negotiating the Purchase Agreement (to which the forms of Transitional Services Agreement and Reverse Transitional Services Agreement are attached).[19] The Transitional Services Agreement and Reverse Transitional Services Agreement each will be signed and delivered only at the time of closing of the Acquisition, and will be effective only as of and following the closing of the Acquisition, at which time none of Union Bank, U.S. Bank or U.S. Bancorp will be affiliated with MUFG for purposes of Sections 23A and 23B and Regulation W.[20] Accordingly, the services, transactions, and payments as between MUFG (as "Service Provider" under the Transitional Services Agreement and, together with its subsidiaries, each as a "Service Recipient" under the Reverse Transitional Services Agreement) on the one hand, and Union Bank (or, following the Bank Merger, U.S. Bank) (as "Service Provider" under the Reverse Transitional Services Agreement and, together with its subsidiaries, each as a "Service Recipient" under the Transitional Services Agreement) on the other hand, will not be subject to the restrictions of Section 23A and Subpart B of Regulation W, since such services, transactions, and payments will not be between a member bank and an "affiliate." For the same reason, such services, transactions, and payments as between the applicable Service Provider and Service Recipients under the Transitional Services Agreement and Reverse Transitional Services Agreement will not subject to the requirements of Section 23B and Subpart F of Regulation W applicable to transactions between a member bank and its affiliate.[21]

Section 23B of the Federal Reserve Act is designed to protect against a depository institution suffering losses in transactions with an affiliate by requiring covered transactions to be on market terms, *i.e.*, on terms that are substantially the same, or at least as favorable to the bank as those prevailing at the time for comparable transactions with unaffiliated companies. The Transitional

[19] The Applicant also notes that the forms of Transitional Services Agreement and Reverse Transitional Services Agreement are on market terms that are comparable to other Transitional Services Agreements and Reverse Transitional Services Agreements entered into in recent transactions involving the sale of a bank subsidiary, and are each thus consistent with the market terms requirement of 12 C.F.R. § 223.51. *See* Form of Transitional Services Agreement and Form of Reverse Transitional Services Agreement, each by and between Banco Bilbao Vizcaya Argentaria, S.A. and The PNC Financial Services Group, Inc., provided as Public Exhibit 4 to the Application to the Board for prior approval for The PNC Financial Services Group, Inc. to acquire BBVA USA Bancshares, Inc, *available at* https://www.federalreserve.gov/foia/files/public-exhibits-to-the-application-by-the-pnc-to-acquire-bbva-usa-volume-I-20201229.pdf.

[20] Union Bank will be a party to the Transitional Services Agreement solely because it will need, on an interim basis, certain operational services being retained by MUFG at closing, and will be a party to the Reverse Transitional Services Agreement solely because the operations and personnel to provide the applicable reverse transitional services are currently housed in Union Bank.

[21] 12 C.F.R. § 223.52(a)(1)–(4)

Services Agreement and Reverse Transitional Services Agreement each is consistent with the policy goals of Section 23B, as each agreement was negotiated by unaffiliated parties: U.S. Bancorp, on the one hand, and MUFG, on the other hand. Union Bank will only become a party to the Transitional Services Agreement and Reverse Transitional Services Agreement at the time of acquisition by U.S. Bancorp, at which point it would no longer be an affiliate of MUFG. U.S. Bancorp has a clear and substantial ongoing financial interest to negotiate terms and conditions of the Transitional Services Agreement and Reverse Transitional Services Agreement that are in the best interest of Union Bank, in anticipation of Union Bank becoming a subsidiary of U.S. Bancorp.

Union Bank and U.S. Bank will not be required to pay for, and will not be liable for, services received by an affiliate for purposes of Regulation W under the Transitional Services Agreement, including Sections 3.3(c), 3.4, and 5.1(b) of the Transitional Services Agreement. Because "Service Recipients" are defined under the Transitional Services Agreement to consist of only Union Bank and its *subsidiaries* (or, following the Bank Merger, U.S. Bank and its subsidiaries), any non-bank Service Recipient under the Transitional Services Agreement will not be an "affiliate" of Union Bank (or U.S. Bank, following the Bank Merger) for purposes of Regulation W.[22] Accordingly, to the extent that Union Bank or U.S. Bank were to make any payments for services received by another Service Recipient under the Transitional Services Agreement (including Sections 3.3(c), 3.4, and 5.1(b) of the agreement), any such payments would not be transactions with, or a payment of money to or for the benefit of, an affiliate of the bank for purposes of Regulation W.[23]

7. Provide actual and pro forma balance sheets for USB, on a parent-only and consolidated basis, and for US Bank and Union Bank on a stand-alone and pro forma bases, as of September 30, 2021, and projections for the next three years of operations, when available.

a. Provide explanatory detailed footnotes for the debit and credit adjustments.

The information requested by this item 7 and 7(a) will be provided to the Federal Reserve on a supplemental basis when available.

b. If not reflected in the explanatory footnotes, provide supporting analysis for the valuation of the transaction.

[22] 12 C.F.R. § 223.2(b)(1).

[23] Because "Service Recipients" are defined under the Reverse Transitional Services Agreement to consist of only MUFG Bank, Ltd. and its *subsidiaries* (including the former Union Bank operations), any Service Recipient under the Reverse Transitional Services Agreement that is not a U.S. branch or agency of MUFG Bank, Ltd. will not be an "affiliate" of such U.S. branch or agency for purposes of Regulation W. 12 C.F.R. § 223.61(b). Accordingly, to the extent that a U.S. branch or agency of MUFG Bank, Ltd. were to make any payments for services received by another Service Recipient under the Reverse Transitional Services Agreement (including Sections 3.3(c), 3.4, and 5.1(b) of the agreement), any such payments would not be transactions with, or a payment of money to or for the benefit of, an affiliate of such U.S. branch or agency for purposes of Regulation W.

Information and analysis in support of the Applicant's valuation of the Proposed Transaction, as prepared by the Applicant's financial advisors, is provided as Confidential Exhibit D to this Response Submission.

8. **Provide actual and pro forma income statements for USB, on a parent-only and consolidated basis, and actual for US Bank and MUFG Union Bank, on a stand-alone and pro forma bases, showing separately each principal source of revenue and expense for the period ending September 30, 2021, and projections for the next three years, when available. Your response should include relevant adjustments and explanatory detailed footnotes.**

The information requested by this item 8 will be provided to the Federal Reserve on a supplemental basis when available.

9. **Provide actual and pro forma capital calculations for USB, US Bank, and Union Bank as of September 30, 2021, when available. Also, provide projected capital calculations for the next three years of operations. Your response should include relevant adjustments and explanatory detailed footnotes.**

The information requested by this item 9 will be provided to the Federal Reserve on a supplemental basis when available.

10. **Provide liquidity metrics for USB as of September 30, 2021.**

For USB liquidity metrics as of September 30, 2021, please see Confidential Exhibit E to this Response Submission.

11. **Provide actual and pro forma cash flow statements for USB, on a parent-only basis, as of September 30, 2021, and projections for the next three years of operations.**

The information requested by this item 11 will be provided to the Federal Reserve on a supplemental basis when available.

12. **Provide related asset quality ratios (with relevant calculations) for USB, US Bank, and Union Bank as of September 30, 2021. The asset quality analysis should include the following:**

    a. **A breakdown of actual asset quality information for Union Bank as of December 31, 2020, and September 30, 2021.**

The information requested by this item 12(a) will be provided to the Federal Reserve on a supplemental basis when available.

    b. **A breakdown of actual asset quality information for USB and US Bank as of December 31, 2020, and September 30, 2021.**

For the information requested by this item 12(b), please see Confidential Exhibit F to this Response Submission.

c. A breakdown of pro forma asset quality information for USB and US Bank as of September 30, 2021.

The information requested by this item 12(c) as of September 30, 2021 will be provided to the Federal Reserve on a supplemental basis when available. The information requested by this item 12(c) as of June 30, 2021 was provided as Confidential Exhibit B to the Applicant's response submission dated October 26, 2021.

d. A focus on two separate elements: (i) criticized and classified assets, comprised of the four separate categories of other assets especially mentioned ("OAEM" or special mention), substandard, doubtful, and loss (with relevant components of other real estate owned ("OREO") separately identified in each category),1 and (ii) nonperforming assets, comprised of the four separate categories of nonaccrual loans, restructured loans in compliance with their terms, OREO, and other repossessed assets. Also, separately provide the category of loans 90 days past due.

For the information requested by this item 12(d) available as of the date of this Response Submission, please see Confidential Exhibit G to this Response Submission.

e. Indicate what level of (i) criticized and classified assets, (ii) nonperforming assets, and (iii) loans 90 days past-due that may be affected by the purchase accounting adjustments and other known events. To the extent not explained elsewhere, discuss the basis and justification for such adjustments.

For the information requested by this item 12(e), please see Confidential Exhibit H.

f. A calculation of relevant asset quality ratios; for example, the level of criticized and classified assets should be compared to the total amount of tier 1 capital and allowance for loan loss reserves, while the level of nonperforming assets should be compared to the total amount of gross loans and OREO. The numerator and denominator of each calculated ratio must be as of the same point in time. Also, the ratios should be calculated in connection with all actual and resulting pro forma columns.

For the information requested by this item 12(f) available as of the date of this Response Submission, please see Confidential Exhibit G to this Response Submission.

g. The amount of criticized and classified assets should be either as confirmed by relevant examiners at a recent examination or as more recently determined by the applicant's internal credit monitoring systems. Also, the breakdown provided for criticized and classified assets should encompass all such assets on the balance sheet, not just loans.

The data that have been and will be presented in response to this item 12 are reported on a consolidated basis using a concordance table which maps as-reported Union Bank commercial risk-rated loans to a U.S. Bank commercial loan risk rating. The loans are then further reviewed

for regulatory alignment for reporting purposes. USB anticipates that all loans will be subject to USB risk rating processes upon system conversion.

13. Provide actual and pro forma loan concentration metrics for US Bank and Union Bank as of September 30, 2021, prepared pursuant to SR Letter 07-1, *Interagency Guidance on Concentrations in Commercial Real Estate*.

For the information requested by this item 13 available as of the date of this Response Submission, please see Confidential Exhibit I to this Response Submission.

14. Provide a list of all Union Bank's subsidiaries that will be acquired by USB as part of this acquisition. Your response should include the financial information (balance sheet, income statement, and capital information) for each of these subsidiaries.

A list of Union Bank subsidiaries that will be acquired by USB as part of the Acquisition was included in Confidential Exhibit 5 to the Application. For financial information related to such Union Bank subsidiaries, please see Confidential Exhibit J.

15. Regarding your October 26, 2021 response submission, non-confidential portion, to the Federal Reserve Bank of Minneapolis, response to question #2 indicates that, in connection with this proposal, USB expects to issue an additional $350 million of preferred stock and $500 million of subordinated debt at a later date. When a decision is made, provide the time and actual amount of capital issuance as well as updated pro forma financial information to the extent applicable.

As noted in the October 26, 2021 response submission, U.S. Bancorp issued $1.5 billion of preferred stock on October 26, 2021, $1.1 billion of which was previously earmarked for a planned redemption of currently outstanding preferred securities related to legacy U.S. Bancorp capital planning and $400 million of which will be used to finance a portion of the cash consideration related to the Union Bank acquisition.

On November 3, 2021, U.S. Bancorp issued $1.3 billion of subordinated debt. The subordinated debt has an interest rate of 2.491% until November 3, 2031, and then resets to the prevailing 5 year U.S. Treasury rate plus a spread of 0.95%. The subordinated debt has a maturity date of November 3, 2036. U.S. Bancorp has determined to use $500 million of the proceeds from this issuance to finance a portion of the cash consideration payable in the Union Bank acquisition.

Also as noted in the October 26, 2021 response submission, U.S. Bancorp expects to issue an additional $350 million of preferred stock at a later date. The timing and terms of that issuance have yet to be determined and will depend on a number of factors, including then-current market conditions. U.S. Bancorp will provide the time and actual amount of capital issuance when final decisions regarding such issuance have been made, and will provide updated pro forma financial information to the extent necessary to reflect any changes to its plans regarding these additional funding sources from those contemplated in the Application and subsequent response submissions.

16. Following consummation of the proposed acquisition, describe changes, if any, to USB's enterprise-wide risk appetite and/or risk capacity. Your response should include, if applicable, anticipated changes to USB's risk management framework and/or total borrowing capacity, and to monitoring of operational and technology risks.

For the information requested by this item 16, please see Confidential Exhibit K to this Response Submission.