BANK POLICY INSTITUTE

March 2, 2020

Via Electronic Mail

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals (RIN 3064–AF19)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the FDIC's proposal to codify the existing Statement of Policy ("SOP") regarding its interpretation and application of Section 19 of the Federal Deposit Insurance Act, which prohibits, without the FDIC's prior written consent, any person from participating in the conduct of the affairs of a bank if that person has been convicted of a crime of dishonesty or breach of trust or money laundering, or has entered a pretrial diversion or similar program in connection with the prosecution for such an offense ("Section 19").[2] As the FDIC has previously noted, the "basic underlying premise of section 19 is to prevent risk to the safety and soundness of an insured institution or the interests of its depositors, and to prevent impairment of public confidence in the insured institution."[3]

Section 19's purpose and requirements unquestionably serve, first and foremost, to promote banks' safety and soundness, and any policy or rule pertaining to the application of Section 19 must primarily serve this purpose. However, achieving this purpose does not—and should not—require banks to implement overly-restrictive bars on employment. Rather, to fulfill Section 19's safety and soundness objectives in a manner that allows banks to prudently manage safety and soundness risk, Section 19's requirements should be appropriately calibrated to the potential and actual safety and soundness risks posed by prospective employees. The FDIC should craft Section 19 requirements whose application permits, encourages, and, most importantly, does not bar the employment of highly qualified individuals who do not pose a threat to a bank's safety and soundness.

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1 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

2 83 Fed. Reg. 38143 (Aug. 3, 2018).

3 63 Fed. Reg. 66,177, 66,181 (Dec. 1, 1998), "Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act Concerning Participation in the Conduct of the Affairs of an Insured Institution by Persons Who Have Been Convicted of Crimes Involving Dishonesty, Breach of Trust or Money Laundering or Who Have Entered Pretrial Diversion Programs For Such Offenses."

Over the years, the FDIC has issued guidance that has expanded a bank's ability to hire, without obtaining prior consent from the FDIC, persons covered by Section 19 who present minimal risk to banks' safety and soundness, and the FDIC's SOP currently strikes a sensible balance between restrictions and exemptions. Nonetheless, we support the FDIC's renewed effort to review and seek public comment on the scope of Section 19, the process for obtaining relief, the scope of *de minimis* exceptions and the treatment of expunged criminal records. The FDIC's review is particularly appropriate and timely given the practical experience banks have gained with the current policy, the most recent updates to which were finalized more than 18 months ago.[4] Our comments below are based on members' practical experience applying the current SOP and focus on specific, incremental improvements that the FDIC could make to its existing policy while remaining consistent with the statutory language of Section 19 and continuing to promote the safety and soundness goals underpinning it.

Our recommendations would improve the FDIC's existing policy by modestly but importantly expanding access to employment in the banking industry to individuals presenting minimal risk. In advocating for these changes, we do not comment on whether the policy on the whole strikes the appropriate balance between the important goals of protecting the safety and soundness of banks and broadening access to employment opportunities in the banking sector. We recognize that, in setting this policy, the FDIC must adhere to the parameters of the statute and neither can nor should make policy decisions that more properly reside with Congress. As academic study of and public views toward criminal justice reform continue to evolve, we encourage Congress and the FDIC to work together to ensure that Section 19 and its application similarly evolve. We also recommend that the FDIC commit to periodically reevaluate this regulation, including by engaging in empirical analysis of its effects on individuals and banks, in order to ensure the regulation provides the broadest possible access to banking sector employment while remaining both consistent with the statute and an appropriate safeguard of banks' safety and soundness.

I. The FDIC should clarify that what constitutes a "reasonable inquiry" for purposes of Section 19 may vary depending upon the size, complexity and resources of the bank, and that some banks may reasonably conclude that subjecting applicants to a fingerprint background check is a necessary element of a process that constitutes a "reasonable inquiry."

The proposal would codify the FDIC's expectation that, in determining whether a bank may employ an individual without obtaining the FDIC's prior written consent under Section 19, a bank make a "reasonable inquiry" regarding the applicant's history. Our members have found that subjecting applicants to a fingerprint background check is a practical, efficient and reliable method for determining whether an applicant's history implicates Section 19. Unfortunately, obtaining these types of background checks has become increasingly difficult in light of certain state and local law restrictions on a prospective employer's ability to run criminal background checks on applicants. Third party vendors that assist employers in conducting these background checks are increasingly informing banks that the checks banks use to identify Section 19 implications are impermissible under state or local law. In most instances, banks have been able to persuade these third parties that the federal requirement to comply with Section 19 preempts these laws, but this often requires a great deal of explanation and discussion regarding the requirements of Section 19 with individuals who are unfamiliar with the statute. Clarifying in the final rule that fingerprinting may constitute part of the required "reasonable inquiry" would assist banks that use this method to more clearly and efficiently demonstrate that such state- and local-law restrictions are preempted by Section 19's federal requirements. At the same time, we understand that some banks may use different, but equally effective, processes to gather information about applicants' past conduct. The FDIC should therefore clarify that what constitutes a "reasonable inquiry" for purposes of Section 19 may vary depending upon the size, complexity and resources of the institution, and that some banks may reasonably conclude that subjecting applicants to a fingerprint background check may be a necessary element of a process that constitutes "reasonable inquiry."

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[4] 83 Fed. Reg. 38143.

II. The current scope of the *de minimis* exceptions largely facilitates banks' employment of individuals who pose minimal risk; however, certain properly calibrated adjustments would allow banks to expand employment without incurring undue risk and would reduce the administrative burden associated with hiring based on the *de minimis* exceptions.

When the FDIC created the *de minimis* exceptions to the requirement that banks obtain FDIC consent prior to offering employment to individuals with certain prior criminal convictions, it explained that "in light of its experience in processing and approving many applications involving minimal offenses" under Section 19, the agency had "determined to grant blanket approval . . . to certain defined categories of offenses . . . [that] are considered to be of such a minimal nature and of such low risk that the affected person may be employed at any institution, in any position"[5] because such individuals would not threaten the safety and soundness of an insured institution or the interests of its depositors, or impair public confidence in the insured institution. For the most part, the current parameters of the *de minimis* exceptions remain appropriately tailored to capture this category of individuals who present minimal risk.

In addition, the parameters are generally straightforward, objective criteria that enable banks to efficiently and independently determine whether a prospective employee qualifies for an exception. Because the existing exceptions are relatively straightforward and have been implemented effectively by banks, we would not support modifying them in ways that would increase their complexity or reduce their objectivity. Such changes would require banks to expend considerably greater time and expense analyzing an applicant's history to determine whether the applicant qualifies for a *de minimis* exception. This increased administrative burden may in turn reduce the number of applicants banks consider for employment.

At the same time, certain properly calibrated adjustments to the *de minimis* exceptions could modestly expand banks' potential employment pool without posing additional risk or imposing this additional administrative burden. Specifically, the FDIC should expand the scope of scenarios covered under the *de minimis* exceptions by: (a) increasing the maximum number of days of jail time that an individual may serve; (b) aligning the permissible maximum simple theft value with the maximum bad or insufficient funds checks value; and (c) clarifying that what constitutes "reasonable inquiry" for purposes of determining whether an individual meets the criteria for a *de minimis* exception does not necessarily require reviewing objective documentation when such documentation is not available.

A. The FDIC should increase the maximum number of days of jail time that an individual may serve.

The FDIC should increase the maximum number of days of jail time that an individual may serve from three, under the current SOP, to thirty. Individuals generally spend time in jail to: (1) serve a sentence following conviction; or (2) await trial. In both scenarios, an individual who is in jail for fewer than thirty days is unlikely to have committed a significant crime or to pose a safety and soundness risk to banks. A post-conviction sentence of thirty or fewer days generally attaches to a relatively minor crime. When awaiting trial, whether an individual spends three or fewer days in jail or more than three but less than thirty days in jail depends not on the gravity of the underlying offense, but on whether the individual can afford bail. The ability—or inability—to pay bail has no bearing on the risk an individual might pose to a bank and should not factor into whether the individual qualifies for the *de minimis* exception.

B. The FDIC should align the maximum simple theft value with the maximum bad or insufficient funds checks value.

The FDIC should align the maximum simple theft value (currently $500) with the maximum bad or insufficient funds checks value (currently $1,000). By setting the bad or insufficient funds checks value at $1,000, the FDIC determined that individuals who had committed offenses involving this value or less did not pose enough risk to banks to merit an FDIC determination of the precise level of risk through the Section 19 application process.

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[5] 63 Fed. Reg. at 66,181.

Individuals who have engaged in simple theft do not appear to pose inherently more risk to a bank than those who have written a bad or insufficient funds check. As such, the maximum value for purposes of the *de minimis* exception for these two crimes should both be $1,000. Raising the maximum amount for simple theft would increase access to employment opportunities without materially increasing risk to financial institutions.

C. The FDIC should clarify that what constitutes "reasonable inquiry" for purposes of determining whether an individual meets the criteria for a *de minimis* exception does not necessarily require reviewing objective documentation when such documentation is not available.

As noted above, the proposal would codify the FDIC's expectation that, in determining whether the bank may employ an individual without obtaining prior written consent, a bank make a "reasonable inquiry" regarding the applicant's history. This "reasonable inquiry" expectation extends to banks' consideration of whether an individual meets the criteria of a *de minimis* exception. Dollar-based elements of certain *de minimis* exceptions raise the question of what constitutes a "reasonable inquiry" when information about the dollar values involved in past offenses are not contained in the records available to a bank. We appreciate that it would not satisfy Section 19's requirements to rely solely on an applicant's uncorroborated statements to establish that the applicant meets the *de minimis* criteria and believe that obtaining objective documentation provides a high level of confidence that the criteria are met. However, in many cases, there is no objective documentation available. For example, in cases of simple theft, members have often found that the underlying records do not specifically state the value of the goods involved. The FDIC should clarify that what constitutes a "reasonable inquiry" does not necessarily require reviewing objective documentation when such documentation is not available.

III. The FDIC should modify the definition of "complete expungement" to apply to any situation in which the records pertaining to a criminal offense have been made unavailable to the public.

The proposed rule's definition of a "complete expungement" as an expungement in which "the language in the [expungement] order itself, or in the legislative provisions under which the order was issued … forbids the conviction or program entry to be used for any subsequent purpose including, but not limited to, an evaluation of a person's fitness or character" is overly narrow. The FDIC should amend the definition to provide that a court order constitutes a "complete expungement" for the purposes of Section 19 if it makes records of the conviction or program entry unavailable to the public. Most of the state expungement (or equivalent) statutes that members routinely encounter do not prohibit the use of the underlying offense information *for any purpose*, as required by the proposed definition, even if the statutes only allow for the use of underlying offense information in extremely limited circumstances. Because of this, many expungements (or equivalent orders) do not qualify as "complete expungements" under the proposed rule. For example, New York State has no general expungement statute, but criminal records relating to certain low-level offenses can be "sealed," meaning that the records of the underlying offense are not available to the public.[6] Although not publicly available, records of these offenses remain available to certain parties in limited circumstances, generally designed to protect public safety.[7] Due to the possibility that sealed records would be used for these limited purposes, the sealing of a record under the New York statute does not constitute a "complete expungement" for purposes of Section 19. Most of the state expungement statutes that members encounter have a similar effect. Collectively, these state laws unnecessarily bar many individuals who pose minimal risk from gaining employment in the banking industry without obtaining prior FDIC approval.

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[6] N.Y. Crim. Proc. Law § 160.59(2).

[7] *C.f.* N.Y. Crim. Proc. Law § 160.59(9). For example, records remain available to prospective employers of police officers and to government agencies with responsibility for the issuance of licenses to possess guns, upon the individual's application for such a license.

IV. **In most cases, individuals apply to the FDIC for relief from Section 19's restrictions directly and on their own behalf; therefore, to expand the pool of potential bank employees, the FDIC should adjust its practices to encourage more individuals to submit applications.**

We note that, in most cases, individuals apply to the FDIC for relief from Section 19's restrictions directly and on their own behalf. It is unusual for most banks to submit these applications. Anecdotal member experience indicates that the application process acts as a deterrent for some potential job applicants, and the FDIC should therefore work to make the application process more accessible, straightforward, streamlined, and transparent. To that end, we encourage the FDIC to seek input from key stakeholders on the Section 19 application process, in particular from potential applicants and relevant public interest groups, since they are well positioned to provide feedback on the impact, if any, the proposed changes may have on potential applicants.

As a practical matter, we view the variety of Section 19 resources the FDIC provides on its website, some of which are linked in the FDIC's proposed rule, to be helpful. Collecting those resources in a single webpage may facilitate their use by an individual with little experience with bank regulation. Any effort to make the resources more accessible to the general public could expand the number of individuals who feel confident in submitting an application for relief.

In addition, considering the short timeframe within which many hiring decisions are made, the FDIC should commit in its rule to process applications within a fourteen-day period. Setting a fourteen-day response timeframe would encourage more banks to make conditional offers of employment, as was permitted in the most recent changes to the SOP, since banks would be confident that making a conditional offer would not require them to keep positions vacant for an extended period of time. The FDIC's adherence to this expedited timeframe may also encourage more individuals to submit applications, since they would expect to receive a response in a timely manner.

Taking these and other steps to encourage increased use of the application process would also help to mitigate some of the practical issues outlined throughout this letter. For example, if an individual's record had been expunged under a state law that did not clearly meet the FDIC's standard for "complete expungement," the individual could bypass the complete expungement question and simply submit a waiver application to the FDIC. Unlike the individual or the prospective employing bank, the FDIC would not need to analyze the state expungement statute, but could instead assess the risk posed by the individual based on the entirety of the available record and make a determination in a timely manner as to whether the individual would pose a risk to the bank's safety and soundness. Clarifying and expediting the waiver application process would reduce the extent to which the practical issues described in this letter inhibit opportunities for employment in the banking industry.

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BPI appreciates the opportunity to comment on the FDIC's proposal to codify the existing SOP regarding its interpretation and application of Section 19 of the Federal Deposit Insurance Act. If you have any questions, please contact either the undersigned, by phone at (202) 589-2412 or by email at katie.collard@bpi.com, or Dafina Stewart, Senior Vice President and Associate General Counsel, by phone at (202) 589-2424 or by email at dafina.stewart@bpi.com.

Respectfully submitted,

Kathryn Collard
Bank Policy Institute