American Bankers Association

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CBA CONSUMER BANKERS ASSOCIATION

January 12, 2024

James P. Sheesley,
Assistant Executive Secretary,
Federal Deposit Insurance Corporation
Attn: Comments RIN 3064–AF92
550 17th Street NW
Washington, D.C. 20429

RE: RIN 3064-AF92, *Amending FDIC regulations to conform with the Fair Hiring in Banking Act (FHBA)*

Dear Mr. Sheesley:

The American Bankers Association[1] and the Consumer Bankers Association[2] (the Associations) are pleased at the opportunity to comment on the proposed Federal Deposit Insurance Corporation (FDIC) regulations, RIN 3064-AF92: *Amending FDIC regulations to conform with the Fair Hiring in Banking Act*[3] *(FHBA)* (the Proposed Regulations). Section 19 of the Federal Deposit Insurance Act (Section 19) prohibits, without the prior written consent of the FDIC, employment by a bank of any person who has been convicted of a crime involving dishonesty or breach of trust or money laundering or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution for one of these offenses, among other prohibitions.[4] The Proposed Regulations include potential amendments to the regulations issued under Section 19 to conform the FDIC's regulations with changes made in the FHBA. The Proposed Regulations also include several other amendments not required by the FHBA, including addressing the types of offenses covered by Section 19, the effect of the completion of sentencing or pretrial-diversion program requirements in the context of Section 19, and the FDIC's procedures for reviewing applications filed under Section 19.

The Associations' members understand the critical importance of the objectives of Section 19 and the Proposed Regulations. Our members must continually balance the need to attract and

[1] The American Bankers Association is the voice of the nation's $23.4 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $18.6 trillion in deposits and extend $12.3 trillion in loans.
[2] The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.
[3] Passed as a part of P.L. 117-263.
[4] 12 U.S.C. § 1829(a)(1).

maintain an effective and talented workforce with the need to protect the security and integrity of bank operations, and also banks' reputations in their communities, including for fair hiring practices. The Associations support the overall Proposed Regulations as striking an effective and reasonable balance between these objectives.

The Associations also note that the FDIC's online publication, "Your Guide to Section 19"[5] is an extremely useful resource for both individuals and institutions involved in hiring decisions related to Section 19. Because of this, the Associations urge the FDIC to issue an updated version of this guide upon completion of the rulemaking process.

In addition, the Associations acknowledge and appreciate that the FDIC must implement the statutory changes enacted via the FHBA into the FDIC's Section 19 regulations. However, the Associations recommend that the FDIC should make several changes to the proposed regulations—most notably, (i) excluding criminal offenses prosecuted by foreign authorities from the scope of Section 19, (ii) carefully tailoring the exclusion of "certain crimes involving controlled substances" from Section 19 coverage, and (iii) providing much-needed certainty regarding Section 19 *de minimis* offenses. The Associations also (iv) recommend the FDIC interpret the definitions of "offense occurred" and "offense committed" to mean the date of the plea, conviction or program entry, and (v) support the FDIC's proposed interpretation of "sentencing occurred" to be the date of the plea, conviction or program entry.

All recommendations are discussed further below.

(i) <u>Foreign convictions and pretrial diversions should be excluded from the scope of Section 19.</u>

Section 19 applies to "any person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense." The phrase "criminal offense involving dishonesty" is defined in the statute, but is silent regarding criminal offenses prosecuted by foreign authorities.[6]

The Associations believe that foreign convictions and pretrial diversions should be excluded from the scope of Section 19 for a plethora of reasons. Most notably, it is not operationally possible for banks to properly investigate and comply with background checks in countless foreign jurisdictions (and even more foreign state/local sub-jurisdictions) in which an applicant may have lived, resided, worked, or previously spent time. Banks may not have any operations in the jurisdictions in which they would be expected to perform these background checks, and compliance with this requirement could subject banks to potential liability.

In addition, certain implicated individuals (e.g., applicants on visas) will have already completed a name check, a fingerprint check, and a background check via the visa process. Further background checks by banks would be duplicative, costly, and unnecessary.

[5] *See* Federal Deposit Insurance Corporation, Your Guide to Section 19, https://www.fdic.gov/regulations/applications/resources/brochure-section-19-rule.pdf.
[6] *See* 12 U.S.C. § 1829(g)(2).

(ii) <u>The FDIC's proposed interpretation of "offense involving the possession of controlled substances" is overbroad and should be limited to possession of controlled substances offenses.</u>

As stated above, Section 19 prohibits a bank from hiring an individual who has been convicted of a "criminal offense involving dishonesty" unless the FDIC has provided its prior written consent.[7] The FHBA excludes offenses "involving the possession of controlled substances" from the definition of "criminal offense involving dishonesty."[8] The FDIC is proposing to interpret this phrase as excluding, at a minimum, the criminal offense of simple possession of controlled substances *and* the separate criminal offense of possession with intent to distribute a controlled substance.[9]

The Associations support the FDIC's proposal to interpret the FHBA to exclude, from the prior written consent requirement, offenses for which possession of the controlled substance was the primary focus. However, the FDIC's decision to *also* exclude offenses focused on distribution and trafficking of controlled substances is overbroad and contrary to Congress' intent.

Simple possession and possession with intent to distribute a controlled substance are two separate crimes under federal law and under many state laws, with separate criminal penalties.[10] Congress chose to exclude from the prior written consent requirement only those crimes "involving the possession of controlled substances." This phrasing is nearly identical to the language Congress used to create the criminal offense of simple possession, which states that "[i]t shall be unlawful for any person . . . to *possess a controlled substance* . . . ."[11] Neither the text of the FHBA nor the report accompanying the House Financial Service Committee's consideration of the legislation (Committee Report) suggests that the legislation was intended to exclude, from the FDIC's consent requirement, crimes involving the distribution of illegal drugs.[12] The Committee Report states that the FHBA is intended to "provide a clear definition of 'criminal offense involving dishonesty.'"[13] The Committee Report does not state that Congress intended to exclude the crime of possession with intent to distribute from the consent requirement. If Congress had wanted to exclude possession with the intent to distribute from the prior written consent requirement, it could have stated that.[14] Congress chose not to do so. The FDIC cannot now rewrite the statute to exclude the offense of possession with the intent to distribute from the prior written consent requirement.

Moreover, applying the FDIC's interpretation of the phrase "involving the possession of controlled substances," at a certain level, *all* criminal offenses for trafficking, distributing or manufacturing controlled substances necessarily have to "involve" the "possession" or at least the constructive possession of a controlled substance. If such a broad interpretation is applied—

[7] 12 U.S.C. § 1829(a)(1).
[8] *See* 12 U.S.C. § 1829(g)(2)(c)(ii).
[9] *See* Prop. 12 C.F.R. § 303.222(a)(1)(iii)(B).
[10] *Compare* 21 U.S.C. § 844 (simple possession) *with* 21 U.S.C. § 841 (possession with intent to distribute).
[11] 21 U.S.C. § 844(a) (emphasis added).
[12] *See* H. Rep. No. 117-314 (2022).
[13] *Id.* at 6.
[14] *See, e.g., Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994) (standing for the proposition that, if Congress intended for a statute to reach certain conduct, Congress would have stated the statute's application clearly).

which we are not advocating—an individual with any such a conviction could argue that *all* such charges should be excluded from Section 19 coverage. This is clearly not the statutory intent of the FHBA.

Further, a bank may be exposed to significant reputational risk if it hires an individual who is convicted of possession with intent to distribute—particularly in a small, rural community where the bank's customers are likely to know the criminal history of a bank employee who is convicted of this offense.

To ensure the FDIC's prior written consent requirement continues to apply to individuals convicted of possession with intent to distribute, the Associations also urge the FDIC to retain the existing language in 12 CFR § 303.222(c) concerning "convictions or program entries for offenses concerning the illegal manufacture, sale, distribution of, or trafficking in controlled substances."[15] This provision states clearly that convictions for the "illegal manufacture, sale, distribution of, or trafficking in controlled substances shall require an application" to the FDIC, while convictions for "the simple possession of a controlled substance are not covered under section 19" and therefore do not require an application.[16] As stated above, the proposed regulation entirely removes this language from the definition of a "covered offense," meaning that convictions for the manufacture, sale, distribution, and trafficking of drugs would be excluded from the scope of Section 19—in addition to "possession with intent to distribute" convictions.[17] Again, the Associations believe this is not consistent with the statutory intent of the FHBA, which solely states, in pertinent part, that a "criminal offense involving dishonesty…does not include…an offense involving the *possession* of controlled substances."[18]

The Associations thus suggest that the Section 19 exclusion for offenses "involving the possession of controlled substances," be limited to simple possession of controlled substances offenses and *not* be expanded to include offenses involving trafficking, distributing, selling, or manufacturing controlled substances.

(iii) <u>The FDIC should provide a clear and coherent position on what constitutes a *de minimis* offense.</u>

The FHBA states that the FDIC may exempt by rule certain *de minimis* offenses from Section 19's coverage.[19] The FDIC considers *de minimis* offenses to be covered offenses for which an application is not required because the FDIC deems the application automatically granted.[20]

While the FDIC has previously promulgated guidance in this space, the Associations request the FDIC provide a clear and coherent position on what constitutes a *de minimis* offense so banks may easily and fully comply with the FDIC's rules.

[15] 12 C.F.R. § 303.222(c).
[16] *Id.*
[17] *See* Prop. 12 C.F.R. § 303.222.
[18] 12 U.S.C. § 1829(g)(2)(c)(ii) (emphasis added).
[19] *See* 12 U.S.C. § 1829(c)(3).
[20] *See* Prop. 12 C.F.R. § 303.227.

(iv) <u>The terms "offense occurred" and "offense committed" should mean the date of the plea, conviction, or program entry rather than the last day of the underlying misconduct.</u>

As revised, Section 19 provides for an exception for an offense if "it has been seven years or more since the offense occurred."[21]

Given how long it can take for many criminal cases to reach final adjudication, the Associations believe the terms "offense occurred" and "offense committed" should be interpreted to mean the date of the plea, conviction, or program entry rather than the last day of the underlying misconduct.

The Associations believe the FDIC's proposed language would reduce and undermine the intended purpose of the seven-year prohibition period by crediting a significant period of time *prior* to court adjudication against an applicant's prohibition period.

In addition, it is not possible for many banks to obtain the necessary facts to determine which date an offense might have last "occurred" or "been committed" as this information is not typically available through FBI background checks. Using the date of the plea, conviction or program entry would instead permit banks to comply with the Section 19 regulations by utilizing information that can be readily available and reasonably accessible by banks in their normal hiring processes. The last date of the underlying misconduct may not be immediately clear from available background check information, whereas using the date of the plea, conviction or program entry would consistently apply the requirement across the variety of possible jurisdictions.

(v) <u>The term "sentencing occurred" should mean the date on which a court imposes a sentence.</u>

The FHBA exempts offenses committed by individuals aged 21 years or younger from Section 19 coverage if it has been more than 30 months since the sentencing occurred.[22] However, the statute does not define the phrase "sentencing occurred." The FDIC proposes to interpret "sentencing occurred" to mean the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed.

The Associations agree with the FDIC's proposed interpretation of "sentencing occurred" because, as stated earlier, this date is knowable and can be consistently applied given the variety of possible state and federal jurisdictions. It may not be possible for many banks to obtain the necessary facts to determine the date on which all conditions of sentencing were completed. Using the date of the plea, conviction or program entry would instead permit banks to comply with the Section 19 regulations by utilizing information that can be readily available and reasonably accessible by banks in their normal hiring processes.

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[21] 12 U.S.C. § 1829(c)(1)(A)(i).
[22] 12 U.S.C. § 1829(c)(1)(B).

Finally, the Associations would like to thank the staff at the FDIC that have been working to promulgate and implement the Section 19 regulations. We greatly appreciate your efforts and look forward to further assisting you in any way possible.

The Associations would welcome the opportunity to discuss these comments or related issues with you. If you have any questions, please contact the undersigned, Joey Connor at JConnor@aba.com, and/or Rachel Ross at rross@consumerbankers.com.

Sincerely,

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