The Leadership Conference
Education Fund

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March 9, 2018

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

RE: Proposed Statement of Policy for Participation in the Conduct of the Affairs of an Insured Depository Institution by Persons Who Have Been Convicted or Have Entered a Pretrial Diversion or Similar Program for Certain Offenses Pursuant to Section 19 of the Federal Deposit Insurance Act, 83 Fed. Reg. 807 (January 8, 2018), RIN 2017-28222.

Dear Mr. Feldman,

On behalf of The Leadership Conference Education Fund, we submit the following comments on the FDIC's Proposed Statement of Policy for Participation in the Conduct of the Affairs of an Insured Depository Institution by Persons Who Have Been Convicted or Have Entered a Pretrial Diversion or Similar Program for Certain Offenses Pursuant to Section 19 of the Federal Deposit Insurance Act ("Proposed Statement of Policy").

The FDIC's stated intention in proposing modifications to the existing Statement of Policy is to "reduce regulatory burden by decreasing the number of covered offenses that will require an application, while ensuring that insured institutions are not subject to risk by convicted persons." We commend the FDIC on many of the proposed reforms it has detailed in the Proposed Statement of Policy. However, we recommend that the FDIC adopt several additional reforms that will more effectively increase access to employment for an important segment of workers. At the same time, these additional reforms will maintain the safety and soundness of the nation's depository institutions.

I. Background

Each year, nearly 700,000 people are released from American prisons, and an estimated nine million are released from jail.

Once released, formerly incarcerated people face a myriad of barriers to successfully re-entering society. They are not allowed to vote, have little access to education, face scant job opportunities, and are ineligible for public benefits, public housing, and student loans. These obstacles have profound negative effects on millions of families and make it practically impossible for millions of people who are returning home to be the engaged, responsible

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citizens we say we want them to be. Securing and holding employment is imperative to successful re-entry, but qualified job seeking people with arrest or conviction histories struggle against immense odds to do so. Seventy million adults living in the U.S.—about one in three adults—has an arrest or conviction history that will show up on a routine background check. More than 90 percent of companies use background checks in their hiring decisions, putting jobs further out of reach for the one in three adults who are living with a record. Having a record reduces the likelihood of a job callback or offer by nearly 50 percent and contributes to high levels of unemployment among prime-age working men; 34 percent of unemployed men ages 25 to 54 have been convicted of a crime.

As set forth in the 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 issued by the Equal Employment Opportunity Commission (EEOC), arrest and incarceration rates are particularly high for African-American and Hispanic men. African-American individuals are arrested at a rate that is two times their proportion of the general population. Due to the racial profiling and discriminatory practices that persist at all stages of the justice system, hiring practices that utilize background checks often have an even more acute impact on individuals of color from low-income communities.

The Leadership Conference has led coalition efforts to eliminate unnecessary and discriminatory barriers to reentry for individuals with records, and has been working to ensure that all job applicants are evaluated on their qualifications, first and foremost. In 2012, The Leadership Conference worked with the EEOC to update its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions (2012 EEOC Guidance). As set forth in the updated EEOC Enforcement Guidance, Title VII of the Civil Rights Act of 1964 requires employers to make individualized assessments of job applicants with records, and to consider the nature or gravity of the offense or conduct, the time elapsed since the conviction and/or completion of the sentence, and the nature of the job sought or held.

In 2015, The Leadership Conference helped lead an effort in support of an executive order and presidential memorandum to "ban the box" in hiring by federal employers and federal contractors – that is, to eliminate arrest and conviction record questions on job applications, which tend to quickly weed out or discourage applicants with prior arrest or conviction histories – and to ensure that both federal agencies and federal contractors comply with the 2012 EEOC Guidance. In 2016, the Office of Personnel Management issued a rule directing federal agencies to "ban the box" on job applications and delay inquiry into conviction history until later in the application process, thereby giving job applicants with conviction histories a fair chance to work in government.

On March 30, 2017, The Leadership Conference on Civil and Human Rights submitted a letter to Chairman Gruenberg, outlining the following overarching recommendations for the FDIC's consideration in revising its Statement of Policy under Section 19 of the Federal Deposit Insurance Act:

1.Clarify for insured institutions that the program entry and conviction history inquiry should occur only after a conditional offer of employment has been made.

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2. Remove the Section 19 waiver application requirement for individuals convicted of drug manufacture, sale, or trafficking offenses that have no relation to "dishonesty or a breach of trust or money laundering;" and clarify that a drug manufacture, sale, or trafficking offense does not in and of itself involve "dishonesty or a breach of trust or money laundering."

3. Increase transparency of and access to the Section 19 waiver application process by clarifying the process for job applicants in plain language on the FDIC website and on waiver forms themselves; require financial institutions to provide notice of the waiver process and make waiver forms available to job applicants; and shorten the processing time of waiver applications by permitting the FDIC to verify documents already in the applicant's possession.

4. Provide detailed guidance to Section 19 waiver application reviewers regarding the arrest and conviction history information that should be deemed relevant during the waiver process (including the relevancy of prior offenses, the position sought by the applicant, and the passage of time), in a manner consistent with Title VII of the Civil Rights Act of 1964 and the 2012 EEOC Enforcement Guidance.

5. Broaden the definition of *de minimis* offenses that do not require a Section 19 waiver application.

6. Clarify that adjournments in contemplation of dismissal issued under New York law and similar dispositions in other jurisdictions are not "diversion programs" and so do not need Section 19 waiver application approval.

The FDIC's Proposed Statement of Policy published in the Federal Register on January 8th addresses - at least in part - many of these priorities. While we applaud a number of these proposed changes, we continue to have concerns about some of the language in the FDIC's Proposed Statement of Policy. We encourage the FDIC to adopt the recommendations we propose in Section II below.

II. Responses to Request for Comments

We include below: (1) our responses to specific requests for comments as solicited by the Federal Register Notice (83 Fed. Reg. 807, Jan. 8, 2018) and (2) additional revisions to the Statement of Policy that we recommend. The italicized headings referred to with letters correspond to sections of the Proposed Statement of Policy. The bolded subheadings refer to our recommendations (which are derived from the six overarching recommendations as listed above in Section I). We have organized our comments and recommendations to follow the general order of the FDIC's Proposed Statement of Policy, with one exception. We have provided our response to the proposed expansion of the IV.B.5 *de minimis* exceptions before our discussion of the IV.B.3 proposed *de minimis* treatment for minor drug offenses, as the general *de minimis* requirements inform our discussion and recommendations regarding the *de minimis* treatment of minor drug offenses.

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A. First Section of the Proposed Statement of Policy, captioned, "FDIC Statement of Policy for Section 19 of the FDI Act" (FDIC Notice, IV, 83 Fed. Reg. at 811).

1. The Statement of Policy Should Be Revised to Instruct FDIC-Insured Institutions to Inquire into a Job Applicant's Program Entry and Conviction History Only After a Conditional Offer of Employment Has Been Made.

The FDIC proposes to amend the introductory section of the Statement of Policy, expanding the instructions provided to FDIC-insured institutions regarding the appropriate screening of persons applying to become institution-affiliated parties. The existing Statement of Policy requires FDIC-insured institutions to establish an applicant screening process that provides the insured institution with information concerning program entries and convictions during the initial job application. The Proposed Statement of Policy would offer those institutions the choice of following that approach or inquiring into an applicant's program entry and conviction history only after extending a conditional offer of employment to the applicant (instead of soliciting conviction information during the initial application phase).

We appreciate the FDIC's intention in proposing this change in screening practices. When FDIC-insured institutions choose to use this new latter option, the application of a qualified applicant would not be summarily discarded because of his or her program entry or conviction history, as can occur when an initial job application requires applicants to list this information. By offering insured institutions the opportunity to adopt the practice of offering a conditional offer of employment prior to screening for program entries and convictions, the FDIC increases the likelihood that otherwise-qualified persons with program entry or conviction histories are not unfairly barred from employment.

However, we recommend that the FDIC go one step further, by instructing all FDIC-insured institutions to adopt the practice of requesting an applicant's program entry and conviction history only after the applicant has been given a conditional offer of employment - instead of allowing FDIC-insured institutions to use their discretion in determining when to request program entry and conviction history. When FDIC-insured institutions are permitted to solicit program entry and conviction history information during the initial phase of application, the applications of otherwise-qualified applicants may often be discarded solely because of their prior program entries and convictions - even prior program entries and convictions that have no relation to an applicant's ability to perform the job sought. Further, this type of application process often has a disparate discriminatory impact on communities of color. Racial profiling and discriminatory sentencing schemes cause people of color - especially African Americans and Latinos - to be arrested and convicted at rates that far exceed their representation in the population at large. Consequently, requiring applicants to list their program entry and conviction history on initial employment applications causes unfair and discriminatory harm to many qualified persons of color seeking to secure well-paid employment.

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For these reasons, we recommend that the FDIC strike the language in the existing Statement of Policy that instructs insured institutions to inquire into an applicant's program entry and conviction history in their initial employment applications. We recommend that the FDIC instead include language that directs FDIC-insured institutions to inquire into program entry and conviction history only after extending a conditional offer of employment to an applicant. Such a policy ensures that insured institutions do not unfairly discard the applications of persons with program entry or conviction histories, while ensuring that FDIC-insured institutions continue to engage in appropriate levels of screening. This policy would also reduce the burden on the FDIC and insured institutions, because the FDIC would only need to review the Section 19 waiver applications from persons who have been extended a conditional offer for a position with the FDIC-insured institution, rather than from all persons who have applied for that position.

Accordingly, we recommend that the FDIC amend the second paragraph of the introductory section of its Statement of Policy in the following manner (language to be added underlined, language to be deleted stricken).

Section 19 imposes a duty upon the insured institution to make a reasonable inquiry regarding an applicant's history, which consists of taking steps appropriate under the circumstances, consistent with applicable law, to avoid hiring or permitting participation in its affairs by a person who has a conviction or program entry for a covered offense. The FDIC believes that at a minimum, each insured institution should establish a screening process that provides the insured institution with information concerning any convictions or program entry pertaining to a job applicant. Such a screening process should be completed only after the FDIC-insured institution has extended the applicant a conditional offer of employment that is contingent on the completion of the background check. This would include, for example, the completion of a written employment application that requires a listing of all convictions and program entries. The FDIC will look to the circumstances of each situation to determine whether the inquiry is reasonable. Upon notice of a conviction or program entry, an application seeking the FDIC's consent prior to the person's participation must be filed.

B. Section "2. A. Scope of Section 19" of the Proposed Statement of Policy (FDIC Notice, IV.A, 83 Fed. Reg. at 811).

1. The Statement of Policy Provides Commendable Guidance on Independent Contractors as Institution Affiliated Parties.

We commend the FDIC for proposing a change regarding guidance for determining whether independent contractors qualify as institution-affiliated parties under Section 19. The Proposed Statement of Policy deletes an unnecessary reference to the 12 U.S.C. § 1813(u) definition of independent contractors, and better ensures that regulated parties are aware that independent contractors are generally not subject to Section 19 screening requirements.

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C. Section "3. B. Standards for Determining Whether an Application is Required" of the Proposed Statement of Policy (FDIC Notice, II.3.B, 83 Fed. Reg. at 811).

1. The Statement of Policy's Definition of "Complete Expungement" Should Be Expanded.

Persons who have obtained a "complete expungement," as defined by the Statement of Policy, are exempted from Section 19 requirements, even if the conviction would otherwise require that person to undergo the Section 19 waiver application process. The FDIC proposes a change to the definition of "complete expungement." Specifically, the FDIC proposes to add the following language to the definition of complete expungement: "Further, the jurisdiction issuing the expungement cannot permit the use of the expunged conviction in any subsequent proceeding or review of the persons' character or fitness. Expungements of pretrial diversion or similar program entries will be treated the same as those for convictions."

The FDIC states that the intention behind this change is to update the Statement of Policy to reflect the fact that "in recent times, the existence of [expunged] records cannot always be completely sealed or destroyed," and to ensure that "the fact that the records have not been timely destroyed, or that there exist copies of the record that that are not covered by the order sealing or destroying them, will not prevent the expungement from being considered complete for the purposes of Section 19."

We appreciate the FDIC's intention in making this change. Persons with expunged convictions should not be subjected to the Section 19 waiver application requirements. In particular, we support the FDIC's clarification in the Proposed Statement of Policy that "[e]xpungements of pretrial diversion or similar program entries will be treated the same as those for convictions." Since many potential applicants may have been engaged in diversion programs that they were then successful in expunging, this change ensures fair treatment of persons with expunged diversion program participation while also meeting the FDIC's goal of reducing regulatory burden by diminishing the number of applicants who might otherwise be required to submit Section 19 waiver applications.

However, we recommend that the FDIC reword its additional proposed changes to better reflect its intentions as stated above, as the language in the Proposed Statement of Policy does not completely realize the FDIC's stated goal. We suggest that the FDIC reword the relevant section of the Proposed Statement of Policy, drawing clearer language and guidance from the explanatory language used by the FDIC in the Federal Register Notice, II.3.B, 83 Fed. Reg. at 809. Specifically, we recommend that the FDIC use the following language (language to be added underlined):

A conviction that has been completely expunged is not considered a conviction of record and will not require an application. For an expungement to be considered complete, no one, including law enforcement, can be permitted access to the record even by court order under the state or Federal law that was the basis of the expungement. If the expungement is intended to be complete under the law of the jurisdiction that issues the expungement, and the jurisdiction intends that no governmental body or court

can use the prior conviction or program entry for any subsequent purpose, then the fact that the records have not been timely destroyed, or that there exist copies of the records that are not covered by the order sealing or destroying them, will not prevent the expungement from being considered complete for the purposes of Section 19. Expungements of pretrial diversion or similar program entries will be treated the same as those for convictions.

This language would most effectively achieve the FDIC's goals in making changes to this section.

2. The Statement of Policy Should Ensure Individuals with Convictions that Have Been Set Aside or Reversed Should Not be Forced to Submit a Section 19 Waiver Application.

The FDIC's existing Statement of Policy states that "Section 19 does not cover [...] any conviction that has been reversed on appeal," and that "a conviction for which a pardon has been granted will require a [waiver] application." In the Proposed Statement of Policy, the FDIC proposes adding that "convictions that are set aside or reversed after the applicant has completed sentencing will be treated consistent with pretrial diversions or similar programs unless the court records reflect that the underlying conviction was set aside based on a finding on the merits that such conviction was wrongful." If this proposed change were to go into effect, individuals with set aside or reversed convictions (except for those where there was a finding of a wrongful conviction by the court) would be, for the first time, explicitly subject to Section 19 waiver application requirements - a substantial expansion of existing Section 19 screening and waiver requirements.

We oppose the proposed expansion of Section 19 screening and waiver requirements to persons with convictions that are set aside or reversed. While every state and local government has a different process for setting aside or reversing convictions, each process represents a determination that it would be unjust to subject the individual to all of the penalties that stem from a conviction. In some states, like Virginia, the determination that a conviction should be reversed or set aside is based on the finding that the conviction was wrongful. Other states, however, set aside convictions after an individual completes a community supervision program to the satisfaction of the court. In Texas, for example, a trial court may set aside a conviction upon a determination that an individual "is completely rehabilitated and is ready to retake his place as a law-abiding member of society."

Regardless of the court's underlying requirements, when a conviction is set aside or reversed, the court has determined that the individual is qualified to rejoin society without being subjected to the legal constraints that come from a conviction. By mandating that individuals whose convictions have been set aside also submit a Section 19 waiver application, the FDIC is placing an additional burden on both the rehabilitated individual and the FDIC-regulated institution seeking to hire them. Accordingly, we recommend that the FDIC amend the relevant language in the Proposed Statement of Policy to remove this substantial expansion of Section 19 screening and waiver requirements, instead leaving the language of the existing Statement of Policy as written, so that convictions that are set aside or reversed will not require a Section 19 waiver application.

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3.The Statement of Policy Should Clarify That Adjournments in Contemplation of Dismissal Issued under New York Law and Similar Dispositions in Other Jurisdictions Are Not "Diversion Programs" and So Do Not Need Section 19 Waiver Application Approval.

The FDIC's existing Statement of Policy states that a pretrial diversion or similar program "is characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution, or other non-criminal or non-punitive alternative." This broad definition of "pretrial diversion or similar program" undermines the FDIC's goal of reducing the burden on regulated industries because it encompasses procedures that are different from pretrial diversion programs and subjects individuals who have used those procedures to the section 19 waiver application process. Specifically, this definition can be interpreted in an overly broad way to encompass judicial procedures such as adjournments in contemplation of dismissal (ACDs) issued in New York courts (and like dispositions in other jurisdictions).

In the Proposed Statement of Policy, the FDIC did not alter the elements for determining whether a procedure constitutes a pretrial diversion or similar program. However, in the explanatory comments preceding the Proposed Statement of Policy, the FDIC did solicit comments as to "whether using some or all of the elements of a pretrial diversion program as cited in the [Statement of Policy] are appropriate for determining on a case-by-case basis whether a procedure is a similar program for the purpose of section 19," and adds language clarifying that it will only consider these elements if federal, state, or local law does not designate whether the program is a diversion program. Additionally, the Proposed Statement of Policy does not explicitly exclude any state-level procedures, such as ACDs, from qualifying as a pretrial diversion or similar program under the elements.

We commend the FDIC for clarifying the process to determine whether a procedure should be treated like a diversion or similar program for the purpose of section 19. However, we recommend that the FDIC specifically state its position that ACDs issued in New York courts (and like dispositions in other jurisdictions) do not constitute "diversion programs." An adjournment in contemplation of dismissal is not a conviction, criminal or otherwise. At the conclusion of the adjourned period (six months in most cases; one year where the arrest was for a family offense or possession of marijuana), the matter is dismissed in furtherance of justice and the record sealed. In many states, such as New York, ACDs are granted as a way of ending cases that could or should be dismissed in furtherance of justice. In 2016 alone, New York City courts issued 67,224 ACDs.

Adjournments in contemplation of dismissal are not like sentences in criminal cases that necessarily involve diversion for drug or other behavioral treatment. For example, ACD adjudication in New York can come with nothing more than the proscription to not be arrested again within the adjourned period. Treating ACD adjudications as pretrial diversion programs also does the banking industry a disservice by creating an irrational barrier to employing qualified workers. Instead, ACD adjudications should be treated as analogous to "completed expungements" as discussed above.

We recommend that the FDIC explicitly state that ACDs are not "diversion programs" and therefore individuals with ACDs (and like dispositions in other jurisdictions) do not need to submit a Section 19 waiver application. Alternatively, we recommend that the FDIC amend the elements of "diversion programs" in such a way that ACDs and similar dispositions are not included.

4.The Statement of Policy Should Broaden the Definition of *De Minimis* Offenses That Do Not Require a Section 19 Waiver Application.

a)The Statement of Policy Should Keep the Expanded Categories of Offenses that Qualify as De Minimis.

In the existing Statement of Policy, the FDIC provides that if a person has been convicted of an offense that meets certain criteria, then that offense is considered *de minimis*, and that person will not be required to file a Section 19 waiver application when applying to become an institution affiliated party. Under the existing Statement of Policy, an individual's offense is considered *de minimis* if there was only one conviction or program entry for the offense; the offense was punishable by imprisonment for a year or less and/or a fine of $2,500 or less, and the individual served three days or less of jail time; the conviction or program was entered five years prior to the time an application would otherwise be required; and the offense did not involve a depository institution or insured credit union. In the Proposed Statement of Policy, the FDIC explicitly adds categories of offenses that qualify as *de minimis* including minor drug offenses, simple theft, and offenses committed by an individual prior to the age of 21.

We support the FDIC's proposal to broaden the definition of *de minimis* offenses to include minor drug offenses, simple theft, and offenses committed by an individual prior to the age of 21. This change will increase access to employment for a marginalized and important segment of workers while maintaining the safety and soundness of the nation's depository institutions. The FDIC's grant of each of the 17 individual Section 19 waiver applications filed in the past three years demonstrates the agency's recognition that people with non-relevant, stale conviction histories should not be barred from bank employment. By expanding the number *of de minimis* offenses exempted from filing, the FDIC will allow more qualified job applicants to seek employment with banks without concern for the Section 19 waiver application process. Additionally, banks will have a larger pool of applicants that they may hire without the delay and burden brought by an applicant who is subject to the Section 19 waiver application process.

b) The Statement of Policy Should Not Redefine "Jail Time."

We have one concern with the FDIC's proposed change in this area. In addition to increasing the categories of offenses that qualify as *de minimis*, the FDIC proposes to define one of the existing criteria an offense must meet to qualify as *de minimis*. Specifically, the FDIC has proposed to amend the current requirement that "the offense was punishable by imprisonment for a term of one year or less and/or a fine of $2,500 or less, and the individual served three (3) days or less of actual jail time." In the Proposed Statement of Policy, however, the FDIC proposes a new, expanded definition of "jail time" that includes "any significant restraint on an individual's freedom of movement which includes, as part of the restriction, confinement where the person may leave temporarily only to perform specific functions or during specified times periods or both." The FDIC is seeking comments as to whether this clarification of what constitutes jail time is useful and levels the playing field among those who are convicted.

We have serious concerns with this expanded definition of "jail time," given the impact that such an expanded definition might have on many low-risk applicants who would otherwise qualify for a *de minimis* exception. This proposed revision of the definition of "jail time" could substantially expand the number of persons forced to seek Section 19 waivers, as the expanded "jail time" definition could include time served in pretrial confinement, for civil infractions, in home confinement, under parole, on probation, or in a halfway house - all of which sometimes impose a "significant restraint on an individual's freedom of movement." In 2014, approximately 3,789,800 individuals were on probation and approximately 870,500 individuals were on parole in the United States - and many of those people could be considered to be experiencing a significant restraint on their freedom of movement.

This expansive new definition would disqualify low-risk individuals who were confined or who had their freedom of movement restricted for failure to pay a low-grade traffic fine, for example, or who could not afford to pay bail. The proposed re-definition of "jail time" would also undermine the FDIC's effort to reduce regulatory burdens, as many more low-risk, qualified applicants will not qualify for the Section 19 *de minimis* exception and will be forced to submit a Section 19 waiver application that both covered institutions and the FDIC will have to process. Accordingly, we recommend that the FDIC refrain from further defining "jail time," instead leaving the Statement of Policy as is.

5. The Statement of Policy Should Remove the Section 19 Waiver Application Requirement for Individuals Convicted of Drug Manufacture, Sale, or Trafficking Offenses That Have No Relation to "Dishonesty or a Breach of Trust or Money Laundering;" and Clarify that a Drug Manufacture, Sale or Trafficking Offense Does Not in and of Itself Involve "Dishonesty or a Breach of Trust or Money Laundering."

Currently, many persons with drug-related convictions are required to undergo the Section 19 waiver application process. The underlying statute does not specifically mention drug-related offenses; Section 19 of the FDI Act prohibits a person convicted of "any criminal offense 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 a prosecution for such offense," from participating directly or indirectly in the conduct of the affairs of an insured institution, without the prior consent of the FDIC. However, in its existing Statement of Policy interpreting Section 19, the FDIC currently requires all individuals convicted of drug manufacture, sale, or trafficking offenses to file a Section 19 waiver application with the FDIC.

The FDIC is seeking comments on whether allowing the *de minimis* treatment for certain minor drug crimes would be beneficial. Specifically, while the FDIC proposes to continue requiring individuals with convictions or program entries for offenses involving the illegal manufacture, sale, distribution of, or trafficking in controlled substances to file a Section 19 waiver application, the FDIC also proposes to add an exemption to Section 19 waiver requirements for persons with these convictions or program entries who also fall within the provisions for *de minimis* offenses discussed in the section II.B.4 of this document, supra.

We commend the FDIC for proposing language that would exempt individuals convicted of certain drug offenses from being required to file a Section 19 waiver application if they meet the *de minimis* requirements. However, we believe the FDIC's proposed change is insufficient. Individuals convicted of drug-related offenses should not be required to file a Section 19 waiver application, as the underlying statute, Section 19 of the FDI Act, does not make any reference to mandated Section 19 waivers for persons with drug-related offenses. The proposed *de minimis* requirements still preclude many individuals convicted of minor drug offenses from being exempted from filing the Section 19 waiver application.

The FDIC's proposal would allow persons with certain drug-related convictions to be exempted from Section 19 waiver requirements, but only if those persons meet all of the general *de minimis* requirements discussed in the previous section. This means that persons with covered drug-related convictions would also have to have been convicted of offenses punishable by imprisonment for a term of one year or less and/or a fine of $2,500 or less.

The FDIC's change will not be effective in benefiting some qualified applicants with relevant drug-related convictions, since the mandatory minimum federal sentences imposed for even very minor drug offenses push these applicants over the threshold used by the FDIC to establish whether a conviction fits into the *de minimis* exempted category. Specifically, if an individual is convicted of drug manufacture, sale, or trafficking offenses under the Federal Criminal Code, they face mandatory minimum penalties in sentencing. The lowest mandatory minimum for the aforementioned drug offenses is five years. The mandatory minimum penalty increases to ten years if an individual is found with a greater quantity of the proscribed drug, or if the individual has a prior conviction for a felony drug offense. Mandatory minimum penalties are assessed to a defendant based on the quantity and type of controlled substance at issue in the case. Mandatory minimum penalties are not tied to the "dishonesty or breach of trust of money laundering" that the FDIC is rightfully concerned about. As they do not relate to the "dishonesty or breach of trust or money laundering" discussed in Section 19 of the FDI Act, these mandatory minimum penalties should not stand as a bar for an individual being exempted from filing a Section 19 waiver application.

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The *de minimis* provision requiring that an offense be punishable by a term of one year or less effectively removes any individual federally convicted of a drug-related offense from the purview of the exemption. Taken together, the actual effects of the broadened *de minimis* exemptions undermine the FDIC's intent in proposing its new language. The proposed expansions will essentially do nothing more than what the existing Statement of Policy provides.

a) The Statement of Policy should not require individuals convicted of drug manufacture, sale, or trafficking offenses that have no relation to "dishonesty or breach of trust or money laundering" to file a Section 19 waiver application.

The FDIC should amend its Statement of Policy to remove the Section 19 waiver application requirement for persons convicted of the illegal manufacture, sale, distribution of, or trafficking of controlled substances, and clarify that a drug manufacture, sale, distribution, or trafficking offense does not in and of itself constitute "dishonesty or a breach of trust or money laundering." Requiring a Section 19 waiver application from individuals convicted of these offenses is overly broad and inconsistent with the underlying statutory language in Section 19 of the FDIC Act.

Courts have consistently held that drug offenses are not inherently crimes of dishonesty. The crimes of illegal manufacture, sale, distribution of, or trafficking in controlled substance are distinct offenses. Federal law recognizes this and treats money laundering and drug offenses as separate and distinct crimes. The Proposed Statement of Policy does not adequately resolve this issue, and instead still imposes a blanket requirement of Section 19 waiver applications for all offenses concerning the illegal manufacture, sale, distribution of, or trafficking in controlled substances, unless the convictions fall within narrow and difficult to reach *de minimis* exceptions.

b) If the FDIC Does Not Completely Exempt Individuals Convicted of Drug Manufacture, Sale, or Trafficking Offenses from Filing a Section 19 Waiver Application, It Should List Conviction or Program Entries for Minor Drug Offenses under Section IV.B.5(B) "Additional Applications of the *De Minimis* Offenses Exception to Filing."

The FDIC does not provide a justification for categorizing drug-related crimes as crimes of dishonesty. However, in its Proposed Statement of Policy, the FDIC exempts persons convicted of crimes related to insufficient funds checks and small-dollar simple theft from Section 19 waiver requirements. These offenses relate more to the "dishonesty" that is specifically proscribed by the FDIC Act than do minor drug offenses. Furthermore, drug offenses are not listed in the underlying statute. Since drug offenses are not listed in the underlying statute, we reiterate that persons with drug convictions should not be required to file Section 19 waiver applications. We urge the FDIC to take this approach. However, if this were not possible, the FDIC could - at an absolute minimum - list convictions or program entries for minor drug offenses as independent, *de minimis* exceptions. By specifically including minor drug offenses as an additional application of the *de minimis* offense exception to filing, individuals convicted of minor drug

offenses would not have to squeeze into the narrow, "general" *de minimis* requirements listed in Section IV.B.5(A).

D. Section "4. C. Procedures" of the Proposed Statement of Policy (FDIC Notice, IV.C, 83 Fed. Reg. at 812).

1.The Statement of Policy Should Increase Access to and Transparency of the Section 19 Waiver Application Process by Clarifying the Process for Job Applicants in Plain Language on the FDIC Website and on Waiver Forms; Requiring Financial Institutions to Provide Notice of the Section 19 Waiver Application Process and Make Waiver Forms Easily Available to Job Applicants; and Shortening the Processing Time of Section 19 Waiver Applications by Permitting the FDIC to Verify Documents Already in the Applicant's Possession.

The FDIC's existing Statement of Policy directs individuals to obtain and file Section 19 waiver applications with the appropriate FDIC Regional Director and states that the insured institution must file the application on behalf of an applicant, unless the FDIC grants a waiver of that requirement. However, it does not include language that provides direction to individual applicants should a covered institution fail to file a Section 19 waiver application with the FDIC on behalf of the applicant.

The FDIC proposes adding language to its "Procedures" subsection clarifying that individual applicants file their application with the FDIC Regional Office covering the state where the individual lives. The Proposed Statement of Policy also provides additional direction on the appropriate Regional Office with which an individual must file a Section 19 waiver application. Finally, the Proposed Statement of Policy provides guidance for applicants about the Section 19 waiver application process and states that "[t]he application must be filed by an insured institution on behalf of a person (bank-sponsored) unless the FDIC grants a waiver of that requirement (individual waiver)." These changes begin to provide additional guidance for individual applicants, both by differentiating between bank-sponsored applications and individual waiver applications, and clarifying with whom the individual should submit their individual Section 19 waiver application.

We commend the FDIC for proposing language that would clarify the application process for individual applicants, and most specifically we support the FDIC's clarifications differentiating between bank-sponsored applications and individual Section 19 waiver applications. The existing Statement of Policy does not even mention the individual section 19 waiver application requirement. However, even with the added language, the individual waiver application process remains largely inaccessible and is not user-friendly. We recommend that the FDIC adopt additional measures that would increase transparency and access to the Section 19 application process.

Section 19 of the FDI Act requires financial institutions to request the FDIC's permission to employ a person with a conviction for dishonesty, breach of trust, money laundering, or several drug offenses by requesting a waiver from the FDIC - a process most financial institutions rarely use. If an institution fails

to seek a Section 19 waiver on behalf of an applicant, that applicant's only recourse is to apply for a waiver in his or her personal capacity, which requires that the individual demonstrate "substantial good cause" for granting a waiver. There are several problems with this process. Prospective employees are often unaware of the opportunity to apply for the waiver individually, and the Section 19 waiver application process is poorly explained - even on the FDIC's own website and materials. Indeed, only 17 individual waiver requests were submitted during the last three years - an astoundingly small number given that the industry employs more than two million people.

Persons seeking employment with financial institutions, especially those seeking low wage, clerical, maintenance, service, or purely administrative positions, face substantial and unreasonable barriers to employment with covered institutions. These barriers include lack of access to the requisite Section 19 waiver application forms; confusing waiver forms and processes; and potential employer unwillingness to submit Section 19 waiver applications. As a result, large numbers of workers are locked out of the financial industry, and the financial sector is deprived of access to an otherwise qualified workforce.

Though the Proposed Statement of Policy provides some additional guidance on the application process for individual applicants, the FDIC can still do more to increase the transparency of the application process and accessibility to Section 19 waiver application materials for individual applicants. The Proposed Statement of Policy adds language explaining that an application must be filed by an insured institution on behalf of an individual unless the FDIC grants a Section 19 waiver of that requirement. It also provides guidance to individual applicants on where and how to file individual Section 19 waiver applications with the appropriate Regional Office. However, the proposed language about the "individual waiver" and showing of "substantial good cause" is still vague. This language is present in the existing Statement of Policy, and the new language does nothing to remedy the disconnect between the two requirements. The FDIC should require regulated insured institutions to provide all job applicants with notice about the pertinent regulation and the Section 19 waiver application process, and provide the FDIC's waiver application form if the financial institution will not seek a Section 19 waiver on the applicant's behalf.

The Proposed Statement of Policy also does not specify that the Section 19 application is available online. Indeed, when an individual accesses the FDIC website, they have to click through five links before arriving at the application itself. Once accessed, the application still contains block quotes of the FDIC's policy and is difficult for most laypersons to understand. In order to make its application more accessible and its process more transparent, the FDIC should provide a link to the application within its Statement of Policy. In addition, the FDIC website and the application and Section 19 waiver forms should explain the process and the relevant law in plainer and more accessible language.

Finally, the FDIC should decrease its Section 19 waiver application review process time to fewer than 60 days. This is feasible because, in most cases, waiver applicants have already acquired the relevant documents. Instead of conducting an entirely new investigation to obtain these documents anew, the FDIC could save substantial time and decrease its regulatory burden by permitting reviewers to verify the documents that individual applicants already have.

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E. Section "5. D. Evaluation of Section 19 Applications" of the Proposed Statement of Policy (FDIC Notice, IV.D, 83 Fed. Reg. at 812).

1. The Statement of Policy Should Better Instruct Reviewers on How to Consider the Passage of Time Since Conviction and the Relevance of Prior Offenses When Evaluating Section 19 Waiver Applications, and Should Ensure That Applicants Filing Section 19 Waiver Applications on Their Own Behalf Provide Reviewers with Information Regarding the Position Sought.

The FDIC's existing Statement of Policy describes the criteria to be applied by reviewers evaluating Section 19 waiver applications. The factors most pertinent to our discussion that the Statement of Policy instructs reviewers to consider are: "the specific nature of and circumstances of the covered offense," "evidence of rehabilitation including the person's...age at the time of conviction or program entry, and the time that has elapsed since the conviction or program entry," "the position to be held," and "the amount of influence and control the person will be able to exercise over the management or affairs of an insured institution." Section D also describes the approval process for Section 19 waiver applications.

The FDIC proposes several changes to this section of the policy. In the explanatory commentary that precedes the FDIC's Proposed Statement of Policy, the FDIC states that the proposed changes seek to generally clarify Section D of the Statement of Policy, as well as to ensure the factors set forth in the Statement of Policy more closely follow the factors listed in 12 C.F.R. 308.157, the FDIC's regulation for evaluating Section 19 applications. We support the FDIC's efforts to provide consistent guidance regarding how Section 19 waiver applications are to be evaluated.

However, these proposed changes still do not address key deficiencies in the existing waiver review process. Specifically, the Statement of Policy does not adequately instruct reviewers on how to consider the passage of time since conviction and the relevance of prior offenses when evaluating Section 19 waiver applications. In addition, the Statement of Policy does not address shortcomings with the current Section 19 waiver application form that effectively prevent applicants who are filing Section 19 waiver applications on their own behalf from providing information regarding the position sought. We discuss each of these problems and our recommendations below.

a) The Statement of Policy Should Provide Clarification on How to Evaluate the Passage of Time Since Conviction and the Relevance of Prior Offenses.

The proposed changes to Section D of the Statement of Policy do not adequately assist reviewers in determining whether an applicant should be granted a Section 19 waiver application. In order to ensure that reviewers are fairly and accurately evaluating whether a person should be barred from employment because of a prior conviction, we recommend that the FDIC update its Statement of Policy so that reviewers understand how to consider (1) the passage of time since conviction, including widely accepted

research demonstrating the minimal risk of recidivism among persons who do not recidivate within seven years of their most recent conviction, and (2) the relevance of a prior conviction to the applicant's ability to satisfactorily perform the position sought. These changes would make the FDIC's Statement of Policy more consistent with the 2012 EEOC Guidance. We recommend that the FDIC amend its Statement of Policy as outlined below in order to ensure that reviewers are making fair and informed decisions on whether to approve Section 19 waiver applications.

(1) The Statement of Policy Should Clarify for Reviewers How to Evaluate the Passage of Time Since Conviction.

First, we recommend that the FDIC update its Statement of Policy so that reviewers understand how to consider the passage of time since conviction. Specifically, when evaluating Section 19 waiver applications, reviewers should be aware that, according to research, the risk of recidivism among persons who do not recidivate within seven years of their most recent conviction is no different than that of persons without conviction records. The 2012 EEOC Guidance specifically cites this research.

Currently the FDIC's Statement of Policy instructs reviewers to consider passage of time since conviction as evidence of an applicant's rehabilitation. We support the inclusion of this instruction.

However, the Statement of Policy could be improved by indicating for reviewers that, consistent with the 2012 EEOC Guidance, the risk that an individual poses of committing future misconduct is vastly reduced when seven or more years have passed since an applicant's conviction. Therefore, we recommend that the FDIC adopt the following language in the its Statement of Policy (underlined language varies from the Proposed Statement of Policy) at D(3).

D(3) Evidence of rehabilitation including the person's reputation since the conviction or program entry, the person's age at the time of conviction or program entry, and the time that has elapsed since the conviction or program entry. It is strong evidence of rehabilitation when a covered person has no additional convictions within seven years of their most recent conviction

(2) The Statement of Policy Should Clarify for Reviewers How to Evaluate the Relevance of Prior Offenses.

We also recommend that the FDIC update its Statement of Policy so that reviewers, when considering whether to approve a Section 19 waiver application, consider the extent to which the nature and circumstances of a prior offense relate to the applicant's ability to successfully perform the duties of the position sought.

Certain offenses that may be covered by Section 19 (e.g., bank fraud while employed at an FDIC-insured institution) are more relevant to an applicant's ability to successfully work at an insured institution than

others (e.g., prior minor drug offenses). Additionally, the relevance of a prior offense depends on the nature of the position sought - a person's prior conviction for money laundering is more relevant to that person's ability to successfully work as a manager at an insured institution than as a courier. The 2012 EEOC Guidance instructs employers that prior convictions that are not relevant (i.e. not "job-related") to the position sought should not be considered during the employer's hiring process.

The FDIC's Proposed Statement of Policy instructs reviewers to consider a variety of factors pertaining to the nature of the prior offense and of the position sought. However, the Statement of Policy should provide more detail to instruct reviewers to consider how relevant the nature and circumstances of the prior offense are to the applicant's ability to perform the duties of the job for which he or she is applying.

The Statement of Policy could be improved by instructing reviewers to consider the extent to which the prior convictions are "job-related" by comparing and considering the relationship between the prior offenses and the applicant's ability to successfully perform the duties of the position sought. Accordingly, using the 2012 EEOC Guidance to ensure that reviewers have useful guidance to fairly and reliably evaluate Section 19 waiver applications, we recommend that the FDIC amend its Statement of Policy to consider the following as a new factor for evaluating these applications:

The extent to which the specific nature and circumstances of the covered offense relate to the duties and essential functions of the applicant's prospective position; the circumstances under which they will be performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals); and the work environment in which they will be performed (e.g., out of doors, in a warehouse, in a private home).

b) The Statement of Policy Should Ensure That Applicants Filing Section 19 Waiver Applications on Their Own Behalf Provide Reviewers With Information Regarding the Position Sought by the Applicant.

We are also concerned that neither the Statement of Policy nor the Proposed Statement of Policy address shortcomings with the Section 19 waiver application forms themselves. Specifically, we are concerned that the Section 19 waiver application form effectively prevents an employee who is filing a Section 19 waiver application on his or her own behalf from providing information regarding the position sought.

The Statement of Policy instructs waiver reviewers to consider the nature of the position sought when evaluating whether the FDIC should exert Section 19 authority over the applicant. The FDIC's Statement of Policy indicates that the FDIC will generally approve Section 19 waiver applications without extensive review for applicants "who will occupy clerical, maintenance, service, or purely administrative positions." The Statement of Policy explains that persons seeking such positions "will not be in a position to constitute a substantial risk to the safety and soundness of the insured institution," even if they do have convictions or program entries that otherwise would require them to file a Section 19 waiver application.

Thus, it is important for reviewers to consider information regarding the position sought in order to fairly and accurately evaluate a Section 19 waiver application. Accordingly, it is essential that all applicants know to provide information regarding the position sought when completing the application form, and know where in the form to provide that information.

However, the current application form does not adequately ensure that all applicants will know to provide reviewers with information regarding the position sought. The application form instructs prospective employees filing individual waivers not to complete the section of the application that explicitly requests information regarding the position sought. While the application does not preclude prospective employees from providing this information in the "Individual Waiver Statement" section of the application - where persons seeking individual waivers are instructed to provide information supporting the approval of their application – the FDIC does not propose additional changes that would provide helpful guidance on the types of information that would support Section 19 waiver application approval.

The current instructions on Section 19 waiver application forms effectively ensure that individuals filing Section 19 waiver applications on their own behalf will not provide reviewers with essential information regarding the position sought or its corresponding duties and work environment. As a result, reviewers will often be unable to determine whether an individual applicant is seeking a clerical, maintenance, service, or purely administrative position and is thus eligible for approval without extensive review, preventing that reviewer from fairly and accurately evaluating these individual Section 19 waiver applications. The Proposed Statement of Policy does not address these issues.

Accordingly, we recommend that the FDIC amend its Statement of Policy to ensure that the FDIC's Section 19 waiver application forms explicitly instruct all applicants to submit information regarding the position sought and its corresponding duties and work environment. We recommend that the FDIC add the following language to Section D:

Each section of the application form will identify all of the foregoing factors that are relevant to that section of the application, so that an applicant is better able to provide all information relevant to the evaluation of his or her application (e.g., the nature of the applicant's prospective position at the FDIC-insured institution), and knows where to provide that information.

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2. The Statement of Policy Should Instruct Reviewers to Consider Certain Other Factors When Evaluating Section 19 Waiver Applications, Namely, the Person's Age at the Time of Conviction, Evidence that the Person Has Performed Similar Work Pre-Conviction Without Incident, and the Length and Consistency of the Person's Employment History.

We recommend that the FDIC add three additional evaluating factors to its Statement of Policy to ensure that reviewers are fairly and accurately evaluating Section 19 waiver applications. These factors are: (1) the person's age at the time of conviction, (2) evidence that the person has performed similar work pre-conviction without incident, and (3) the length and consistency of the person's employment history. The 2012 EEOC Guidance instructs employers to consider these factors when evaluating applicants with prior convictions in order to ensure that these employers' hiring practices comply with Title VII.

We recommend that the FDIC amend its Statement of Policy to instruct reviewers to positively consider the following factors:

- A person's older age at the time of conviction. Specifically, research shows that persons of older age at the time of their first conviction are less likely to recidivate than persons of younger age.
- Evidence that the person has performed the same type of work post-conviction without recidivating. Specifically, persons who have performed a similar type of work post-conviction without recidivating are unlikely to recidivate when employed at an FDIC-insured institution.
- The length and consistency of employment history both before and after the conviction. Specifically, persons with long and consistent employment histories are unlikely to recidivate when employed at an FDIC-insured institution.

III. Conclusion

We appreciate the FDIC's solicitation of comments on its Proposed Statement of Policy on Section 19. We urge the FDIC to adopt the recommendations made above and continue to take steps necessary to ensure that qualified workers with conviction or program entry histories—but who do not pose safety or soundness risks—do not lose the job opportunities they desperately need to support their families.

Thank you for your consideration of our comments and recommendations. If you have any questions, please feel free to contact Senior Counsel Sakira Cook at cook@civilrights.org or (202) 263-2894.

Sincerely,

[redacted]

Vanita Gupta
President & CEO