American Bankers Association
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Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
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Attention: Comments

RE: Notice of Proposed Rulemaking - 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 American Bankers Association[1] appreciates the opportunity to comment on FDIC's Notice of Proposed Rulemaking (Proposal)[2] - Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals. The Proposal would: revise existing regulations requiring FDIC's prior written consent before persons convicted of certain criminal offenses may participate in the conduct of the affairs of any depository institution; would incorporate FDIC's existing Statement of Policy (SOP)[3] on administration of Section 19 of the Federal Deposit Insurance Act (FDIA)[4]; and would amend the regulations setting forth FDIC's procedures and standards applicable to an application to obtain FDIC's prior written consent. The proposed incorporation of the SOP into FDIC's regulations would provide greater transparency as to its application, provide greater certainty about the FDIC's application process, and help both insured depository institutions and affected individuals to understand its impact and to potentially seek relief from its provisions.

ABA's members understand the critical importance of the objectives of Section 19 and the Proposal - our members must continually balance the need to attract and 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. ABA supports the overall Proposal as striking an effective and reasonable balance between these objectives. In particular, the Proposal's scope of *de minimis* covered offenses (for which FDIC automatically will grant consent for the individual's employment with the bank) is appropriate.

[1] The American Bankers Association is the voice of the nation's $18.6 trillion banking industry, which is composed of small, regional and large banks. Together, America's banks employ more than 2 million men and women, safeguard $14.5 trillion in deposits and extend more than $10.5 trillion in loans.
[2] 84 *Federal Register* 68,353 (December 16, 2019), *available at* https://www fdic.gov/news/board/2019/2019-11-19-notice-dis-b-fr.pdf
[3] *See* https://www.fdic.gov/regulations/laws/rules/5000-1300.html.
[4] 12 U.S.C. 1829.

As discussed below, we believe that FDIC should take this opportunity to address several points on which it could improve the Proposal. Specifically, FDIC should (1) include language to support insured institutions faced with state and local laws that restrict background checks and other reasonable actions needed for the bank to comply with Section 19 requirements, and (2) clarify application of Section 19 to contractors retained by insured institutions.

Addressing Conflicts Between Section 19 and State and Local Laws

Existing state and local laws may limit a bank's ability to seek information relevant to compliance with Section 19, which may result in the bank unnecessarily expending resources to consider an applicant who ultimately proves to be ineligible. For example, the City of New York prohibits an employer from inquiring about a job applicant's criminal conviction until after the employer has extended a conditional offer of employment to the applicant.[5] Other states' laws prohibit an employer from asking an applicant about expunged records[6] or permit an applicant not to reveal the conviction on an employment application.[7] In addition, the City of New York prohibits an employer, in its advertisement of an open position, from stating that a background check will be required prior to hire.[8]

Although these state and local laws may be well intentioned, they make it more difficult for banks to comply with Section 19's requirements. The FDIC should clarify that a bank may ask individuals seeking employment with the bank about the individual's criminal history related to crimes of dishonesty, breach of trust or money laundering (except with respect to matters subject to a "complete expungement," as defined in the Proposal) at some point after the application but prior to extending a formal offer of employment. The FDIC also should clarify that a bank can make known to the public, including but not solely directed at job applicants, that the potential hiring of an individual who has been convicted of a criminal offense will be subject to Section 19. The FDIC should state that any state or local law that conflicts with these actions by the bank is preempted.

[5] New York City, N.Y., Local Law No. 63 Int. No. 318-A (2015) (available at: https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/Int.%20No%20318.pdf) [hereinafter, New York City Local Law No. 63].
[6] *See, e.g.*, N.C. Gen. Stat. Ann. § 15A-153 (2019) (available at: https://www.ncleg net/Sessions/2013/Bills/Senate/PDF/S91v5.pdf).
[7] *See, e.g.*, Ky. Rev. Stat. Ann. § 431.073 (West 2019) (available at: http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2016-Reg-HB-0040-2115.pdf).
[8] New York City Local Law No. 63, *supra* note 5, § 11-a(a)(1); *see also* N.Y.C. Comm'n on Human Rights, Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 53, at 5 (2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/FCA-InterpretiveGuide-052419.pdf (employment "[a]ds cannot say, for example, . . . 'background check required'").

Application of Section 19 to Contractors

A point needing clarification is the application of Section 19 to contractors. Though Section 19 and the Proposal make clear their application to "institution-affiliated parties,"[9] it is also clear that FDIC intends that some individuals who are not institution-affiliated parties would also be covered, while other individuals are not: FDIC notes that, "[t]ypically, an independent contractor does not have a relationship with the insured depository institution other than the activity for which the institution has contracted," but "[a]n independent contractor who influences or controls the management or affairs of the insured depository institution would be covered by section 19."[10]

Furthermore, the Proposal notes that the scope of employees subject to Section 19 includes "*de facto* employees, as determined by the FDIC based upon generally applicable standards of employment law."[11] Analysis of *de facto* employment status is often applied in the case of nominally independent contractors, but there are numerous and varying legal standards for this determination, depending on the purpose for which the status must be determined. For example, standards applied in interpreting the Internal Revenue Code[12] may differ significantly from standards applied in determining eligibility for workers' compensation benefits. None of these standards clearly indicates when an individual "participate[s], directly or indirectly, in the conduct of the affairs" of an institution, let alone whether he or she has any particular "degree of influence or control over the management or affairs of an insured depository institution," or has "the power to define and direct the management or affairs of an insured depository institution."

FDIC is very familiar with the extent to which insured institutions make use of a variety of contractors that significantly enhance the institutions' operations. Such arrangements provide not only the benefits of flexible resourcing, but also access to sophisticated technical expertise that individual institutions might otherwise be unable to retain or afford. Because of the wide variety that such arrangements can take, and because "generally applicable standards of employment law" invokes such a wide and varying collection of legal standards, none obviously related to the standards in Section 19, a final rule should provide significant additional clarity on its application to individuals working under various contracting arrangements, including clarification of which individuals FDIC would consider *de facto* employees.

[9] *See* id; 12 U.S.C. 1829(a)(1)(A)(i); Proposal *at* 68,359.
[10] *See* Proposal *at* 68,359.
[11] Id.
[12] *See* 26 CFR § 31.3121(d)-1.

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ABA would be pleased to discuss any additional aspects of the Proposal and the administration of Section 19. Please do not hesitate to contact the undersigned at (202) 663-5042 or hbenton@aba.com.

Very truly yours,

[redacted]

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