



March 9, 2018

Via Electronic Mail

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

Re: Proposed Statement of Policy Pursuant to Section 19 of the FDI Act

Ladies and Gentlemen:

The Clearing House Association L.L.C.¹ appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's ("FDIC") proposed changes to its Statement of Policy ("SOP") regarding section 19 of the Federal Deposit Insurance Act ("FDI Act"), which prohibits, without the FDIC's prior written consent, any person from participating in the conduct of the affairs of a bank if they have been convicted of a crime of dishonesty or breach of trust or money laundering, or have entered a pretrial diversion or similar program in connection with the prosecution for such an offense.² As noted by the FDIC, 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 The SOP, which was first adopted in 1998 and has been amended

¹ The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Association L.L.C. is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system. Its affiliate, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by launching a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume.

² 83 Fed. Reg. 807 (Jan. 8, 2018), "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."

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."

several times since, explains the manner in which the FDIC interprets and implements section 19.⁴

We support the FDIC's effort to review and seek public comment on potential amendments to the SOP. That public review and reassessment is appropriate given the considerable experience the agency has gained in considering section 19 waiver requests over the past decades of experience, and appropriately reflects the current focus by both the public and private sectors more generally on issues of employment and the labor force, including with respect to the banking sector — which is a major and significant source of jobs in the U.S. economy.

As an initial matter, it is important to note that section 19 does not create any legal obligation of any insured depository institution (“IDI”) to employ any particular individual on any particular basis. Rather, Section 19 merely provides for procedures that individuals seeking employment at IDIs and IDIs that have made the decision to employ any particular individual may follow to obtain the FDIC's specific determination that such individual may serve at an IDI because he or she does not present a safety or soundness or reputational threat to the IDI. Institutions themselves must ultimately determine their own policies and preferences for employing individuals with prior criminal (or other) histories, subject to that statutory scheme.

In the proposal, the FDIC proposes certain clarifying changes to its SOP as well as an expansion of the categories of convictions or program entries that would qualify for the *de minimis* exception from the section 19 waiver requirement. We focus our comments on the FDIC's proposed amendments to the *de minimis* exception under the SOP. As articulated more fully below, TCH supports the FDIC's proposed expansion of the category of *de minimis* offenses.

De minimis Exception

In the 1998 SOP, the FDIC adopted an exception to the prior consent requirement for individuals convicted of “*de minimis*” crimes. At the time of adoption, the FDIC 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 pose a threat to the safety and soundness of an insured institution or the interests of its depositors, or impair public confidence in the insured institution.

In the current proposal, the FDIC proposes to expand the current *de minimis* exception to encompass additional categories of offenses. The FDIC explains that it has proposed “[t]hese carefully measured changes . . . to reduce regulatory burden by decreasing

⁴ See discussion at 83 Fed. Reg. 808.

⁵ 63 Fed. Reg. at 66,181.

the number of covered offenses that will require an application, while ensuring that insured institutions are not subject to risk by convicted persons.”⁶ In particular, the FDIC is proposing to expand the *de minimis* category of offenses to include:

- Certain minor drug convictions or program entries;
- A covered conviction or program entry that occurred when an individual was 21 or younger at the time of the conviction or program entry, who also meets the general *de minimis* exception to filing and who has completed all sentencing or program requirements, if at least 30 months have passed prior to the date an application would otherwise be required.
- A conviction or program entry based on a small dollar theft of goods, services, and/or currency (or other monetary instrument) and the aggregate value of the goods, services and/or currency was \$500 or less at the time of the conviction or program entry, so long as the individual has only one conviction or program entry under Section 19, and five years have passed since the conviction or program entry.
 - Simple theft for the purposes of this exception to filing does not include burglary, forgery, robbery, embezzlement, identity theft and/or fraud. Additionally, if the conviction or program entry occurred when the individual was 21 or younger, then the five-year period would be reduced to 30 months.
- Multiple convictions or program entries for bad or insufficient funds checks, provided that the aggregate value of all the checks across all the convictions or program entries is \$1,000 or less; the current requirement that there are no other convictions or program entries subject to Section 19, and that no insured financial institution or credit union was a payee on any of the checks, would remain.

We support the expansion of the *de minimis* category of offenses to include the proposed categories of convictions or program entries because we do not believe that such expansion would present increased safety and soundness or reputational risk to IDIs. The FDIC has proposed that the additional offenses be considered *de minimis* under section 19 because the FDIC has determined that individuals convicted of such crimes do not pose a threat to the safety and soundness or reputation of an IDI. Indeed, the FDIC has indicated that it has approved waiver applications of individuals convicted of such crimes with no negative consequences to the employing IDI. Thus, were the requirement to obtain a waiver for the proposed new *de minimis* categories retained, presumably the FDIC would continue to grant such waivers with respect to those institutions seeking to employ such individuals based on the determination that no threat would be presented to the IDI. The addition of the proposed categories to the *de minimis* exceptions would simply eliminate burden for the FDIC, for institutions, and for individuals seeking employment at IDIs.

Further, institutions themselves have a vested interest in their own safety and soundness and reputations. In this regard, institutions can and should make their own risk assessments regarding the employment of individuals generally, including those with criminal histories, with the institution’s safety and soundness and reputations in mind. As noted, section 19 does not create any legal obligation of any insured depository institution to

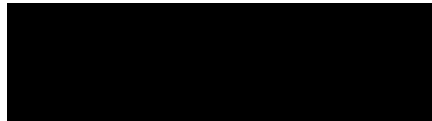
⁶ 83 Fed. Reg. at 807.

employ any individual on any basis, nor would the expansion of the *de minimis* exception compel institutions to employ individuals with any criminal background, however minor. The expansion of the *de minimis* category of offenses would simply allow IDIs that have made the decision to employ individuals with convictions or program entries that are *de minimis* in nature to employ such individual without the additional burden of seeking the FDIC's approval.

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The Clearing House appreciates the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at (202) 649-4619 or by email at paige.pidano@theclearinghouse.org.

Respectfully submitted,



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