



January 16, 2024

James P. Sheesley, Assistant Executive Secretary
Attention: Comments (RIN 3064–AF92)
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Fair Hiring in Banking Act; FDIC RIN 3064–AF92; 88 FR 77906 (Nov. 14, 2023)

Dear Mr. Sheesley:

Better Markets¹ appreciates the opportunity to comment on the proposed amendments² (“Proposal”) to the Federal Deposit Insurance Corporation (“FDIC”) regulations to conform them with the Fair Hiring in Banking Act (“FHBA”).³

Specifically, the Proposal would change and update the implementation of Section 19 of the Federal Deposit Insurance Act (“FDI Act”), which generally prohibits persons who have been convicted of certain crimes from being employed by or participating in the affairs of FDIC-insured banks (“banks”). The Proposal would exclude or exempt certain older offenses, offenses committed by persons who are 21 years old or younger, and certain lesser offenses from the scope of Section 19. As a result of these changes, once final, some persons who currently need to file an application with the FDIC to request permission to work with or become affiliated with a bank would no longer need to apply.

We support the Proposal and urge the FDIC to implement the changes to its regulations as soon as practicable. Specifically, first, these changes would align the FDIC’s rules with the FHBA. Second, the changes would remove barriers and costs for persons who have committed minor crimes, enabling them to work for banks. This could potentially increase employment opportunities for minorities, who account for the largest share of the convicted population. Third,

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

² Fair Hiring in Banking Act; FDIC RIN 3064-AF92; 88 FED. REG. 77906 (Nov. 14, 2023), <https://www.federalregister.gov/documents/2023/11/14/2023-23853/fair-hiring-in-banking-act>.

³ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Public Law 117–263, 136 Stat. 2395, 3411, Section 5705, <https://www.govinfo.gov/content/pkg/PLAW-117publ263/pdf/PLAW-117publ263.pdf>.

the changes would reduce administrative burdens related to the application process and benefit individuals and banks seeking Section 19 waivers, as well as the FDIC. Finally, as FDIC Board Member Rohit Chopra highlighted, the Proposal marks a step toward greater parity, *but not nearly enough*, in the treatment of prospective low-level bank employees relative to bank executives. It is fundamentally unfair, particularly for low-level job applicants, who have committed minor offenses to face a permanent ban on ever working at a bank while top executives at the largest banks—many of whom have repeatedly allowed widespread consumer abuses, money laundering, and a range of other serious financial crimes—are rarely held accountable in any fashion.⁴

BACKGROUND

Within the FDI Act enacted by Congress in 1950,⁵ Section 19 serves as the basis for the FDIC’s rules governing hiring by insured banks. That section, along with the FDIC’s implementing regulations, generally prohibits persons who have been convicted of certain crimes from becoming affiliated with a bank, as an employee or in other positions of ownership or control. Section 19 focuses on persons who have been convicted of criminal offenses involving dishonesty, breach of trust, or money laundering.

The FDIC currently has an application process that individual persons or banks can use to seek a Section 19 waiver. Through this process, the FDIC considers several factors such as the nature of the offense, evidence of rehabilitation, the position and degree of influence that the person would have, and the management oversight that the bank would provide. This application and approval process requires the expenditure of considerable time and resources by both the applicant and the FDIC.

Over the last few decades, the FDIC has issued several Statements of Policy⁶ (“SOP”) that, in part, attempted to refine definitions in Section 19 to make it less restrictive. In 2020, the FDIC

⁴ Consumer Financial Protection Bureau, *Statement of CFPB Director Rohit Chopra, Member, FDIC Board of Directors, on the Proposed Rule Regarding Lifetime Banking Bans for Certain Criminal Offenses* (Oct. 24, 2023), <https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-member-fdic-board-of-directors-on-the-proposed-rule-regarding-lifetime-banking-bans-for-certain-criminal-offenses/>.

⁵ Federal Deposit Insurance Act of 1950, 12 U.S.C. 1829, Section 19, <https://www.govinfo.gov/link/uscode/12/1829>.

⁶ *See e.g.*, 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, 63 FED. REG 66177 (Dec. 1, 1998), <https://www.federalregister.gov/documents/1998/12/01/98-31915/statement-of-policy-pursuant-to-section-19-of-the-federal-deposit-insurance-act-concerning>;

issued a final rule⁷ that contained the SOP and other details that took some positive steps toward limiting the scope of offenses that would prevent a person from becoming employed or otherwise involved with a bank, including:

- **Expungements:** All covered offenses that had been expunged or sealed by a court were excluded from the rule.
- **De minimis offenses:** The offenses for which a person will be deemed automatically approved and no application will be required were expanded to include small-dollar theft of \$1000 or less and the use of a fake or false identification by a person under the age of 21 to circumvent age-based restrictions on purchases, activities, or entry (not just alcohol-related purposes). Also, the minimum number of de minimis offenses was increased and the waiting period for persons with just one de minimis offense was eliminated.
- **Application procedures:** The 2020 rule also clarified when and how an application must be filed, the application types available, how the FDIC will evaluate an application, and information about application denials.

SUMMARY OF THE PROPOSAL

The Proposal builds on the 2020 final rule and makes additional changes to the implementation of Section 19, mainly to align with the FHBA, including items related to the types of offenses covered, the effect of the completion of sentencing or pretrial-diversion program requirements, and the FDIC's procedures for reviewing applications. As mentioned earlier, the changes will further narrow the scope of offenses covered by Section 19.

Statement of Policy for Section 19 of the Federal Deposit Insurance Act, 72 FED. REG 73823 (Dec. 8, 2007), <https://www.federalregister.gov/documents/2007/12/28/E7-25128/statement-of-policy-for-section-19-of-the-federal-deposit-insurance-act>, with correction issued at 73 FED. REG 5270 (Oct. 13, 2008), <https://www.federalregister.gov/documents/2008/01/29/Z7-25128/statement-of-policy-for-section-19-of-the-federal-deposit-insurance-act>; Clarification of Statement of Policy, 76 FED. REG 28031 (May 13, 2011), <https://www.federalregister.gov/documents/2011/05/13/2011-11790/clarification-of-statement-of-policy>;

Modifications to Statement of Policy for Section 19 of the Federal Deposit Insurance Act, 77 FED. REG 74847 (Dec. 18, 2012), <https://www.federalregister.gov/documents/2012/12/18/2012-30351/modifications-to-statement-of-policy-for-section-19-of-the-federal-deposit-insurance-act>;

Modifications to the 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, 83 FED. REG 38143 (Aug. 3, 2018), <https://www.federalregister.gov/documents/2018/08/03/2018-16634/modifications-to-the-statement-of-policy-pursuant-to-section-19-of-the-federal-deposit-insurance-act>.

⁷ Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals, FDIC RIN 3064-AF19, 85 FED. REG 51312 (Sept. 21, 2020), <https://www.federalregister.gov/documents/2020/08/20/2020-16464/incorporation-of-existing-statement-of-policy-regarding-requests-for-participation-in-the-affairs-of>.

More specifically, the Proposal includes the following amendments to the current rule:

- Section 19 would not apply at all for certain offenses if more than one year has passed since the conviction or program entry, including: using fake identification; shoplifting; trespassing; fare evasion; and driving with an expired license or tag. All offenses that occurred more than seven years ago would also be excluded.
- The definition of “criminal offense involving dishonesty” that is a key part of determining whether a Section 19 application is needed would exclude offenses involving the possession of controlled substances and criminal offenses committed more than one year before the date of application.
- The determination of whether an offense has been expunged, dismissed, or sealed, and therefore excluded from the Section 19 scope would be widened to align with the FHBA.
- Other details and definitions would be included to:
 - provide specific metrics to determine ownership and control in a bank, which determines whether a Section 19 application is required;
 - eliminate the need to provide certified copies of criminal records in most cases; and
 - clarify that banks must make a reasonable and documented inquiry to verify a person’s history to ensure that Section 19 is implemented appropriately.

SUMMARY OF COMMENTS

We applaud the FDIC’s proposed changes to its regulations implementing Section 19. Alignment of the FDIC rules with the FHBA is the right thing to do and is required by law.

Our additional comments are summarized as follows:

- The proposed changes will benefit society through the removal of employment barriers, particularly for minorities and the banks that hire them. While all Americans could benefit from the Proposal, minorities will likely benefit most, since they make up the largest share of the population of convicted persons in the U.S.
- The proposed changes will reduce Section 19 filing costs. We expect that the changes will result in less unnecessary and burdensome paperwork for applicants, banks, and the FDIC.
- While the Proposal is a step in the right direction, it highlights the need for more work among the banking regulators to increase the accountability and punishment of executives responsible for major criminal offenses by the Wall Street megabanks that harm consumers and endanger financial stability. The continuing pattern of illegal conduct by the largest banks suggests that the current punishment and accountability

are insufficient to deter criminal activity or protect the American people and the financial system.

COMMENTS

I. THE PROPOSED CHANGES WILL BENEFIT SOCIETY THROUGH THE REMOVAL OF EMPLOYMENT BARRIERS, PARTICULARLY FOR MINORITIES AND THE BANKS THAT HIRE THEM.

The proposed changes to the FDIC Section 19 guidelines have the potential to increase employment opportunities for formerly convicted persons who now want to contribute productively to society. This change will not only help these individuals but also benefit their families, communities, and the banks that hire them.

While any convicted American could benefit from the Proposal, racial minorities are likely to benefit the most because they make up the majority of the convicted population. To illustrate, Chart 1 shows that the imprisonment rate of Hispanic, American Indian/Alaska Native, and Black adults in the U.S. was at least double and as much as six times higher than White U.S. adults in 2022, the most recent year for which data is available, and even higher in prior years.⁸

The Proposal will also benefit banks. While it is generally known that job applicants with criminal records are less likely than other applicants to obtain job offers, regardless of industry, one groundbreaking study⁹ explores how job applicants with criminal records perform once they are hired. The study finds that “employees with a criminal record have a much longer tenure and are less likely to quit their jobs voluntarily than other workers.” In addition, the study finds that “employees with a criminal record are no more likely than those without a record to leave their job involuntarily or for reasons of misconduct.” Employee turnover is costly for any employer. The proposed Section 19 changes could therefore not only help both job seekers but also banks whose hiring, training, and administrative costs may be reduced with less turnover.

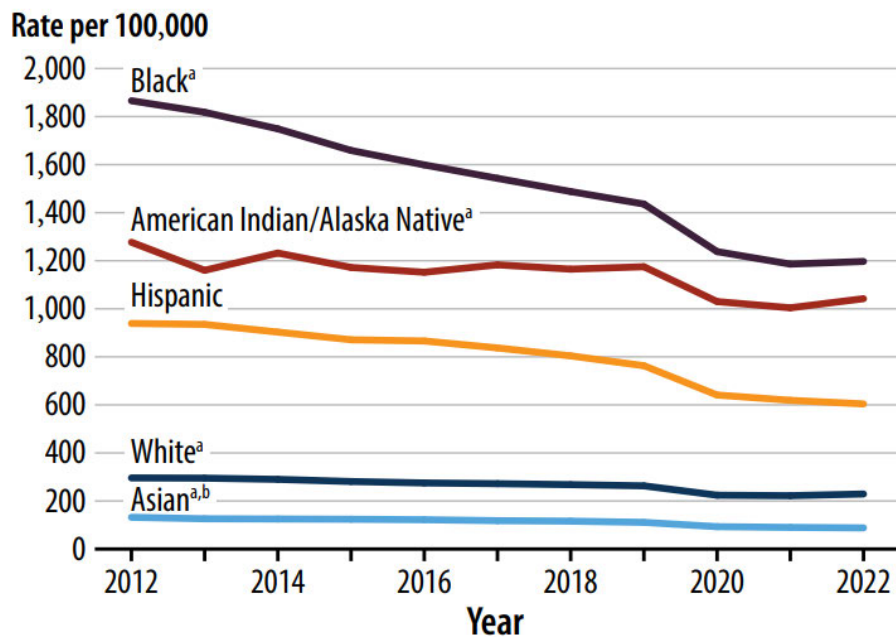
Of course, we strongly believe that the FDIC must work to safeguard the banking system. This Proposal, however, offers key changes that will enable the FDIC to fulfill its mission while also providing increased opportunities for all Americans to work in or become affiliated with banks.

⁸ E. Ann Carson & Rich Kluckow, *Prisoners in 2022 – Statistical Tables*, U.S. Department of Justice (Nov. 2023), <https://bjs.ojp.gov/document/p22st.pdf>.

⁹ Dylan Minor, Nicola Persico & Deborah M. Weiss, *Criminal Background and Job Performance*, 7 IZA J LABOR POLICY 8 (Sept. 12, 2018), <https://doi.org/10.1186/s40173-018-0101-0>.

Chart 1

Imprisonment rates of adult U.S. residents, based on sentenced prisoners under the jurisdiction of state or federal correctional authorities, by race or Hispanic origin, 2012–2022



Note: Jurisdiction refers to the legal authority of state or federal correctional officials over a prisoner, regardless of where the prisoner is held. Imprisonment rate is the number of sentenced prisoners per 100,000 U.S. residents age 18 or older in a given category. Rates are for December 31 of each year and are based on prisoners with a sentence of more than 1 year. Rates for 2021 and earlier may have been revised from previous reports.

^a Excludes persons of Hispanic origin (e.g., “white” refers to non-Hispanic white persons and “black” refers to non-Hispanic black persons).

^b Includes Asians, Native Hawaiians, and Other Pacific Islanders.

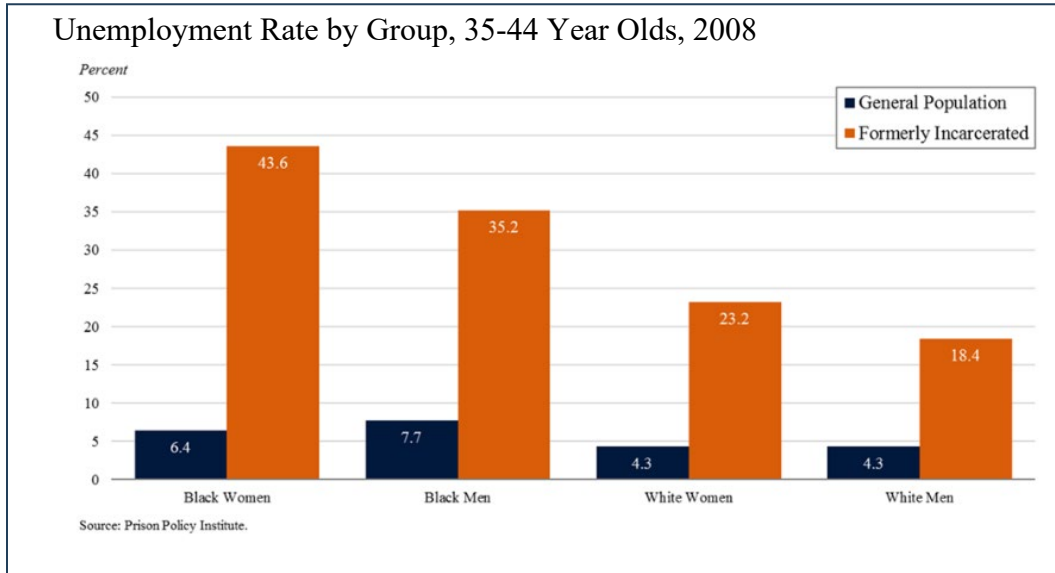
Source: Bureau of Justice Statistics, Federal Justice Statistics Program, 2022 (preliminary), National Corrections Reporting Program, 2021, National Prisoner Statistics, 2012–2022, Survey of Inmates in State and Federal Correctional Facilities, 2004, and Survey of Prison Inmates, 2016; and U.S. Census Bureau, postcensal resident population estimates for January 1 of the following calendar year.

Employment challenges for persons with a criminal record can be severe, affecting not only their economic future but also their mental, physical, and social well-being. To illustrate, as shown in Chart 2, unemployment rates for formerly incarcerated persons are far higher than the general population. Analysis from the White House Council of Economic Advisors details these extreme differences in unemployment rates between formerly incarcerated persons and the general public:

[T]he unemployment rate for formerly incarcerated Black women was about 43 percent, compared with 5 percent for their never-incarcerated counterparts; for formerly incarcerated Black men, the unemployment rate was 35 percent, compared with 6 percent for their never-incarcerated counterparts. The unemployment rates for formerly incarcerated white women and men were 23 percent and 18 percent, respectively, as opposed to 4 percent for their counterparts who were never

incarcerated. A Black-white gap in unemployment exists across all demographic groups, but having a criminal record exacerbates the difference¹⁰

Chart 2



II. THE PROPOSED CHANGES WILL REDUCE SECTION 19 FILING COSTS.

The Section 19 application process can be cumbersome, costly, and confusing for individuals and banks. Indeed, the FDIC has developed an extensive guide to explain the Section 19 filing process.¹¹ There are also FDIC staff in each regional office and in the Washington, DC headquarters office who work with the Section 19 applications. Beyond the FDIC’s resources, private lawyers peddle their services to assist individuals with Section 19 applications, often costing applicants thousands of dollars.¹²

Between 2020 and 2022, the FDIC received 27 Section 19 applications from banks and 202 applications from individual persons.¹³ By implementing the Proposal and narrowing the scope of offenses that require a Section 19 application, the FDIC, banks, and the public would save time and money. Individuals and banks would avoid filing time and costs while the FDIC would reduce staff time and resources spent assisting applicants and reviewing applications.

¹⁰ The White House, *Expanding Economic Opportunity for Formerly Incarcerated Persons* (May 9, 2022), <https://www.whitehouse.gov/cea/written-materials/2022/05/09/expanding-economic-opportunity-for-formerly-incarcerated-persons/>.

¹¹ Federal Deposit Insurance Corporation, *Your Guide to Section 19* (2021), <https://www.fdic.gov/regulations/applications/resources/brochure-section-19-rule.pdf>.

¹² See e.g., Lifeback Legal, <https://lifebacklegal.com/fdic-waiver/> (last visited Jan. 5, 2024).

¹³ Fair Hiring in Banking Act, *supra* note 2 at 77910.

III. WHILE THE PROPOSAL IS A STEP IN THE RIGHT DIRECTION, IT HIGHLIGHTS THE NEED FOR MORE WORK AMONG THE BANKING REGULATORS TO INCREASE THE ACCOUNTABILITY AND PUNISHMENT OF EXECUTIVES FOR MAJOR CRIMINAL OFFENSES BY THE WALL STREET MEGABANKS THAT HARM CONSUMERS AND ENDANGER FINANCIAL STABILITY.

The Proposal brings to light a stark disparity between the treatment of those who commit relatively minor offenses and the high-level bank executives whose banks engage in massive fraud and abuse yet face few if any consequences. The Proposal deals with individuals involved in minor offenses who face the potentially serious consequence of a lifetime ban on bank employment. At the same time, we witness the continuing record of Wall Street megabanks that consistently, and in many cases increasingly and repeatedly, break laws, discriminate against customers, and financially endanger the American people. As mentioned earlier, FDIC Board Member Rohit Chopra¹⁴ highlighted this outrageous and unfair disconnect, and we agree with his view.

As Better Markets has detailed,¹⁵ all six U.S. megabanks were heavily engaged in illegal activity before the 2008 Crash (“Crash”); they reached new heights of lawlessness in connection with the Crash; and they continue to violate the law in the post-Crash era. In fact, the lawlessness has gotten worse. As shown in Chart 3, the number of cases against just the six megabanks has doubled in the post-Crash era relative to the Crash itself and tripled since the pre-Crash era. The dollar amount of sanctions imposed on the banks during the post-Crash era has also increased relative to the pre-Crash period. Worst of all, the nature and variety of the violations are astounding and appalling, spanning virtually every conceivable type of white-collar crime, fraud, and breach of contract that a bank could commit including money laundering, market manipulation, foreclosure abuses, unlawful debt collection practices, antitrust violations, conflicts of interest, and kickback schemes. For example, in the last decade, JPMorgan has *pleaded guilty five times to criminal charges*, including:

- *Two felony counts* related to its handling of fraudster Bernard Madoff’s bank accounts and Ponzi scheme, including violations of the Bank Secrecy Act,¹⁶

¹⁴ Consumer Financial Protection Bureau, *supra* note 4.

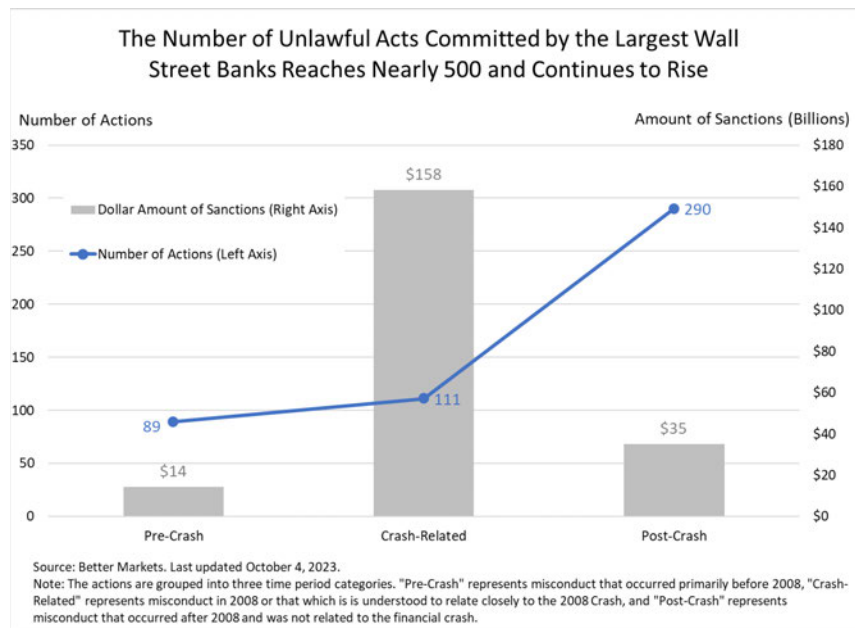
¹⁵ See BETTER MARKETS, RAP SHEET REPORT: WALL STREET’S ONGOING CRIME SPREE — 490 MAJOR LEGAL ACTIONS AND NEARLY \$207 BILLION IN FINES AND SETTLEMENTS (Oct. 12, 2023), https://bettermarkets.org/wp-content/uploads/2023/10/BetterMarkets_Wall_Street_RAP_Sheet_Report_10-2023.pdf.

¹⁶ See U.S. Attorney’s Office, Southern District of New York, *Manhattan U.S. Attorney And FBI Assistant Director-In-Charge Announce Filing Of Criminal Charges Against And Deferred Prosecution Agreement With JPMorgan Chase Bank, N.A., In Connection With Bernard L. Madoff’s Multi-Billion Dollar Ponzi Scheme* (Jan. 7, 2014), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-assistant-director-charge-announce-filing-criminal>.

- **Two felony counts** related to schemes to defraud the precious metals and U.S. Treasuries market;¹⁷
- **One felony count** for manipulation of the foreign currency market.¹⁸

Several of these offenses—like those included in Section 19—involve dishonesty, breach of trust, or money laundering, so it stands to reason that the treatment of persons convicted of these types of violations acts should be similar.

Chart 3



The solution, of course, is not to abandon appropriately close scrutiny of individuals seeking bank employment who have committed certain offenses that do endanger public trust, and the Proposal does not follow that path. Rather, the Proposal lightens the burdens of the Section 19 requirements, and above all, achieves a better match between the misconduct at issue and the consequences that follow.

It is precisely this mismatch—between misconduct and consequences—that is so problematic. That must change to better protect millions of American financial consumers, safeguard the financial system from catastrophic meltdowns, and promote fundamental fairness.

¹⁷ See U.S. Department of Justice, *JPMorgan Chase & Co. Agrees To Pay \$920 Million in Connection with Schemes to Defraud Precious Metals and U.S. Treasuries Markets* (Sept. 29, 2020), <https://www.justice.gov/opa/pr/jpmorgan-chase-co-agrees-pay-920-million-connection-schemes-defraud-precious-metals-and-us>.

¹⁸ See U.S. Department of Justice, *Five Major Banks Agree to Parent-Level Guilty Pleas* (May 20, 2015), <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

Therefore, Better Markets continues to urge regulators to strengthen enforcement practices to better protect consumers from banks' and bankers' lawlessness by:

1. Focusing on large banks' boards of directors to ensure that they are in fact carrying out their responsibilities and holding them accountable when they are not;¹⁹
2. Focusing on banks' senior executives and officers as well as gatekeepers like internal and external auditors, inside and outside lawyers, and compliance and risk personnel, and imposing meaningful personal sanctions against individuals rather than merely imposing the cost of doing business through fines against the banks that are so meaningless that they reward past crimes and incentivize future lawbreaking;
3. Revising the structure of penalties that result from banks' unlawful behavior to make the financial and reputational cost to banks and their executives commensurate with the nature of the offense and severe enough to incentivize behavior change;²⁰ and
4. Increasing the public disclosure of supervisory information related to the unlawful behavior and risky practices at banks to leverage the power of market discipline.

This recidivist record among the large banks, along with the de facto impunity that banks and their executives enjoy from regulators and prosecutors, are starkly visible to all Americans and present a clear disconnect with the much more strict Section 19 process. While we urge the FDIC to approve its Proposal to exclude minor offenses that are not directly related to public trust from the Section 19 process, we also urge the FDIC to increase its efforts to recognize the blatant violations of public trust that are occurring regularly in the banking industry by top bank executives, address these violations with appropriate sanctions to protect the public, and consequently achieve a better balance between the treatment of the wealthy and powerful and the treatment of new entrants and lower-level employees in the banking system.

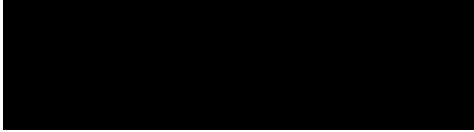
¹⁹ See, e.g., Better Markets Comment Letter re *Proposed Guidance on Supervisory Expectation for Boards of Directors* (Feb. 15, 2018), <https://bettermarkets.com/sites/default/files/FRS-%20CL-%20BoD%20Supervision%20Expectations%202-15-18.pdf>.

²⁰ For example, monetary amounts, including penalties, although sometimes headline-grabbing, typically represent just a fraction of a bank's profits. Moreover, those amounts are typically significantly less than they appear because the settlements often assign unrealistically high values to future purported remedial actions (many of which the banks would have undertaken anyway) and because the settlements are usually structured to be largely tax deductible.

CONCLUSION

We hope these comments are helpful for the prompt finalization of the Proposal.

Sincerely,



Dennis Kelleher
Co-founder, President and CEO

Better Markets, Inc.
2000 Pennsylvania Avenue, NW
Suite 4008
Washington, DC 20006
(202) 618-6464
dkelleher@bettermarkets.org
<http://www.bettermarkets.org>