Billing Code: 6714-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

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.

AGENCY: Federal Deposit Insurance Corporation (FDIC)

ACTION: Notice.

SUMMARY: The FDIC seeks to update its Statement of Policy (SOP), which is issued pursuant to Section 19 of the Federal Deposit Insurance Act (FDI Act) (Section 19). Section 19 prohibits, without the prior written consent of the FDIC, any person from participating in banking who has been convicted of a crime of dishonesty or breach of trust or money laundering, or who has entered a pretrial diversion or similar program in connection with the prosecution for such an offense.

Based upon its experience with the application of the SOP since 1998, the FDIC is now proposing to revise and issue an updated SOP and rescind the current SOP, and is seeking comments on the proposed revisions by issuing this *Federal Register* Notice. Notably, in addition to minor format and technical changes, as well as clarifying changes, the FDIC is proposing to expand its current *de minimis* exception to encompass insufficient funds checks of aggregate moderate value; small dollar, simple theft; and isolated, minor offenses committed by young adults. These carefully measured changes are intended 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.

DATES: Comments must be received on or before [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: You may submit comments, identified by Section 19, by any of the following methods:

- **Agency Web Site:** https://www.fdic.gov/regulations/laws/federal/.
  Follow instructions for submitting comments on the Agency Web site.
- **E-mail:** Comments@fdic.gov. Include Section 19 on the subject line of the message.
- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- **Hand Delivery:** Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

Public Inspection: All comments received will be posted without change to https://www.fdic.gov/regulations/laws/federal/, including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-1002, Arlington, VA 22226 by telephone at (877) 275-3342 or (703) 562-2200.

FOR FURTHER INFORMATION CONTACT:

Brian Zeller, Review Examiner (319) 395-7394 x4125, or Larisa Collado, Section Chief (202) 898-8509, in the Division of Risk Management Supervision; or Michael P. Condon, Counsel, (202) 898-6536, or Andrea Winkler, Supervisory Counsel (202) 898-3727 in the Legal Division.

SUPPLEMENTARY INFORMATION:

I. Background

Section 19 of the FDI Act (12 U.S.C. 1829) prohibits, without the prior written consent of the FDIC, a person convicted of any criminal offense involving dishonesty or breach of trust or money laundering (covered offenses), or who has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, from becoming or continuing as an institution-affiliated party (IAP), owning or controlling, directly or indirectly an insured depository institution (insured institution), or otherwise participating, directly or indirectly, in the conduct of the affairs of an insured institution. Further, the law forbids an insured institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by Section 19. It also imposes a ten-year ban against the FDIC's consent for a person convicted of certain crimes enumerated in Title 18 of the United States Code, absent a motion by the FDIC and approval by the sentencing court.

The FDIC issued, after notice and comment, the current SOP for Section 19 of the FDI Act in December 1998[1] to provide the public with guidance relating to Section 19 and the FDIC's application thereof. The 1998 SOP, among other things, instituted a set

[1] 63 Fed. Reg. 66177 (Dec. 1, 1998).

of criteria to provide for blanket approval of certain low-risk crimes, and for persons convicted of such *de minimis* crimes to forgo filing an application.

A clarification to the SOP was issued in 2007, based on the 2006 amendment to Section 19 of the FDI Act by the Financial Services Regulatory Relief Act of 2006, Pub. L. 109-351, § 710, which modified Section 19 to include coverage of institution-affiliated parties (IAPs) participating in the affairs of bank holding companies, or savings and loan holding companies, and gave supervisory authority over such entities to the Board of Governors of the Federal Reserve System (Federal Reserve Board) and the Office of Thrift Supervision (OTS), respectively.[2] The FDIC, in 2011, further clarified the SOP as to: (i) the applicability of Section 19 to IAPs of bank and savings and loan holding companies ; (ii) the meaning of the term "complete expungement;" and (iii) the factors for considering which convictions are considered *de minimis*. 76 Fed. Reg. 28031 (May 13, 2011). In December of 2012, the FDIC modified the *de minimis* exception to filing by changing the amount of the maximum potential fine to qualify for *de minimis* treatment from $1,000 to $2,500. The modification also changed the limit on the amount of jail time needed to qualify for the *de minimis* exception from no jail time served to a maximum number of three days spent in jail. 77 Fed. Reg. 74847 (Dec 18, 2012)).

The FDIC is again proposing to amend the SOP as more fully set forth below, and seeks comments on a number of the proposed changes as set out forth Section II of this

[2] The FDIC amended the SOP by including a footnote which noted the authority of the Federal Reserve Board and the OTS with regard to bank and savings and loan holding companies under Section 19. 72 Fed. Reg. 73823 (Dec. 28, 2007) with correction issued at 73 Fed. Reg. 5270 (Jan. 29, 2008). In May of 2011, the FDIC subsequently eliminated the footnote added in December of 2007 and incorporated the change directly into the text of the SOP. It also noted the coming transfer of authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-202, §312 (2010) (Dodd-Frank) of savings and loan holding company jurisdiction to the Federal Reserve Board.

Federal Register Notice. The proposed changes are identified by the area of the SOP that is being considered for the revision.

When final, the revised SOP, after consideration of any comments received, will be published in the *Federal Register* and on the FDIC's website at www.fdic.gov.

II. Revisions to the Statement of Policy

The SOP will be revised in the following areas:

1. Introductory Section

In addition to some minor grammatical and format changes, the introductory section includes language that would allow an FDIC-supervised insured institution, in the case of a prospective employee or other person seeking to participate in the affairs of the institution, to make a conditional offer of employment to such a person, contingent on the completion of a background check satisfactory to the institution and a determination that the person is not barred by the provisions of Section 19. In such a case, the SOP makes clear that the prospective employee or person seeking to participate in the affairs of the institution will not be permitted to work at or participate in the affairs of, the institution unless the applicant's background check is completed to the satisfaction of the institution and a determination is made that the applicant's employment or participation at the institution is not barred by Section 19. Related to this change is an alteration of the language that limits the FDIC's determination whether an institution's inquiry as to whether Section 19 applies is reasonable.

The FDIC is seeking to clarify its supervisory role regarding Section 19 and seeks comments whether the use of a conditional offer of employment is a practice that is

helpful to FDIC-supervised institutions in their hiring practices and in their determination whether Section 19 bars an applicant from being employed at, or participating in, the affairs of the institution.

2. *A. Scope of Section 19*

In addition to some minor grammatical and format changes, the FDIC is proposing to provide a more consistent view of the application of Section 19 to certain persons who are not employees, officers, directors or shareholders of an insured institution. The definition of persons covered by Section 19 includes "institution affiliated parties" (a term which is defined in 12 U.S.C. 1813(u) and that is broader than employees, officers, directors or shareholders). The FDIC believes that the key concern under Section 19 is whether a person participates directly or indirectly in the affairs of an insured institution, regardless of their formal relationship with the institution. Therefore, the example currently set out in the SOP regarding employees of the insured institution's holding company has been changed to be more consistent with the language of Section 19 and the definition contained in 12 U.S.C. 1813(u), to focus on the ability of employees to define and direct the management or affairs of the insured institution. Similarly, the concept of participating in the affairs of an insured institution has been added to the example of directors and officers of affiliates, subsidiaries or joint ventures to more accurately reflect the concerns of Section 19.

In addition, the inclusion of the definition of independent contractors, as contained in 12 U.S.C. 1813(u), has been deleted as unnecessary in determining whether Section 19 would apply at the time the person commenced work for, or participated in the affairs of, the insured institution.

Further, the FDIC deleted language referencing the change that expanded Section 19's application to bank and savings and loan holding companies. The language now simply notes that if a person also seeks to participate in the affairs of a bank or savings and loan holding company, they may be required to comply with any requirements of the Federal Reserve Board under 12 U.S.C. 1829(d) & (e).

The FDIC seeks comments on the consistency of the application of Section 19 to officers and directors of bank and savings and loan holding companies, affiliates, subsidiaries and joint ventures as well as independent contractors.

3. B. Standards for Determining Whether an Application is Required

In addition to some minor grammatical and format changes, the FDIC is proposing a number of changes in this section of the SOP which pertains to determining whether an application under Section 19 is required. In the introductory paragraph of this section, the FDIC has included language addressing when an application will be considered by the FDIC which states that the FDIC will not consider an application unless all of the sentencing requirements associated with the conviction, or the conditions imposed by a pretrial diversion or similar program, are completed, and the court's decision must be considered final under the procedures of the applicable jurisdiction.

The FDIC seeks comments on whether the requirement that an applicant completes the sentencing requirements of a conviction, or the conditions imposed by a program entry, and that the case is considered final are relevant factors to accepting an application under Section 19.

In subsection B(1) "Convictions", the FDIC has added additional language to address questions regarding expungements. Previously, the FDIC simply stated that an

expungement was considered a complete expungement only when the conviction of record was no longer accessible even by court order. However, it is clear that in recent times, the existence of such records cannot always be completely sealed or destroyed. 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 SOP makes clear that 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.

The FDIC seeks comment on whether this interpretation would aid in determining if an expungement is complete.

In this section, the FDIC also proposes language that treats certain convictions that have been set aside or reversed after the sentencing requirements have been completed the same as pretrial diversion or similar programs are treated, unless the reason that the conviction was set aside or reversed is based on a finding on the merits that the conviction was wrongful.

Given the wide range or pretrial diversion and similar programs, the FDIC seeks comments on whether this language serves to properly include as pretrial diversion or similar programs, programs in jurisdictions that set aside or reverse convictions in a manner that, in effect, operates as a pretrial diversion or similar program.

In subsection B(2) “Pretrial Diversion or Similar Program”, the FDIC is also clarifying that whether a program constitutes a pretrial diversion or similar program is

determined by relevant Federal, state or local law, and if that program is not so designated under applicable law, then the determination will be made by the FDIC on a case-by-case basis.

The FDIC is seeking comments whether using some or all of the elements of a pretrial diversion program as cited in the SOP are appropriate for determining on a case-by-case basis whether a procedure is a similar program for the purposes of Section 19, and whether a determination that considers such elements is required under the statute.

In subsection B(3) "Dishonesty or Breach of Trust", the FDIC proposes language that would allow certain minor drug convictions or program entries which currently require an application to fall within the *de minimis* exceptions to filing that are set out in subsection B(5).

The FDIC seeks comments whether allowing the *de minimis* treatment for certain minor drug crimes would be beneficial.

In subsection B(4) "Youthful Offender Adjudgments", the FDIC has added language confirming that an adjudication under "youthful offender" statutes is not covered by Section 19 at all and, therefore, is not a matter covered under the *de minimis* exception to the filing requirements.

In subsection B(5) "*De Minimis* Offenses", the FDIC, based upon its experiences and past Section 19 applications that it has reviewed since the current SOP was adopted in 1998, has decided to create several additional conditions under which the *de minimis* exception to filing may apply, and has restructured the pertinent subsection. The subsection has been divided into two parts. The first (a) "In General", restates the current version of the *de minimis* exception to filing, and moves the current provision related to

bad or insufficient funds checks into the second part of the subsection. The FDIC has also made one modification to the provision addressing imprisonment and/or fines. In order to clarify what the FDIC intends by the concept of jail time, the FDIC is including explanatory language which indicates that a significant restraint on a person's freedom of movement will be considered jail time. The intent is to address situations such as work release or other situations that allow a person's release to perform a specific function or functions, or a release in which a person must report continuously to a facility that is not itself a jail for some portion of the day or night.

The FDIC is seeking comments as to whether this clarification of what constitutes jail time for the purposes of the SOP is useful and levels the playing field among those who are convicted.

A second part of subsection (5), (b) "Additional Applications of the *De Minimis* Exception to Filing", includes an expanded version of the current provision related to bad or insufficient funds checks as well as two additional limited circumstances in which the *de minimis* exception to filing applies. The first new exception that the FDIC is proposing would create an age-based exception to the filing requirement. A person with a covered conviction or program entry that occurred when the 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, will qualify for this *de minimis* exception to filing if it least 30 months have passed prior to the date an application would otherwise be required.

A second new *de minimis* exception to filing is proposed for convictions or program entries for small-dollar theft. The exception applies if the conviction or program

entry is 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. Additionally, the individual must have only one conviction or program entry under Section 19, and five years must 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 proposal reduces the five-year period to 30 months.

The FDIC also proposes to modify the current *de minimis* exception to filing for convictions or program entries related to bad or insufficient funds checks, to cover 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, remains.

Lastly, the FDIC proposes to add qualifying language that no conviction for a violation of certain Title 18 provisions, as set out in 12 U.S.C. 1829(a)(2), can qualify under any of the *de minimis* exceptions to filing that are set out in subsection (5).

The FDIC is seeking comments regarding whether these expansions of the *de minimis* exceptions to filing are appropriate and reasonable, and whether individuals with the minor offenses covered in the expansion of the exceptions should be able to participate in the affairs of an insured institution without filing a Section 19 application.

4. *C. Procedures*

The FDIC has added language to this subsection clarifying that individual applicants file their application with the FDIC Regional Office covering the state where the person lives.

5. D. Evaluation of Section 19 Applications

The FDIC has redrafted some of the factors set forth in the SOP for considering a Section 19 application to more closely follow the provisions for considering applications set forth in the FDIC's rules at 12 CFR 308.157. Additionally, the FDIC has noted that under the provision that allows the FDIC to consider other appropriate factors, the FDIC may contact the primary Federal and /or state regulator to aid in the evaluation of an application.

The FDIC seeks comment on whether there remains a material inconsistency between the factors used in the proposed SOP and the regulation.

Additionally, in this section, the FDIC has added clarifying language that states that the utilization of the evaluation factors related to the ten-year ban provision refers to the restriction in 12 U.S.C. 1829(a)(2).

Lastly, the FDIC is proposing to add clarifying language related to bank-sponsored applications that makes clear that changes in an individual's duties at the insured institution which filed a previously approved Section 19 application on that individual's behalf will require a new application. There is also a clarification that a new application will be required if an individual covered by a previously approved bank-sponsored application desires to participate in the affairs of another insured depository institution.

The FDIC seeks comments on whether the changes to this subsection sufficiently clarify the requirement for previously approved bank-sponsored applications—first, that the bank seek additional approval of the FDIC when the duties previously approved by the FDIC change and second, that a new application must be filed when the individual covered by the previous bank sponsored application wishes to work at a different insured institution.

III. Paperwork Reduction Act

In accordance with section 3512 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. These modifications to the SOP for Section 19 of the FDI Act include clarification of reporting requirements in an existing FDIC information collection, entitled *Application Pursuant to Section 19 of the Federal Deposit Insurance Act* (3064-0018), that should result in a decrease in the number of applications filed. Specifically, the revised policy statement broadens the application of the *de minimis* exception to filing an application due to the minor nature of the offenses and the low risk that the covered party would pose to an insured institution based on the conviction or program entry. By modifying these provisions, the FDIC believes that there will be a reduction in the submission of applications where approval has been granted by virtue of the *de minimis* offenses exceptions to filing in the policy statement. In its last submission with OMB, the FDIC indicated that it will receive approximately 75 applications per year. The FDIC estimates that the revised SOP would reduce the

number of applications filed each year by approximately 28 percent bringing the number of applications each year down to approximately 54. This change in burden will be submitted to OMB as a non-significant, nonmaterial change to an existing information collection. The estimated new burden for the information collection is as follows:

Title: ‘‘Application Pursuant to Section 19 of the Federal Deposit Insurance Act”.

Affected Public: Insured depository institutions and individuals.

OMB Number: 3064-0018.

Estimated Number of Respondents: 54.

Frequency of Response: On occasion.

Average Time per Response: 16 hours.

Estimated Annual Burden: 864 *hours*.

Comments are invited on:

(a) whether this collection of information is necessary for the proper performance of the FDIC’s functions, including whether the information has practical utility;

(b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodologies and assumptions used;

(c) ways to enhance the quality, utility, and clarity of the information to be collected;

(d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

All comments will become a matter of public record. Comments may be submitted to the FDIC by any of the following methods:

• *http://www.FDIC.gov/regulations/laws/federal/*

• *E-mail: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.

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

• *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

A copy of the comment may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, # 10235, Washington, DC 20503; by facsimile to (202) 395-5806; or by email to: *oira_submission@omb.eop.gov*, Attention, Federal Banking Agency Desk Officer. All comments should refer to the ''Application Pursuant to Section 19 of the Federal Deposit Insurance Act," OMB No. 3064-0018.

IV. Proposed Statement of Policy for Section 19

For the reasons set forth above, the entire text of the proposed FDIC Statement of Policy for Section 19 is stated as follows.

FDIC STATEMENT OF POLICY FOR SECTION 19 OF THE FDI ACT

Section 19 of the Federal Deposit Insurance Act (12 U.S.C. 1829) prohibits, without the prior written consent of the Federal Deposit Insurance Corporation (FDIC), a person convicted of any criminal offense involving dishonesty or breach of trust or money laundering (covered offenses), or who has agreed to enter into a pretrial diversion or similar program (program entry) in connection with a prosecution for such offense, from becoming or continuing as an institution-affiliated party, owning or controlling, directly or indirectly an insured depository institution (insured institution), or otherwise participating, directly or indirectly, in the conduct of the affairs of the insured institution. In addition, the law forbids an insured institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by Section 19. It imposes a ten-year ban against the FDIC's consent for persons convicted of certain crimes enumerated in Title 18 of the United States Code, absent a motion by the FDIC and court approval.

Section 19 imposes a duty upon an 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. This would include, for example, the completion of a written employment application that requires a listing of all convictions and program entries. In the alternative, for the purposes of Section 19, an FDIC-supervised institution may extend a conditional offer of employment contingent on

the completion of a background check satisfactory to the institution and to determine if the applicant is barred by Section 19. In such a case, the job applicant may not work for or be employed by the insured institution until such time that the applicant is determined to not be barred under Section 19. The FDIC will look to the circumstances of each situation for FDIC-supervised institutions to determine whether the inquiry is reasonable.

Section 19 applies, by operation of law, as a statutory bar to participation absent the written consent of the FDIC. Upon notice of a conviction or program entry, an application must be filed seeking the FDIC's consent prior to the person's participation. The purpose of an application is to provide the applicant an opportunity to demonstrate that, notwithstanding the bar, a person is fit to participate in the conduct of the affairs of an insured institution without posing a risk to its safety and soundness or impairing public confidence in that institution. The burden is upon the applicant to establish that the application warrants approval.

*A. Scope of Section 19*Section 19 covers institution-affiliated parties, as defined by 12 U.S.C. 1813(u) and others who are participants in the conduct of the affairs of an insured institution. This Statement of Policy applies only to insured institutions, their institution-affiliated parties, and those participating in the affairs of an insured depository institution. Therefore, all employees of an insured institution fall within the scope of Section 19. In addition, those deemed to be *de facto* employees as determined by the FDIC based upon generally applicable standards of employment law, will also be subject to Section 19. Whether other persons who are not institution-affiliated parties are covered depends upon their degree of influence or control over the management or affairs of an insured

institution. For example, Section 19 would not apply to persons who are merely employees of an insured institution's holding company, but would apply to its directors and officers to the extent that they have the power to define and direct the management or affairs of the insured institution. Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an insured institution or its holding company will be covered if they participate in the affairs of the insured institution or are in a position to influence or control the management or affairs of the insured institution. Typically, an independent contractor does not have a relationship with the insured institution other than the activity for which the insured institution has contracted. In terms of participation, an independent contractor who influences or controls the management or affairs of the insured institution would be covered by Section 19. Further, "person" for purposes of Section 19 means an individual, and does not include a corporation, firm or other business entity.

Individuals who file an application with the FDIC under the provisions of Section 19 who also seek to participate in the affairs of a bank or savings and loan holding company may have to comply with any filing requirements of the Board of the Governors of the Federal Reserve System under 12 U.S.C. 1819(d) & (e).

Section 19 specifically prohibits a person subject to its coverage from owning or controlling an insured institution. For purposes of defining "control" and "ownership" under Section 19, the FDIC has adopted the definition of "control" set forth in the Change in Bank Control Act (12 U.S.C. 1817(j)(8)(B)). A person will be deemed to exercise

"control" if that person has the power to vote 25 percent or more of the voting shares of an insured institution (or 10 percent of the voting shares if no other person has more shares) or the ability to direct the management or policies of the insured institution. Under the same standards, person will be deemed to "own" an insured institution if that person owns 25 percent or more of the insured institution's voting stock, or 10 percent of the voting shares if no other person owns more. These standards would also apply to an individual acting in concert with others so as to have such ownership or control. Absent the FDIC's consent, persons subject to the prohibitions of Section 19 will be required to divest their control or ownership of shares above the foregoing limits.

B. Standards for Determining Whether an Application Is Required

Except as indicated in paragraph (5), below, an application must be filed where there is present a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or where such person has entered a pretrial diversion or similar program regarding that offense. Before an application is considered by the FDIC, all of the sentencing requirements associated with a conviction or conditions imposed by the pretrial diversion, or similar program, including but not limited to, imprisonment, fines, condition of rehabilitation, and probation requirements, must be completed, and the case must be considered final by the procedures of the applicable jurisdiction.

(1) Convictions. There must be present a conviction of record. Section 19 does not cover arrests, pending cases not brought to trial, acquittals, or any conviction that has been

reversed on appeal. A conviction with regard to which an appeal is pending requires an application. A conviction for which a pardon has been granted will require an application. 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. Further, the jurisdiction issuing the expungement cannot permit the use of the expunged conviction in any subsequent proceeding or review of the person's character or fitness. Expungements of pretrial diversion or similar program entries will be treated the same as those for convictions. 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.

(2) Pretrial Diversion or Similar Program. Program entry, whether formal or informal, is characterized by a suspension or eventual dismissal of charges or criminal prosecution often upon agreement by the accused to treatment, rehabilitation, restitution, or other noncriminal or non-punitive alternatives. Whether a program constitutes a pretrial diversion or similar program is determined by relevant Federal, state or local law, and, if not so designated under applicable law then the determination of whether it is a pretrial diversion or similar program will be made by the FDIC on a case-by-case basis. Program entries prior to November 29, 1990, are not covered by Section 19.

(3) Dishonesty or Breach of Trust. The conviction or program entry must be for a criminal offense involving dishonesty, breach of trust or money laundering. "Dishonesty" means directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which Federal, state or local laws define as dishonest. "Breach of trust" means a wrongful act, use, misappropriation or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.

Whether a crime involves dishonesty or breach of trust will be determined from the statutory elements of the crime itself. All convictions or program entries for offenses concerning the illegal manufacture, sale, distribution of, or trafficking in controlled substances shall require an application unless they fall within the provisions for de minimis offenses set out in (5) below.

(4) Youthful Offender Adjudgments. An adjudgment by a court against a person as a "youthful offender" under any youth offender law, or any adjudgment as a "juvenile delinquent" by any court having jurisdiction over minors as defined by state law does not require an application. Such adjudications are not considered convictions for criminal

offenses. Such adjudications do not constitute a matter covered under Section 19 and is not an offense or program entry for determining the applicability of the *de minimis* offenses exception to the filing of an application.

(5) *De minimis* Offenses.

(a) *In General*

Approval is automatically granted and an application will not be required where the covered offense is considered *de minimis*, because it meets all of the following criteria:

• There is only one conviction or program entry of record for a covered offense;

• 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 jail time. The FDIC considers jail time to include 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 conviction or program was entered at least five years prior to the date an application would otherwise be required; and

• The offense did not involve an insured depository institution or insured credit union.

(b) *Additional Applications of the De minimis Offenses Exception to Filing*

Age at time of conviction or program entry

• A covered conviction or program entry of record that occurred when the individual was 21 years of age or younger at the time of conviction or program entry that otherwise meets the general *de minimis* criteria in (a) above, will be considered *de minimis* if the conviction or program entry was entered at least 30 months prior to the date an application would otherwise be required and all sentencing or program requirements have been met.

Convictions or program entries for insufficient funds checks

• Convictions or program entries of record based on the writing of "bad" or insufficient funds check(s) shall be considered a *de minimis* offense under this provision and will not be considered as having involved an insured depository institution if the following applies:

• There is no other conviction or program entry subject to Section 19 and the aggregate total face value of all “bad” or insufficient funds check(s) cited

across all the conviction(s) or program entry(ies) for bad or insufficient funds checks is $1,000 or less and;

• No insured depository institution or insured credit union was a payee on any of the "bad" or insufficient funds checks that were the basis of the conviction(s) or program entry(ies).

Convictions or program entries for small-dollar, simple theft

.

• A conviction or program entry based on a simple theft of goods, services and/or currency (or other monetary instrument) where the aggregate value of the currency, goods and/or services taken was $500 or less at the time of conviction or program entry, where the person has no other conviction or program entry under Section 19, and where it has been five years since the conviction or program entry (30 months in the case of a person 21 or younger at the time of the conviction or program entry) is considered *de minimis*. Simple theft excludes burglary, forgery, robbery, identity theft, and fraud.

Any person who meets the criteria under (5) above shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction or program entry to all insured institutions in the affairs of which he or she intends to participate.

Further, no conviction or program entry for a violation of the Title 18 sections set out in 12 U.S.C. 1829(a)(2) can qualify under any of the *de minimis* exceptions to filing set out in 5 above.

C. Procedures

When an application is required, forms and instructions should be obtained from, and the application filed with, the appropriate FDIC Regional Director. The 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). Such waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown. The appropriate Regional Office for an individual filing for a waiver of the institution filing requirement is the office covering the state where the person resides.

D. Evaluation of Section 19 Applications

The essential criteria in assessing an application are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an insured institution, and whether the affiliation, ownership, control, or participation by the person in the conduct of the affairs of the insured institution may constitute a threat to the safety and soundness of the insured institution or the interests of its depositors or threaten to impair public confidence in the insured institution. In determining the degree of risk, the FDIC will consider, in conjunction with the factors set out in 12 CFR 308.157:

(1) Whether the conviction or program entry and the specific nature and circumstances of the covered offense are a criminal offense under Section 19;

(2) Whether the participation directly or indirectly by the person in any manner in the conduct of the affairs of the insured institution constitutes a threat to the safety and soundness of the insured institution or the interests of its depositors or threatens to impair public confidence in the insured institution;

(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;

(4) The position to be held or the level of participation by the person at an insured institution;

(5) The amount of influence and control the person will be able to exercise over the management or affairs of an insured institution;

(6) The ability of management of the insured institution to supervise and control the person's activities;

(7) The level of ownership the person will have of the insured institution;

(8) The applicability of the insured institution's fidelity bond coverage to the person; and

(9) Any additional factors in the specific case that appear relevant including but not limited to the opinion or position of the primary Federal and/or state regulator.

The foregoing criteria will also be applied by the FDIC to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban under 12 U.S.C. 1829(a)(2) for certain Federal offenses, prior to its expiration date.

Some applications can be approved without an extensive review because the person will not be in a position to constitute any substantial risk to the safety and soundness of the insured institution. Persons who will occupy clerical, maintenance, service, or purely administrative positions generally fall into this category. A more detailed analysis will be performed in the case of persons who will be in a position to influence or control the management or affairs of the insured institution. All approvals and orders will be subject to the condition that the person shall be covered by a fidelity bond to the same extent as others in similar positions. In cases in which a waiver of the institution filing requirement has been granted to an individual, approval of the application will also be conditioned upon that person disclosing the presence of the conviction(s) or program entry(ies) to all insured institutions in the affairs of which he or she wishes to participate. When deemed appropriate, bank sponsored applications are to allow the person to work in a specific job at a specific bank and may also be subject to the condition that the prior

consent of the FDIC will be required for any proposed significant changes in the person's duties and/or responsibilities. In the case of bank applications such proposed changes may, in the discretion of the Regional Director, require a new application. In situations in which an approval has been granted for a person to participate in the affairs of a particular insured institution and who subsequently seeks to participate at another insured depository institution, another application must be submitted.

By Order of the Board of Directors.

Dated at Washington, DC, the 19th day of December, 2017.

FEDERAL DEPOSIT INSURANCE CORPORATION

Robert E. Feldman,
Executive Secretary.
[FR Doc. 2017-28222 Filed: 1/5/2018 8:45 am; Publication Date: 1/8/2018]