The Leadership Conference
on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

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

RE: RIN 2017-28222.

Dear Mr. Feldman,

The undersigned civil and human rights organizations are pleased to submit comments on the 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"). We commend the FDIC on many aspects of its proposal. However, we urge the FDIC to make several additional changes that will more effectively increase access to employment for affected workers, while maintaining the safety and soundness of the nation's depository institutions.

1. The Statement of Policy should be revised to instruct FDIC-insured institutions to inquire into an applicant's arrest or conviction history only after a conditional employment offer has been made.

As written, the Proposed Statement of Policy would offer institutions the choice of inquiring into an applicant's conviction history either during the application process *or* after extending a conditional offer of employment. We appreciate the FDIC's intention behind this change. Institutions choosing the latter option would be less likely to unfairly bar qualified applicants from employment, because they would not be summarily discarding applications based on conviction history information learned upfront.

However, we urge the FDIC to instruct all institutions to request arrest or conviction history *only* after applicants have been given a conditional offer of employment, instead of leaving institutions to decide when to request this history. When employers make these inquiries in the initial application, the applications of otherwise-qualified applicants are often discarded solely because of their prior convictions, even when they have no relation to an applicant's ability to perform the job. Further, this type of process often has a disparate discriminatory impact on communities of color, as 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.[1] This causes

[1] *See* "Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey," *ACLU of New* Jersey (Dec. 2015), https://www.aclu-nj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf (in test cities, African Americans were 2.6 to 9.6 times more likely than whites to be arrested for disorderly conduct, trespassing and marijuana possession); "Report of the Sentencing Project to the United Nations Human Rights

unfair and discriminatory harm to many qualified persons of color seeking employment.[2]

For these reasons, we recommend that the FDIC amend the Proposed Statement of Policy to direct institutions to inquire into arrest or conviction history only after extending a conditional offer of employment to an applicant. This would ensure that insured institutions do not unfairly discard the applications of persons with conviction histories, while ensuring that FDIC-insured institutions continue to engage in appropriate levels of screening, and would reduce regulatory burdens because the FDIC would only need to review Section 19 waiver applications from persons who have been extended a conditional offer rather than from any persons with such histories who have applied for a position.

2. The Statement of Policy's definition of "complete expungement" should be clarified.

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 to clarify that "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."

We appreciate the FDIC's intention in making this change. In particular, we support the 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." However, we recommend that the FDIC reword its proposed changes to better reflect its intentions. Specifically, the Statement of Policy should clarify that where an expungement is intended to be complete, and where the jurisdiction intends that no governmental body or court can use the prior conviction for any subsequent purpose, the fact that records have not been properly sealed or destroyed, or that there exist copies of records that are not covered by the order, will not prevent the expungement from being considered complete for purposes of Section 19.

3. The Statement of Policy should ensure that individuals with convictions that have been set aside or reversed are not required 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." 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." Under this change, individuals with set aside or reversed convictions (except for those where there was a finding of a wrongful conviction by the court) would be,

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Committee Regarding Racial Disparities in the United States Criminal Justice System," *The Sentencing Project* (Aug. 2013), http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf; "Mandatory Minimum Penalties in the Federal Criminal Justice System." *The U.S. Sentencing Commission*. (Oct. 2011), https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system. (mandatory minimum sentences disproportionately impact communities of color).

[2] For instance, African-American men with a conviction are 40 percent less likely than whites with a conviction to receive a job callback. Emsellem, Maurice & Rodriguez, Michelle Natividad. "Advancing a Federal "fair chance hiring" Agenda." *National Employment Law Project* (Jan. 20, 2015), http://www.nelp.org/page/content/Federal-Fair-Chance-Hiring-Agenda/.

for the first time, explicitly subject to Section 19 waiver application requirements. This constitutes a substantial expansion of existing Section 19 screening and waiver requirements.

We oppose this 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 and disabilities that stem from a conviction. In any such case, a court has determined that an individual is qualified to rejoin society without being subjected to legal constraints that arise from a conviction.[3] 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.

In addition, we recommend that the Statement of Policy explicitly state that adjournments in contemplation of dismissal (ACDs) issued under New York law and similar dispositions are not "diversion programs" and do not need Section 19 waivers. ACDs 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.[4] 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.

4. The Statement of Policy should broaden the definition of *de minimis* offenses that do not require a section 19 waiver application.

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 marginalized workers while maintaining the safety and soundness of depository institutions. By expanding the number of *de minimis* offenses, the FDIC will allow more qualified job applicants to seek employment with banks without concern for the Section 19 waiver process, and banks will have a larger pool of applicants that they may hire from with less delay or burden.

However, we do 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 redefine one of the existing criteria an offense must meet to qualify as *de minimis*. 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."

We have serious concerns with this expanded definition of "jail time," given the impact it might have on many low-risk applicants who would otherwise qualify for a *de minimis* exception. This 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

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[3] In some states certain constraints do remain and are generally related to interactions with children. *Compare* Ariz. Rev. Stat. § 13-907 *with* Tex. Penal Code § 42.12.

[4] *Id*. If the individual is arrested on a new matter within the adjourned period, the District Attorney may – but is not required to – restore the prior matter to the calendar for further proceedings.

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." This new definition would disqualify low-risk individuals 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.[5] As such, we recommend that the FDIC refrain from further defining "jail time," and leave the Statement of Policy as is.

5. **The Statement of Policy should remove the Section 19 waiver 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 such an 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, even though the underlying statute does not specifically mention drug-related crimes. Section 19 of the FDI Act (12 U.S.C. § 1829) prohibits a person convicted of "any criminal offense involving dishonesty or breach of trust or money laundering" from participating directly or indirectly in the conduct of the affairs of an insured institution without the prior consent of the FDIC.[6] However, in its existing Statement of Policy, the FDIC currently requires all individuals convicted of drug manufacture, sale, or trafficking offenses to file a Section 19 waiver application.

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 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, because 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. Similarly, 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.

We recommend that the FDIC 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 FDI Act. If this were not possible, the FDIC could – at a bare minimum – list convictions or program entries for minor drug offenses as independent, *de minimis* exceptions, similar to its treatment of convictions or program entries for insufficient funds checks and small-dollar, simple theft in its Proposed Statement of Policy. By specifically including minor drug offenses as an additional category of the *de minimis* offense exceptions to filing, individuals convicted of minor drug offenses would not have to squeeze into the narrow "general" *de minimis* requirements.

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[5] "Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor," *White House Council of Economic Advisors, at* 1 (Dec., 2015) https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

[6] 12 U.S.C. § 1829.

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6. The Statement of Policy should increase access to and transparency of the Section 19 waiver application process.

We commend the FDIC for proposing language that would clarify the Section 19 waiver 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. Even with the added language, however, the individual waiver application process remains largely inaccessible and not is user-friendly. We recommend that the FDIC adopt additional measures that would increase transparency and access to the Section 19 application process, including:

a) Clarifying the process for job applicants on the FDIC website and on waiver applications;
b) Requiring financial institutions to provide notice to applicants of the individual Section 19 waiver application process if an institution fails to apply for a waiver on the applicant's behalf, and to make waiver forms easily available to applicants; and
c) Shortening the processing time of Section 19 waiver applications by permitting the FDIC to verify documents already in the applicant's possession.

7. The Statement of Policy should improve guidance to Section 19 waiver application reviewers.

The FDIC proposes several commendable changes to how Section 19 waiver applications are to be evaluated. However, we recommend the following improvements:

First, the statement of policy should provide additional clarification on how to evaluate 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 minimal. The 2012 EEOC Guidance specifically cites this research.[7] This finding should be included in the Proposed Statement of Policy to better guide reviewers.

Second, the Statement of Policy should clarify for reviewers how to evaluate the relevance of prior offenses. Reviewers should consider the extent to which the nature and circumstances of a prior offenses relate to the applicant's ability to successfully perform the duties of the specific position sought. A prior conviction for money laundering, for example, is more relevant to an applicant'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.

Third, and to this same end, the Statement of Policy should instruct applicants filing Section 19 waiver applications on their own behalf to provide reviewers with information regarding the position sought. The current application form does not do this. 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 review process would be more efficient if applicants were specifically instructed to submit information regarding the position sought and its corresponding duties and work environment.

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[7] "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964." n. 118, *Equal Employment Opportunity Commission*. (April 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

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Finally, the Statement of Policy should instruct reviewers to consider several more factors, all of which are relevant to determining the likelihood of recidivism, when evaluating Section 19 waiver applications:

a) The person's age at the time of conviction;
b) Evidence that the person has performed similar pre-conviction work without incident; and
c) The length and consistency of the applicant's prior employment history.

Thank you for your consideration of our comments and recommendations. If you have any questions, please contact Rob Randhava, Senior Counsel at The Leadership Conference, at 202-466-3311.

Sincerely,

The Leadership Conference on Civil and Human Rights
AFSCME
Americans for Financial Reform
Asian Pacific American Labor Alliance, AFL-CIO
Cabrini Green Legal Aid
Center for Popular Democracy
Center for Responsible Lending
Defending Rights & Dissent
Demos
Equal Justice Society
Impact Fund
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Long Island Housing Services, Inc.
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National Association of Human Rights Workers
National Association of Social Workers
National CAPACD
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National Community Reinvestment Coalition
National Council of Churches
National Employment Law Project
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National Fair Housing Alliance
National Hispanic Media Coalition
National LGBTQ Task Force
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