

Via Email: [comments@fdic.gov](mailto:comments@fdic.gov)

March 16, 2020

Robert E. Feldman  
Executive Secretary  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, N.W.  
Washington, D.C. 20429

Re: Comments on the Proposed FDIC Section 19 Regulations (RIN 3064-AF19)

Dear Mr. Feldman:

The undersigned organizations, which advocate for the employment rights of people with arrest and conviction records, are writing in response to the Federal Deposit Insurance Corporation's ("FDIC") request for public comments (84 Fed. Reg. 68353, dated December 16, 2019) on proposed regulations governing criminal background checks under Section 19 of the Federal Deposit Insurance Act ("FDI Act").<sup>1</sup>

We appreciate the FDIC's efforts in the proposed regulations to liberalize the Section 19 policy, and the express interest in comments that address the timeframes that should apply to disqualifying offenses and the exclusions for minor offenses designated as *de minimis* by the FDIC. As described in more detail below, we recommend that the FDIC adopt the following improvements to the Section 19 regulations:<sup>2</sup>

- Ensure opportunities to review the impact of codifying the Section 19 policy.
- More narrowly define "dishonesty" offenses and expand the exception for drug offenses.
- Adopt reasonable "washout" periods limiting consideration of older offenses.
- Narrow the definition of "complete expungement" to conform with states laws.
- Narrow the definition of "pretrial diversion" to advance the goal of rehabilitation promoted by the states and localities.
- Streamline the employer-sponsored and individual application process to expand the take-up rate.
- Reasonably expand the criteria that qualify for the *de minimis* exception.
- Liberalize the conditions that apply when the FDIC approves bank-sponsored applications.
- Expand the criteria and evidence that the FDIC considers when evaluating rehabilitation.
- Liberalize the conditions that apply when the FDIC approves bank-sponsored applications.
- Clarify that the banks may wait to inquire into an applicant's criminal history until after the conditional offer stage of the hiring process.

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<sup>1</sup> 12 U.S.C. Section 1829.

<sup>2</sup> The undersigned organizations are also grateful that the FDIC approved the request for an extension of the deadline to file public comments. See FDIC Letter to the National Employment Law Project and the Leadership Conference on Civil and Human Rights, dated January 28, 2020; 85 Fed. Reg. 4614 (January 27, 2020).

## I. Expand Job Opportunities in the Banking Industry for Qualified People with Records

Over 70 million people in the U.S., or one in three adults, have an arrest or conviction record that can show up on a routine background check for employment.<sup>3</sup> While record numbers of people are impacted by criminal background checks for employment, Blacks and Latinos are most severely disadvantaged as racial profiling and discriminatory sentencing schemes have caused these groups to be targeted by law enforcement, arrested, and convicted at rates that far exceed their representation in the population at large.<sup>4</sup>

In recent years, a bi-partisan movement has taken hold around the country advancing robust federal and state policies that have expanded employment opportunities of people with records, which provides helpful context to evaluate the FDIC's Section 19 proposed regulations. For example, at a White House event held last year to celebrate the passage of the First Step Act, President Trump signaled the Administration's support for stronger reentry measures, announcing that "the Second Step Act will be focused on successful reentry and reduced unemployment for Americans with past criminal records, and that's what we're starting right away."<sup>5</sup>

Most recently, the federal Fair Chance Act (FCA) was signed into law, which extends the "ban the box" policy to federal agencies and private employers that contract with the federal government.<sup>6</sup> In 2019, the Administration also rescinded the Office of Personnel Management's (OPM) proposed changes to the Declaration of Federal Employment form that would have vastly expanded the items collected about job applicants to include participation in diversionary programs and other prejudicial information.<sup>7</sup> The states have also passed a record number of laws removing obstacles to occupational licensing for people with records, expanding sealing and expungement of records, and extending diversion programs to

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<sup>3</sup> National Employment Law Project, "Opening Pathways for People with Records to Join Licensed Professions" (December 2019), at Appendix E. Available at: <https://www.nelp.org/publication/fair-chance-licensing-reform-opening-pathways-for-people-with-records-to-join-licensed-professions/>

<sup>4</sup> "Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey," *ACLU of New Jersey* (Dec. 2015). Available at: [https://www.aclu-nj.org/files/7214/5070/6701/2015\\_12\\_21\\_aclunj\\_select\\_enf.pdf](https://www.aclu-nj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf) (in test cities, Blacks 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 Committee Regarding Racial Disparities in the United States Criminal Justice System," *The Sentencing Project* (Aug. 2013). Available at: <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). Available at: <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).

<sup>5</sup> The White House, Office of the Press Secretary. (2019). Remarks by President Trump at 2019 Prison Reform Summit and First Step Act Celebration. Available at: <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-2019-prison-reform-summit-first-step-act-celebration/>

<sup>6</sup> National Defense Authorization Act, H.Rept. 116-333, Title XI, Sections 1121-1124; The FCA expands on the Office of Personnel Management (OPM) regulations that apply to federal hiring, which were finalized in 2016. 81 Fed. Reg. 86555 (December 1, 2016).

<sup>7</sup> "White House Kills Plan for Expanded Criminal Background Checks for Federal Jobs," *Washington Post* (May 29, 2019); 84 Fed. Reg. 38305 (August 6, 2019) (Referencing the 2,748 public comments received in response to the proposed Declaration of Federal Employment form, OPM stated that "it supports efforts by the Administration and Congress to take steps to reform the criminal justice system and improve second chance hiring employment opportunities.").

reach greater numbers of people impacted by criminal justice system.<sup>8</sup>

Recognizing the significant demand for qualified and diverse financial services workers, industry leaders have advocated for greater flexibility to hire people with arrest and conviction records and called for major reform of the FDIC Section 19 policies. As the *Wall Street Journal* reported, “[b]anks say the restriction is too tight, keeping them from hiring a more diverse pool of candidates.”<sup>9</sup> Significantly, the Bank Policy Institute called on Congress to provide “banking organizations flexibility to consider employment for a broader universe of qualified individuals without prior approval,”<sup>10</sup> and JPMorgan Chase urged the FDIC to remove unnecessary criminal record restrictions imposed by its Section 19 policy.<sup>11</sup> In October 2019, JPMorgan Chase also launched a multi-million dollar initiative to help expand employment opportunities of people with records in the banking industry.<sup>12</sup>

While the receptivity and demand for workers with records in the banking industry has never been higher, the FDIC Section 19 policy and procedures present a major roadblock to employment for far too many qualified workers. According to FDIC data reported by the *Wall Street Journal*, only about 1,200 Section 19 applications (including unsponsored, and employer-sponsored applications) have been filed with the FDIC over the past twelve years, which comes to roughly 100 per year.<sup>13</sup> While about half of the applications were approved, almost half were withdrawn by the applicant to avoid receiving a denial that would be made a public record.

This minimal number of Section 19 applications likely reflects multiple factors at play, including the extensive scope of the disqualifying offenses adopted by the FDIC, the burdensome and lengthy application process, and the chilling effect that the policy has on individuals who may indeed qualify, but are convinced that the process is stacked against them. Given these low take-up rates, the time has come for the FDIC to fundamentally shift its approach, which will require major reform of the Section 19 policies and procedures as well as the adoption of strong metrics and targets to measure the impact of the new policy on people with records seeking employment in the banking industry.

## II. Recommendations to Clarify and Expand the Proposed Section 19 Regulations

### A. Ensure future opportunities to review the impact of codifying the Section 19 policy

As a threshold matter, it is important to evaluate the FDIC’s decision to codify the current Statement of

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<sup>8</sup> In 2019 alone, there were 41 new laws addressing consideration of criminal records in employment and occupational licensing alone, and another 70 new laws enhancing record relief (counting both record-sealing and diversion programs). Collateral Consequences Resource Center, “Pathways to Integration: Criminal Record Reforms in 2019” (2020). Available at: <http://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration-Criminal-Record-Reforms-in-2019.pdf>

<sup>9</sup> “Small Time Crimes a Deal Breaker for Banking Jobs,” *Wall Street Journal* (April 21, 2019).

<sup>10</sup> Letter from the Bank Policy Institute to the House and Senate Chairs of the Banking and Financial Services Committees (dated April 8, 2019).

<sup>11</sup> Letter from Reid Broda, Associate General Counsel, JPMorgan Chase & Co. to Robert Feldman, Executive Secretary of the FDIC (dated March 6, 2018).

<sup>12</sup> Press Release, “JPMorgan Chase Joins Second Chance Efforts to Reduce Obstacles to Employment” (October 21, 2019). Available at: <https://www.jpmorganchase.com/corporate/news/pr/jpmorganchase-joins-second-chance-efforts-to-reduce-obstacles-to-employment.htm>.

<sup>13</sup> FDIC FIOA Log Number 19-0083 (FDIC Letter to Lalita Clozel of the *Wall Street Journal*, dated March 1, 2019).

Policy for Section 19 of the FDI Act into regulations.<sup>14</sup> The FDIC states that the codification of the policy provides for “greater transparency as to its application, provides greater certainty as to the FDIC’s application process and to aid both insured depository institutions and individuals who may be affected by section 19 of the FDI Act to understand its impact and potentially seek relief.” 84 Fed. Reg. at 68355.

While we support the FDIC’s underlying goals, we are concerned that by codifying the policy the agency is limiting its flexibility to adopt necessary updates and improvements as it has done over the past two decades. As described below, the FDIC has considerable discretion to interpret the broad language of the FDI Act to help increase the low rates that people with records are filing FDIC Section 19 applications. To do so, the FDIC should adopt strong metrics and targets to measure the impact of its new Section 19 policies on application, approval and denial rates and respond in a timely fashion to improve the policies where appropriate.

Accordingly, we urge the FDIC to expressly incorporate a “retrospective analysis” of the regulations on at least a biennial basis in order to evaluate the impact of the new codified policy on job applicants and banking institutions.<sup>15</sup> Based on progress measured by the designated metrics, the FDIC should propose modifications to the regulations where necessary to continually streamline the process and remove unnecessary restrictions that limit the number of people applying for and receiving FDIC approval to work in the banking industry.

The FDIC should also produce regional and national office data indicating the number of individual and bank-sponsored applications that are filed, and well as the number recommended for approval by region, the number withdrawn by the applicant, and the number denied by the FDIC. All these data should be broken down by the individual’s disqualifying offense. Within the first two years of implementing the new regulations, the FDIC should establish a goal of doubling the application and approval rates for individual applications and tripling the rates for employer-sponsored applications. Within the first two years, the FDIC should also seek to reduce the time required to process individual applicants by 50 percent, while also reducing the time required to process employer-sponsored applications.

*Recommended Language (Section 303.220): “The FDIC shall conduct a retrospective analysis of 12 CFR Part 303.220 – 303.231 on a biennial basis based on metrics established to measure the impact on Section 19 application, approval and denial rates, report the results of the analysis to the public, and propose sub-regulatory or regulatory modifications where necessary in a timely fashion.”*

**B. The FDIC should exercise its broad discretion under the statute to more reasonably limit the scope of “covered offenses” (Section 303.222)**

**1. The FDIC should more narrowly define “dishonesty” offenses and expand the exception for drug offenses (Section 303.222)**

Section 19 of the FDI Act requires prior written consent of the FDIC for an individual to be employed by a bank in cases where the person has been convicted of an offense “involving dishonesty, or breach of trust or money laundering . . . .” 12 U.S.C. Section 1829(a)(1)(A). The use of ambiguous and

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<sup>14</sup> “FDIC Statement of Policy for Section 19 of the FDI Act.” Available at:

<https://www.fdic.gov/regulations/laws/rules/5000-1300.html>

<sup>15</sup> Executive Order 13563 (January 11, 2011); Executive Order 13579 (July 11, 2011).

exceptionally vague terms like “dishonesty” or “breach of trust” without any specific statutory guidance places the FDIC in the necessary position of more narrowly defining the boundaries of the law.

However, we are especially concerned that the proposed regulations will further compound the potential for prejudicial treatment of people whose minor offenses are captured under the broad language of the proposed “dishonesty” definition. Specifically, we question the FDIC’s proposed definition of “dishonesty” offenses, which includes “acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully, or fraudulently . . . .” Section 303.222(a). Phrases like “disposition to distort, cheat or act deceitfully” or “want of integrity” are not only exceptionally vague, which undermines their practical application and effectiveness, they also introduce the potential for the biases and subjective judgements of FDIC reviewers that may compromise the integrity of the Section 19 process. Thus, as proposed below, we urge the FDIC to strike this prejudicial language, while also establishing a bright-line rule that eliminates consideration of older, minor misdemeanor offenses.

With regard to the “covered offenses” provision, we commend the FDIC for taking the position that convictions for simple drug possession are not covered by Section 19. Section 303.222(c). However, we urge the FDIC to go further and eliminate all drug convictions from consideration. The proposed regulation, expressly requiring FDIC approval of all people convicted of drug offenses other than simple drug possession, will discourage exceptionally large numbers of qualified people from seeking jobs in the banking industry. Indeed, in 2018, drug offenses accounted for the largest proportion of arrests (16 percent) in the U.S. compared to any other category of crime.<sup>16</sup> Thus, by eliminating Section 19 review of all drug offenses, the FDIC will also be creating more capacity to timely process applications for other offenses that are more directly probative of “dishonesty.”

The FDIC’s proposed regulation also fails to take into account the devastating legacy of the “War on Drugs” on communities of color and continued discriminatory drug enforcement practices.<sup>17</sup> As the data now convincingly show, Whites are more likely to sell illegal drugs than Blacks, but they are far less likely to be arrested for drug offenses.<sup>18</sup> The FDIC should expressly recognize the impact of these discriminatory policing practices, and ensure that the agency is not compounding the harm by unnecessarily denying employment opportunities based on drug convictions.

Recommended Language (Section 303.222, substitute subsection (a), strike subsection (c)): *“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 a criminal statute. Dishonestly includes offenses that Federal, state or local laws define as dishonest (or for which dishonesty is an element of the offense), but shall not include misdemeanor criminal offenses or program entries committed more than one year from the date of the Section 19 application (excluding any period of incarceration) or offenses involving the possession, sale, manufacturing or distribution of controlled substances.”*

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<sup>16</sup> Federal Bureau of Investigation, “2018 Crimes in the United States,” Table 30. Available at: <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-30>.

<sup>17</sup> J. Fellner, “Race Drugs, and Law Enforcement in the United States,” 20 *Stanford Law and Policy Review* 257 (2009). Available at: <https://law.stanford.edu/publications/race-drugs-law-enforcement-united-states/>.

<sup>18</sup> J. Rothwell, “How the War on Drugs Damages Black Social Mobility” (Brookings Institution, September 14, 2014). Available at: <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

## 2. The FDIC should adopt reasonable “washout” periods limiting consideration of older offenses (Section 303.222)

The FDIC invites commentators to address whether “timeframes should be considered for various offenses.” 84 Fed. Reg. at 68357. Drawing on the leading empirical research and precedents established by other federal laws, we urge the FDIC to not consider any offenses that are older than seven years and to further restrict the period of time when offenses are considered if they are committed by people age 21 and younger.

FDIC Section 19 policy, like other federal and state policies regulating employment of people with records, should be informed by the best available research, which includes a line of studies documenting the low rates of “desistance” from crime. These studies measure the rates that people with a felony record re-commit crimes over the passage of time compared to people in the general population. A prominent study by Professor Alfred Blumstein of Carnegie Mellon University found that four to seven years after offending, people who have been convicted of a felony are no more at risk of being arrested for a new offense than anyone in the general population.<sup>19</sup>

The “desistance” period varies depending on the offense. In the states studied by Professor Blumstein, the period was four to seven years for someone previously arrested or convicted of a violent felony, four years for someone previously arrested or convicted of drug felony, and three to four years for someone previously arrested or convicted of a felony property crime. Based on these studies, the FDIC should limit the lookback period for all disqualifying offenses to a maximum of seven years (with the exception of the narrow list of offenses that, by statute, mandate a ten-year disqualifying period).<sup>20</sup>

There is helpful precedent in other federal employment and licensing laws for the adoption of reasonable washout periods, most notably including the Maritime Security Act, which requires the nation’s two million port workers to be screened by the Transportation Security Administration (TSA) based on their FBI rap sheet.<sup>21</sup> TSA may only consider felony records, not misdemeanors. Aside from certain terrorism-related offenses, the TSA may not consider convictions dating back more than seven years since the application for the port worker’s TSA security credential (or five years from the date of release from incarceration).<sup>22</sup> Significantly, the worker protections of the Maritime Security Act have especially benefited people of color, who have been disproportionately penalized by the criminal justice system.<sup>23</sup> California law also precludes private background check companies from reporting convictions to employers dating back more than seven years.<sup>24</sup>

In addition, we support the recommendation of JPMorgan Chase, which calls on the FDIC to expand the

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<sup>19</sup> Alfred Blumstein and Kiminori Nakamura, “Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences,” submitted to the Nat’l Institute of Justice (November 2012), at page 89. Available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf>.

<sup>20</sup> 12 U.S.C. Section 1829(a)(2).

<sup>21</sup> 46 U.S.C. Section 70105(c); 49 C.F.R. Section 1572.103.

<sup>22</sup> 46 U.S.C. Section 70105(c)(1)(b); 49 C.F.R. Section 1572.103(b)(1).

<sup>23</sup> National Employment Law Project, “A Scorecard on the Post 9-11 Port Worker Background Checks” (July 2009). Available at: <https://www.nelp.org/wp-content/uploads/2015/03/PortWorkerBackgroundChecks.pdf>.

<sup>24</sup> Investigative Consumer Reporting Agencies Act (ICRAA), CA Civil Code Sections 1786 et seq. Notably, the federal community block grant program regulating child serving organizations also places a 5-year limit on the consideration of any drug-related offenses. 42 U.S.C. Section 9858f(c)(1)(D)(ix).

age-base exception that is currently limited to the *de minimis* offense provision (Section 303.227(b)(1)) for individuals who were 21 years of age or younger at the time of their conviction. Specifically, JPMorgan Chase urges the FDIC to extend the exception to “[a]ny conviction or program entry resulting from a crime committed prior to age 21, provided the underlying criminal conduct occurred at least 30 months prior to the date an application to the FDIC would otherwise be required, and all sentencing or program requirements have been met.”<sup>25</sup> Consistent with the FDIC’s policy precluding consideration of youthful offender determinations that apply to minors under state law (Section 303.223(c)), the FDIC should not penalize youthful conduct that occurred when the individual was under the age of 21 given the strong evidence that brain development and maturation is not fully accomplished until age 25.<sup>26</sup>

Recommended Language (Section 303.222, add new subsection (d): *“Except for the offenses set forth under 12 U.S.C. 1829(a)(2), a conviction or program entry will not be considered unless it occurred during the 7-year period ending on the date on which the individual’s application was filed with the FDIC, or during the 5-year period starting when the individual was released from incarceration and ending on the date on which the individual’s application was filed with the FDIC. For individuals who committed an offense when they were 21 years of age or younger, the conviction or program entry will not be considered if the sentencing occurred prior to the 30-month period before the application was filed with the FDIC.”.*

### **C. The FDIC’s definition of “complete expungement” should be narrowed to conform with states laws (Section 303.223(b))**

Under Section 303.223(b) of the proposed regulations, convictions that have been “completely expunged” do not constitute convictions of record, and therefore do not require a Section 19 application. The proposed rule states that convictions are considered to be completely expunged when “the jurisdiction, either in the order or the underlying legislative provisions, forbids the conviction or program entry to be used for any subsequent purpose including, but not limited to, an evaluation of a person’s fitness or character.”

Recognizing that “expungements continue to be a source of confusion,” the FDIC invites public comments to clarify the proper scope of the proposed regulation. 84 Fed. Reg. at 68357. This issue takes on special significance in light of the exceptional level of state activity expanding expungement and sealing protections, including several new laws that automatically expunge and seal a broader range of arrest and conviction records.<sup>27</sup> The strong bi-partisan support for more expansive expungement and sealing protections is intended to promote and reward rehabilitation by removing the collateral consequences of covered arrests and convictions. While states vary in the use of expungement and sealing methods for removing records from public view, most states employ one or both methods of relief.<sup>28</sup>

While we appreciate the FDIC’s intention in broadening the situations in which an expungement or

<sup>25</sup> JP Morgan Chase & Co. Policy Center, “Reducing Barriers to Employment in the Banking Industry for Qualified Individuals with Criminal Records.” Available at: <https://www.jpmorganchase.com/corporate/Corporate-Responsibility/document/hiring-reform.pdf>.

<sup>26</sup> Arain, M., et al., “Maturation of the Adolescent Brain,” *Neuropsychiatr Dis Treat.* 2013;9:449-61. Available at: <https://www.ncbi.nlm.nih.gov/pubmed/23579318>.

<sup>27</sup> *Supra*, footnote 8, “Pathways to Integration: Criminal Record Reforms in 2019.”

<sup>28</sup> Collateral Consequences Resource Center. “50-State Guide to Expungement and Sealing Laws.” (2016). Available at: <http://ccresourcecenter.org/2016/01/13/expungement-and-sealing-laws/>.

sealing will no longer be considered, we recommend that the FDIC regulation state that all expungements and sealings be recognized by the FDIC, regardless of whether they may be considered for subsequent purposes, including an evaluation of a person's fitness or character. In most states, the remedy of expungement or sealing of criminal records is described as a restriction on access to records.<sup>29</sup> In these states, there remains some provision in the law where in very limited circumstances a record may be unsuppressed, which would qualify these cases for review under the proposed regulation.

Given the vast number of laws and regulations that may authorize access to an expunged or sealed record in very narrow situations governing character and fitness determinations, the FDIC's proposed "fitness or character" restriction threatens to swallow the progressivity of the new rule. Further, requiring an FDIC application for expunged or sealed convictions may place an undue hardship on the applicant to obtain certified court documents. In many states, court files for a conviction that have been expunged are impounded by the courts and cannot be accessed by anyone, including court personnel, without a court order.<sup>30</sup> Thus, applicants with "incomplete" expungements would need to file motions in court to unseal the record to obtain the document, exposing the once sealed or expunged record to public access while it remains unsealed.

To advance the FDIC's aim to eliminate confusion with respect to expungement, we propose two changes to the definition of "complete expungement." First, we recommend changing the section title to "Expungements and Sealings" to recognize that states use both mechanisms to remove records from public view. We also recommend removing the word "complete" from the title and eliminating the need for further investigation into the way each state handles expungements and sealings. Finally, we propose expressly clarifying that the FDIC will not consider expunged or sealed records, even in cases where the state authorizes consideration for character and fitness purposes.

*Recommended Language (Section 303.223(b), substitute): "(b) Expungement and Sealing: If an order of expungement, sealing or dismissal has been issued in regard to a conviction and it is intended by the language in the order itself, or in the legislative provisions under which the order was issued, that the conviction will be destroyed or sealed from individual's state or federal record, then it will be considered expunged for the purposes of Section 19 even if exceptions allow the record to be considered for certain character and fitness evaluation purposes."*

#### **D. The definition of "pretrial diversion" should be narrowed to advance the goal of rehabilitation promoted by the states and localities (Section 303.224)**

Under Section 19, both convictions and participation in a pre-trial diversion or similar program will be considered records that trigger the requirement that the individual obtain the FDIC's prior consent to be employed in the banking industry. We urge the FDIC to significantly limit consideration of pretrial diversion programs exercising its broad discretion to more narrowly define the statutory restriction.

Under proposed Section 303.224, a pretrial diversion or similar program "is characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution upon agreement, whether formal or informal, by the accused to treatment, rehabilitation, restitution, or other noncriminal alternatives." According to the proposed rule change, "whether a program constitutes a

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<sup>29</sup> *Id.*

<sup>30</sup> *See, for example*, Illinois Compiled Statutes 20 ILCS 2630/5.2(d)(9)(A)(ii).

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.”

It is important to first emphasize the critical policy goals of pretrial diversion programs. The early intervention of pretrial diversion programs allow “caseloads and jail days [to be] reduced, criminal records [to be] prevented, and access to services that put men and women on the path to health and stability [to be] accelerated.”<sup>31</sup> Pretrial diversion also can “prevent the costs and harmful consequences— to the justice system, the community, and the individual—of repeated arrests, convictions, and incarcerations.”<sup>32</sup> It is estimated that nearly 8 percent of the people who are arrested and charged with felonies are identified by prosecutors to qualify for pretrial diversions.<sup>33</sup> Most diversion programs serve either people charged with drug offenses or people without prior convictions.<sup>34</sup>

These programs are designed to truly give individuals a second chance by promoting and rewarding rehabilitation. The FDIC’s proposed regulation, which broadly expands on the language of the statute, undermines the key purpose of such programs: avoiding the devastating consequences a criminal conviction can have on an individual’s life and livelihood. The proposed rule would make it more difficult for people who were judicially granted the opportunity to avoid a criminal conviction by immediately addressing their underlying issues, remain seamlessly connected to their community and not jeopardize work opportunities.

The FDIC’s proposed rule would also have a discriminatory impact on people of color who are disproportionately arrested for drug offenses,<sup>35</sup> which are the most common diversion alternatives established by state laws to address substance use.<sup>36</sup> Also, studies that have found that prosecutors were more likely to negotiate with White defendants than with Black or Latino defendants with similar legal characteristics. Thus, the proposed policy change would serve as yet another way Black and Latino people who are in recovery are limited from receiving a fair opportunity to be considered for employment.

The proposed rule also runs counter to the direction the states and the Federal government have taken in expanding the use of pretrial diversion programs as a method by which individuals can avoid both a criminal conviction and its lasting collateral consequences. According to a 2019 national survey, 16

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<sup>31</sup> The Center for Health and Justice at TASC, “No Entry: A Survey of Prosecutorial Diversion in Illinois” (2017). Available at: <http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/IL-ProsecutorialDiversionSurvey-2017.pdf>

<sup>32</sup> *Id.*

<sup>33</sup> Traci Schlesinger. (2013, April 5). “Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts.” Available at: <https://journals.sagepub.com/doi/full/10.1177/2153368713483320>

<sup>34</sup> *Id.*

<sup>35</sup> The Drug Policy Alliance, “The Drug War, Mass Incarceration and Race” (2018). Available at: [http://www.drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race\\_01\\_18\\_0.pdf](http://www.drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race_01_18_0.pdf).

<sup>36</sup> Forty-three states have adopted population-specific diversion programs, while 39 states have diversion alternatives that address substance abuse specifically. National Conference of State Legislatures, Pretrial Diversion, September 28, 2017. Available at: <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx>.

states passed laws creating or expanding diversionary programs, reflecting a clear trend across the country to limit the debilitating impact a criminal record can have on individuals and their communities.<sup>37</sup> Furthermore, the Federal government has also distanced itself from policies broadening the scope of criminal background inquiries to include pretrial diversion programs.<sup>38</sup>

We urge the FDIC to exercise its broad discretion to narrowly define “pretrial diversion or similar programs” so as to reduce the number of individuals facing disclosure and possible disqualification on the basis of a non-conviction. As indicated below, we propose the FDIC eliminate the “noncriminal alternative” and “whether formal or informal” phrases. These qualifiers unnecessarily introduce ambiguous criteria that could restrict the types of pretrial diversion programs that would be considered acceptable under the rule. Thus, our recommended definition more clearly and narrowly defines the meaning of pretrial diversion while still respecting the intent of the FDI Act.

Recommended Language (Section 303.224, substituting current subsections (a) and (b)): *“A pretrial diversion or similar program is characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution upon agreement by the accused to restitution, drug or alcohol rehabilitation, anger management or community service.”*

#### **E. Streamline the employer-sponsored and individual application process to expand the take-up rate (Sections 303.225, 303.226, 303.228)**

Sections 303.225, 303.226 and 303.228 of the proposed regulations outline the critical procedures that the FDIC has established for an individual with a covered offense to petition the agency to be authorized to work in the banking industry. However, the complexity and burdensome paperwork required by the codified application process has, we believe, substantially contributed to the low numbers of individuals with records and banks that have petitioned the FDIC.

Thus, we urge the FDIC to streamline the application process in the following areas:

Eliminate the Threshold “Waiver”: The FDIC review of employer-sponsored applications is more efficient than individual-sponsorship applications because the process is completed by the Regional Office without the requirement of national review, thereby shortening the processing time. Further, bank sponsorship increases the likelihood of the applicant’s ability to successfully petition the FDIC. As discussed in Section II.G.2., the banks have identified certain challenges with the process, which could be addressed by limiting the restrictions that apply when a bank-sponsored application is approved by the FDIC.

With regard to Sections 303.225, 303.226, and 303.228, we recommend that the FDIC remove the requirement that a person seeking to file an individual application first petition the FDIC for a “waiver” of the requirement that the bank initiate the process by filing an application on behalf the individual. This extra level of process, requiring “substantial good cause” why the application should be granted, is

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<sup>37</sup> Collateral Consequences Resource Center, “New 2019 Laws on Diversion and Other Non-Conviction Dispositions” (February 7, 2020). Available at: <http://ccresourcecenter.org/2020/02/07/new-2019-laws-on-diversion-and-other-non-conviction-dispositions/>.

<sup>38</sup> “The White House Withdraws Proposed Expanded Criminal Background Check Requirements,” *The Hill* (May 29, 2019). Available at: <https://thehill.com/homenews/administration/446037-trump-admin-withdraws-proposed-expanded-criminal-background-checks>.

both confusing and unnecessary. 84 Fed. Reg. at 68361. For example, it incorrectly communicates to the individual that he or she must first establish a relationship with a bank to apply to the FDIC for authorization to work with a covered offense. Second, we recommend that the FDIC authorize an application to be filed as an initial matter by either an individual or a bank, or contemporaneously by both parties.

Expand the Regional Office Authority: As reflected in the proposed regulations, the Regional Offices have significant authority to receive and approve bank-sponsored applications, while they also serve as the initial screening entity before an individual application is forwarded to the national office for review. It is our understanding that in most cases, the national office is not likely to grant an individual application if the Regional Office has not made a positive recommendation. Moreover, the Regional Office may discourage the individual from pursuing an application that will not be recommended for national office approval. As these formal and informal screening processes illustrate, Regional Offices already play a critical role screening applications, which could be more systematized to ensure greater uniformity and transparency and help expand the number of applications approved by the FDIC in a timely fashion.

Recommended Language (Section 303.225, substitute): *“The FDIC will accept bank-sponsored applications or individual applications filed separately or contemporaneously with the Regional Office.*  
*(a) Bank-sponsored applications: The bank-sponsored applications are reviewed by the appropriate FDIC Regional Office, and may be approved or denied by the Regional Office pursuant to delegated authority. A denial of a bank-sponsored application must be with the certification of the General Counsel, or designee that the denial is consistent with the purposes of section 19.*  
*(b) Individual applications: The individual applications are reviewed by the appropriate Regional Office, and may be approved or denied by the Regional Office pursuant to delegated authority, except in cases involving offenses listed in 12 U.S.C. Section 1829(a)(2) and other high-level security cases designated by the FDIC.*  
*(c) National office review: The national office will review designated high-security cases filed and reviewed by the Regional Office. The Regional Office will submit to the national office individual waiver applications where the recommendation is to deny and the applicant seeks national review of the determination. The national office will function as the ultimate reviewer of applicants denied by the Regional Office where the individual is seeking reconsideration.”*

Reduce Paperwork Requirements: The application process required of individuals and banks under Section 19 can be complicated and time-consuming, which undermines the processes and can discourage even the most qualified candidates from pursuing their Section 19 review rights.

Most notably, while the FDIC accesses the individual’s FBI rap sheet for the list of arrest and convictions that comprise a person’s criminal history, applicants are still required to submit original copies of their conviction and expunged or sealed records, no matter the age of the offense or the level of access to the information. Obtaining these documents can be costly. Courts often assess copy fees and certified court dispositions and filing fees if the applicant has to petition the court to temporarily unseal expunged or sealed records to obtain the required documents.

We have also observed some variation across the FDIC Regional Offices regarding the items that can and should be included in application forms. For example, one Regional Office provides a comprehensive list of items on a cover letter for applicants, while another does not provide the same guidance. These policies can impact an applicant’s ability to adequately provide mitigation packets for their Section 19

application. Thus, we recommend that the FDIC establish procedures that reduce the paperwork burdens on the applicant, and help create consistent processes across the Regional Offices.

Recommended Language (Section 303.228, substituted): *Forms and instructions will be published online for the general public to access, and made available by the Regional Office. The individual or bank-sponsored application must be filed with the appropriate Regional Office director. The appropriate Regional Office is the office covering the state where the person resides, as indicated on the FDIC's home page in the contacts section. The forms shall provide a comprehensive list and sample cover letter detailing the items that may accompany the application, including clear guidance on evidence that may support a finding of rehabilitation. The Regional Office will primarily rely on the FBI criminal history record, which must be provided to the applicant to review for accuracy. The FDIC will not require the applicant to provide certified copies of criminal history records unless there is a clear and compelling justification to require additional information to verify the accuracy of the FBI record.*

#### **F. Reasonably expand the criteria that qualify for the *de minimis* exception (Section 303.227)**

The FDIC expressly seeks comments to determine if “additional situations involving low risk convictions should be covered” by the *de minimis* exception set forth in Section 303.227 of the proposed regulations. 84 Fed. Reg. at 68357. As described below, we recommend a number of reasonable reforms that would expand the number of people with minor offenses who are eligible to pursue employment opportunities in banking.

The FDIC's proposed *de minimis* exception imposes multiple layers of restrictions, requiring that:

1. There have only been one conviction (or pretrial diversion entry) on the individual's record;
2. The offense was punishable by a term of less than one year or a fine of \$2,500 or less;
3. The individual served three days or less of jail time;
4. The offense occurred five years prior to the application; and
5. The offense did not involve a financial institution.

Individuals with covered offenses that meet *de minimis* criteria are exempted from having to file a Section 19 application, which gives the banking industry greater flexibility to hire people with arrest and conviction records.

Eliminate the Jail-Time Rule: The FDIC proposed regulation prevents individuals from qualifying for a *de minimis* offense if they served over three days of “jail time,” which is defined to cover “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.” 84 Fed. Reg. at 68360.

We have serious concerns with this expansive definition of “jail time” given the onerous impact it has on many low-risk applicants, especially including people of color, who would otherwise qualify for a *de minimis* exception. This definition of “jail time” substantially expands the number of persons forced to file Section 19 applications as it includes time served in pretrial confinement, for civil infractions, or in home confinement – all of which sometimes impose a “significant restraint on an individual's freedom of movement.”

Specifically, this 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

while they await trial.<sup>39</sup> Unfortunately, because of the “money bail” system in place in many jurisdictions across the U.S., far too many people serve time in jail simply because of their lack of financial resources, not because they are a threat to public safety. And Blacks are far more likely to serve jail time while awaiting trial at a rate that is 3.6 times White people.<sup>40</sup>

Accordingly, we strongly recommend that the FDIC revise the criteria to expressly preclude consideration of jail time spent incarcerated in pretrial detention, which should not be relevant to someone’s eligibility for the *de minimis* exception, and that it be limited to time spent incarcerated as a sanction or punishment over a more extended period of time, which would capture more serious offenses.

Recommended Language (Section 303.227(a)(2), amended): “*The offense was punishable by a term of three years or less confined in a correctional facility. The definition is intended to only apply where the individual spent time incarcerated as a punishment or a sanction, not as pretrial detention. The definition is not intended to include those on probation or parole who may be restricted to a particular jurisdiction, or who must report occasionally to an individual or a specific location;*”

Raise the Bad Checks Threshold: As proposed, an offense involving the writing of a “bad” check (i.e., an insufficient funds check) will be considered *de minimis* where the aggregate face value of all “bad” checks cited within all convictions is \$1,000 or less and the payee was not an insured depository institution or insured credit union.

We recommend that the FDIC increase the aggregate face value amount of all bad checks to at least \$2,000. This change aligns more closely with the \$2,500 threshold for a covered offense that meets the *de minimis* criteria with the maximum fine that could be imposed at conviction. Increasing the threshold to \$2,000 will expand access to employment for individuals who fall under this offense while still maintaining the safety and soundness of insured depository institutions. Increasing the FDIC’s bad check threshold would also mirror the trend with respect to the felony theft thresholds set at the state level. According to the Pew Charitable Trusts, 37 states have increased their thresholds since 2000.<sup>41</sup>

Recommended Language (Section 303.227(b)(2)(i) amended): “. . . *the aggregate total face value of all ‘bad’ of insufficient funds checks(s) cited across all the convictions(s) or program entry(ies) for bad or insufficient funds checks is \$2,000 or less;*”

Recognizing More Lesser Offenses: The FDIC proposes (Section 303.227(b)(3)) a *de minimis* exception for convictions for small-dollar simple theft where the value of the goods, services or currency stolen was \$500 or less at the time of the conviction. 84 Fed. Reg. at 68361. However, the FDIC proposed guidance would still require that the person have no other Section 19 convictions on his or her record, and that at least five years have passed since the conviction.

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<sup>39</sup> White House Council of Economic Advisors, “Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor,” at page 1 (Dec., 2015). Available at:

[https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf).

<sup>40</sup> Vera Institute of Justice, “Divided Justice: Trends in Black and White Jail Incarceration: 1990-2013,” at page 22 (2018). Available at: <https://www.vera.org/publications/divided-justice-black-white-jail-incarceration>.

<sup>41</sup> The Pew Charitable Trusts, “The Effects of Changing Felony Theft Thresholds: More Evidence that Higher Values Have Not Led to Increased Property Crime or Larceny Rates” (April 2017). Available at: [https://www.pewtrusts.org/~media/assets/2017/04/pspp\\_the\\_effects\\_of\\_changing\\_felony\\_theft\\_thresholds.pdf](https://www.pewtrusts.org/~media/assets/2017/04/pspp_the_effects_of_changing_felony_theft_thresholds.pdf)

It is fair to assume that this provision has extremely limited impact because simple theft convictions of \$500 or less are unlikely to be punishable by imprisonment for a term of more than one year or a fine of more than \$2,500, and the individual is unlikely to have served more than three days in jail. Thus, because most simple theft convictions likely meet the general definition of a *de minimis* exception, it is not especially significant that they are singled out for special treatment.

Instead, we believe the FDIC can go further without introducing risk by expanding Section 303.227(b)(3) to exclude a number of lesser offenses, including convictions for use of a fake ID (beyond the proposed FDIC exemption for people under the legal age to purchase alcohol), shoplifting, fare evasion and other lesser offenses – all of which will disqualify an applicant from employment. At a minimum, the FDIC should exclude such convictions from coverage after a limited time period (e.g., one year, not five years as proposed), and remove the burdensome *de minimis* offense restrictions that limit the impact of the proposed simple-dollar, simple theft exception.

Recommended Language (Section 303.227(b)(3), substitute): *“Convictions or program entries for designated lesser offenses: A conviction or program entry based on certain lesser offenses, including use of a fake ID, shoplifting, trespass, fare evasion, driving with an expired license or tag, and additional low-risk offenses to be designated by the FDIC. These offenses shall be considered de minimis if at least one year has passed since the conviction or program entry.”*

Expand the Youth Exception: The FDIC proposes an age-based exception to the filing requirement for individuals who were age 21 or younger at the time of the conviction or program entry. Section 303.227(b)(1) proposes that these individuals must still satisfy all the general *de minimis* criteria and at least 30 months (rather than the standard five years) have passed prior to the date of the application.

As described in Section II.B.2. of our comments, we urge the FDIC to adopt a “washout” period for people who were 21 years of age or younger at the time of the conviction, which would eliminate the need for this more limited *de minimis* exception. At a minimum, we urge the FDIC to reduce the proposed age-based restriction further by also modifying the burdensome *de minimis* criteria that still apply to offenses committed prior to the age of 21 (e.g., that the offense be punishable by a jail term of less than one year or a fine of less than \$2,500).

Recommended Language (Section 303.227(b)(1) amended): *“Age of the person at time of covered offense. If the actions that resulted in a covered conviction or program entry of record all occurred when the individual was 21 years of age or younger, then a subsequent conviction or program entry 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.”*

#### **G. The FDIC’s should expand the criteria and evidence it takes into account in evaluating individual and employer-sponsored applications (Section 303.229)**

Section 303.229 of the proposed regulations sets forth the standards that FDIC officials must follow in evaluating individual and employer-sponsored applications under Section 19. We urge the FDIC to expand the criteria and the evidence it takes into account in evaluating Section 19 applications and to liberalize the conditions that apply when the FDIC approves bank-sponsored applications. Section 303.229 should also clarify for banking institutions the value of removing the criminal history question

from job applications and instead waiting until the end of the hiring process to collect criminal history information on the applicant.

### **1. Liberalize the conditions that apply when the FDIC approves bank-sponsored applications (Section 303.229(e))**

As the data reported by the *Wall Street Journal* clearly illustrate, banking institutions are rarely taking advantage of the opportunity to apply on behalf of an individual for Section 19 approval. Indeed, from 2008 to 2019, only 168 bank-sponsored applications were filed despite the fact that they are approved at a higher rate than individual applications and processed in less than half the time (44 days, compared to 106 days on average for individual Section 19 applications).<sup>42</sup>

The proposed regulations place overly strict conditions on the approval of bank-sponsored applications, which is likely contributing to the exceedingly low number of such applications. Most notably, the applicant, if approved by the FDIC, may only “work in a specific job at a specific bank and may also be subject to the condition that prior consent of the FDIC will be required for any proposed significant changes in the person’s duties and/or responsibilities.” Section 303.220(e).

The banks have expressed concerns with these restrictions. For example, they require the banks to make investments in human resources systems to isolate and separately track all individuals conditionally approved by the FDIC to determine if they have changed positions or bank locations. We strongly favor the FDIC’s streamlined approval process that governs bank-sponsored applications, which provides workers with a broader range of offenses on their record the opportunity to compete for jobs and to better navigate the tight time constraints that dictate the hiring process. If properly fashioned to address the interests of the job applicants, the banks and the FDIC, we believe that reformed bank-sponsored applications could vastly expand the number of Section 19 applications and approvals without compromising bank safety or security.

Whatever specific policy is ultimately adopted, it is critically important that a robust and liberalized bank-sponsored application process be a key feature of the FDIC’s Section 19 reform agenda. We recommend that the FDIC first eliminate the restriction against changing bank locations, thus allowing the individual to be approved to work for the same employer, regardless of location. Second, we urge the FDIC to approve individuals sponsored by the bank to work across all bank positions, except those positions that involve promotion to a bank officer or other positions that the bank determines will require higher security screening credentials.

Recommended Language (Section 303.229(e), amended): *“When deemed appropriate, bank-sponsored applications are to allow the person to work for the same employer (without restrictions on the bank’s location) and across positions, except that the prior consent of the FDIC will be required for any proposed significant changes in the person’s security-related duties or responsibilities, such as promotion to a bank officer or other positions that the bank determines will require higher security screening credentials. In the case of sponsored bank applications, such proposed changes may, in the discretion of the Regional Director, require a new application.”*

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<sup>42</sup> FDIC FIOA Log Number 19-0083 (FDIC Letter to Lalita Clozel of the *Wall Street Journal*, dated March 1, 2019).

## **2. Expand the criteria and evidence that the FDIC considers when evaluating rehabilitation (Section 303.229(a)(3))**

While Section 303.229(a)(3) includes positive guidance for FDIC officials to evaluate evidence of rehabilitation submitted in support of the Section 19 application, the regulation should be more expressly aligned with the federal civil rights standards (Title VII of the Civil Rights Act of 1964) given the significant disparate impact of criminal background checks on people of color.<sup>43</sup>

In addition, the FDIC should expressly rely on the “desistance” research described above (Section II.B.2.) in evaluating “the time that has elapsed since the conviction or program entry.” 84 Fed. Reg. at 68361. Specifically, the leading study on the issue found that four to seven years after offending, people who have been convicted of a felony are no more at risk of being arrested for a new offense than anyone in the general population.<sup>44</sup> The desistance period was four to seven years for someone previously arrested or convicted of a drug felony and three to four years for someone previously arrested or convicted of a felony property crime.

In addition, we urge the FDIC to provide more specific guidance to help the applicants present mitigating evidence of rehabilitation, including a checklist of the major items that the FDIC will consider that mitigate in favor of a favorable determination. For example, the FDIC should expressly reference the value of letters of references from prior employers, certificates demonstrating completion of substance abuse programs, and successful participation in job preparation and job training programs.

Recommended Language (Section 303.229(a)(3) amended): *“Consistent with Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the FDIC will conduct an individualized assessment that takes into account evidence of rehabilitation, the applicant’s age at the time of the conviction or program entry, the time that has elapsed since conviction or program entry, and the relationship of individual’s offense to the responsibilities of the position. The FDIC will presume that the individual is rehabilitated if four years have passed since the individual’s offense and the individual has no subsequent convictions on his or her record. The FDIC will also consider the individual’s employment history, letters of recommendation, certificates documenting participation in substance abuse programs, successful participating in job preparation and educational programs, and other relevant mitigating evidence.”*

## **3. The FDIC should clarify that the banks may wait to inquire into an applicant’s criminal history until after the conditional offer stage of the hiring process (Section 303.229)**

When employers make criminal record inquiries on the initial job application, the applications of otherwise-qualified applicants are often discarded, even when the applicant’s record may have no relation to the job requirements and are not indicative of an applicant’s ability to perform the job. The “ban the box” policy, which has been adopted by the new federal Fair Chance Act and 36 states,<sup>45</sup> was

<sup>43</sup> For example, the regulations implementing the federal community development block grants covering child care programs states that “[t]he review process shall be consistent with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)” 81 Fed. Reg. 67438, 67503, 67584, dated September 30, 2016; 45 C.F.R. Section 98.43(e)(4). See also Equal Employment Opportunity Commission, “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.” (April 2012). Available at: [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

<sup>44</sup> *Supra*, footnote 19.

<sup>45</sup> National Defense Authorization Act, H.Rept. 116-333, Title XI, Sections 1121-1124; Beth Avery, “Ban the Box: U.S. Cities, Counties and States Adopt Fair-Chance Policies to Expand Employment Opportunities for People with

borne out of this reality faced by millions of workers with arrest and conviction records.

As OPM also explained in the preamble to its 2016 regulations, inquiries into an individual's record "could have the effect of discouraging motivated, well-qualified individuals from applying for a Federal job because they have an arrest record, when the arrest did not result in a conviction or when, following a conviction, they have fully complied with the penalty and have been rehabilitated in the eyes of the law." 81 Fed. Reg. at 86555. The policy has also been embraced by JPMorgan Chase and other major employers.

We recommend that the FDIC encourage the banks to inquire into criminal record history only after extending a conditional offer of employment to an applicant. This would safeguard that banking institutions fairly evaluate the applications of qualified persons with conviction histories while also ensuring that they continue to engage in appropriate levels of screening. At a minimum, we urge the FDIC to clarify that the banks are entirely within their rights under the federal law to adopt a ban the box policy, and that they are not required to collect information on their job applications listing the individual's criminal history until the conditional offer stage of the hiring process.

*Recommended Language (Section 303.229, add new subsection (g)): "FDIC-regulated banks may be subject to federal, state and local laws that require employers to delay the inquiry into an applicant's criminal history until late in the hiring process, such as the federal Fair Chance Act, which takes effect in 2021. These 'ban the box' policies are intended to help reduce the stigma of a criminal record in the hiring process and expand the pool of qualified applicants with records. Consistent with these laws, the FDI Act does not require covered banks to collect criminal history information on their job applications, and it provides the flexibility for the banks to wait until the end of the hiring process to collect criminal history information."*

\* \* \*

We appreciate this opportunity to comment on the FDIC's Section 19 proposed regulations. As described above, we urge the FDIC to significantly expand the Section 19 policy and procedures, which has the potential to broadly impact the ability of the nation's banks to attract qualified and more diverse workers. If you have any questions regarding the content of these comments, please contact Maurice Emsellem, Fair Chance Program Director at the National Employment Law Project ([510-663-5700](mailto:510-663-5700)/[emsellem@nelp.org](mailto:emsellem@nelp.org)), or Sakira Cook, Director of the Justice Reform Program at the Leadership Conference on Civil and Human Rights ([202-263-2894](tel:202-263-2894)/[cook@civilrights.org](mailto:cook@civilrights.org)).

Sincerely,

American Civil Liberties Union  
 Cabrini Green Legal Aid  
 Collateral Consequences Resource Center  
 Community Legal Services in East Palo Alto  
 Community Legal Services of Philadelphia  
 Drug Policy Alliance  
 LatinoJusticePRLDEF  
 Legal Action Center/H.I.R.E. Network

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Records" (National Employment Law Project, July 2019). Available at: <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

Legal Aid at Work  
Mental Health Advocacy Services, Inc.  
NAACP  
National Association of Criminal Defense Lawyers  
National Center for Transgender Equality  
National Employment Law Project  
National LGBTQ Task Force  
National Organization for Women  
Philadelphia Lawyers for Social Equity  
Public Justice Center  
Root and Rebound  
Rubicon Programs  
The Community Service Society of New York  
The Leadership Conference on Civil and Human Rights  
The Leadership Conference Education Fund  
The Legal Aid Society  
The R Street Institute  
The Safer Foundation  
Voice of the Experienced (V.O.T.E.)  
William E. Morris Institute for Justice  
Youth Represent