CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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

Re: Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals – RIN 3064–AF19

Dear Executive Secretary Feldman:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the Notice of Proposed Rulemaking on the Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution (IDI) by Convicted Individuals (the "Proposed Rule") issued by the Federal Deposit Insurance Corporation (the "FDIC"). The Proposed Rule would amend and codify previously issued policy statements under Section 19 of the Federal Deposit Insurance Act ("Section 19") intended to clarify its application, and seek public comment on additional proposals that could expand the scope of relief available for minor offenses.

Our membership includes a wide variety of banks ranging in size—from local community banks to some of the largest banks in the world. They serve different markets, locally and internationally, urban and rural and all share the Chamber's commitment to reducing barriers for the previously incarcerated to enter the workforce, regain their financial independence, and contribute to their communities.

The Chamber welcomes the Proposed Rule and appreciates the FDIC's effort to clarify the application of Section 19's requirements. We agree with the sentiment expressed by Chairman McWilliams when the Proposed Rule was released, "Section 19 should not be a barrier for entry for individuals who have committed minor crimes

in the past, paid their debt to society, and reformed their conduct, and are now seeking to gain employment with a financial institution."[1] The Chamber and its members have prioritized reintegrating past offenders into the workforce and we are pleased the FDIC shares this priority.

2019 U.S. Chamber of Commerce Foundation Report

The U.S. Chamber of Commerce Foundation published a special report in 2019, "America Working Forward," on how businesses are bridging the gap with ex-offenders in search of employment.[2] The forward of the report underscores the credo of the U.S. Chamber of Commerce Foundation: *Because when businesses do well, people do well, and the communities around us thrive.* The report details numerous stories of how businesses and nonprofits are bridging the skills gap to empower ex-offenders to contribute to their communities.

According to the report, "There are currently about 2.3 million people in U.S. prisons. And there are a lot of people on the outside who have done time. One study estimated that as of 2010 there were 19 million ex-offenders who had been returned to society. Most of both groups of people were convicted of nonviolent crimes. Those prisoners willing to put in the time required by demanding skills-training programs tend to be highly motivated to change their lives."[3]

However, barriers for hiring ex-offenders – like those currently in Section 19 – may make it even more difficult for businesses, including insured depository institutions, to bring ex-offenders back into the workforce.

The Chamber is pleased to provide a number of recommendations to improve the Proposed Rule:

- **I. Broaden the Applicant Pool for Bank Employment**
- **II. Narrow the Scope of Individuals Required to Apply for a Waiver by Expanding the *De Minimis* and Low Risk Exceptions**
- **III. Simplify the Waiver Application Process**

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[1] Federal Deposit Insurance Corporation. FDIC Proposes New Rule Codifying Policy on Section 19 Hiring (November 19 2019), available at https://www.fdic.gov/news/news/press/2019/pr19106.html

[2] U.S. Chamber of Commerce Foundation. (2019). America Working Forward. Washington, DC. Available at https://workingforward.wpengine.com/wp-content/uploads/2019/06/AmWorkingFwd_FINAL.pdf.

[3] Ibid

IV. Identify Statutory Limitations and Recommend Changes to Congress

The Proposed Rule is intended to formalize agency policy related to individuals with minor criminal offenses seeking to work in the banking industry. The stated policy objective of the Proposed Rule is to "clarify the FDIC's application of section 19 of the FDI Act (section 19), clarify the application process for insured depository institutions and individuals who seek relief from the provisions of section 19, and seek public comment on additional proposals that could expand the scope of relief available for minor offenses." 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. The FDIC is seeking comment on a proposed rule to codify and amend its 1998 Statement of Policy that established a set of criteria for providing relief to individuals convicted of certain low-risk, *de minimis* crimes, forgoing the need to apply for a Section 19 waiver..

I. Broaden the Applicant Pool for Bank Employment

Financial institutions have a desire to strengthen their communities, but they also have a real need to hire the requisite talent to meet the needs of their customers and drive growth. Financial institutions have to fill a wide range of positions—requiring varying degrees of skills and experience.. Meeting these hiring needs is not possible without a large pool of candidates from which to choose. Section 19 may limit this pool of applicants beyond what is necessary to achieve the safety and soundness objectives of the statute.

The Proposed Rule likely underestimates the number of ex-offenders that could be hired by financial institutions. The FDIC estimates the Proposed Rule would affect at least four FDIC-insured depository institutions and 100 individuals per year.[4] However, this would not account for the institutions and individuals who did *not* apply for a waiver because they were intimidated by the process, found it cumbersome, were afraid of rejection etc. Ideally, the Proposed Rule would result in fewer individuals required to apply for a waiver, and a higher approval rate for individuals who did apply. Additionally, it is very likely there are more than four

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[4] See Proposed Rule, Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals, 84 Fed. Reg. 68356 (December 16, 2019).

FDIC-insured depository institutions that are interested in hiring ex-offenders but find the existing Section 19 requirements too confusing or the waiver application process too cumbersome.

This comes at a time when overall labor market conditions are very tight. The Worker Availability Ratio ("WAR") recently fell to the lowest level in the nearly 20-year history of the data series: 0.88, less than one available worker per job opening. The monthly ratio has fallen from the record high of 7.99 available workers per job in December 2010 and averaged 2.84 over the history of the series since January 2001. The U.S. Chamber expanded this analysis to include a state-by-state WAR report. Our analysis shows a varying but universally significant workforce shortage challenge in every state across the country, with no state averaging a monthly WAR ratio of more than 1.5 available workers for every open job during the most recent 12 months of available data.[5]

II. Narrow the Scope of Individuals Required to Apply for a Waiver by Expanding the *De Minimis* and Low Risk Exceptions

The FDIC should focus on narrowing the scope of individuals who are required to apply for a Section 19 waiver. An application must be filed when there is a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or when such person has entered a pretrial diversion or similar program regarding that offense, unless the offense is considered *de minimis* by the FDIC. The current guidance is unnecessarily broad to ensure the safety and soundness of insured depository institutions and its complexity makes it difficult for either insured depository institutions or an applicant to navigate. The FDIC should expand and clarify certain aspects of the criteria to meet the *de minimis* exception.

a. Age of person at time of covered offense

The Chamber supports codifying the 2018 Statement of Policy ("2018 SOP") regarding the age of person at time of covered offense. According to the Proposed Rule, 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 that otherwise meets the general *de minimis* criteria, will

[5] U.S. Chamber of Commerce. (January 8, 2020). Monthly Workforce Monitor: Available Workers Per Open Job Falls to Lowest Level on Record. Washington, DC. Available at https://www.uschamber.com/series/above-the-fold/monthly-workforce-monitor-available-workers-open-job-falls-lowest-level-record

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. The Chamber believes the additional flexibility afforded to individuals who committed an offense before the age of 21 – 30 months since the offense as opposed to 60 months (five years) – would make it easier for IDIs to hire more qualified candidates without undermining safety and soundness.

b. Convictions or program entries for small-dollar, simple theft

The Chamber supports codifying the *de minimis* exception for small dollar, simple theft but believes additional changes are necessary to achieve the intent of simplifying the application waiver screening. According to the Proposed Rule, a conviction or program entry based on a simple theft (does not include burglary, forgery, robbery, identity theft, and fraud) 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, will meet the *de minimis* exception assuming certain other restrictions are not applicable. The Chamber believes changes to the 2018 SOP are an improvement – notably that an IDI would no longer have to determine the maximum penalty for the crime or how much jail time was served.

c. Convictions or program entries for the use of a fake, false or altered identification card.

According to the Proposed Rule, the use of a fake, false or altered identification card by a person under the legal age for the purpose of obtaining or purchasing alcohol, or used for the purpose of entering a premise where alcohol is served and age appropriate identification is required, provided that there is no other conviction or program entry for a covered offense, will be considered *de minimis*. The Chamber supports this change and believes it would have a material impact on the number of applicants that would be required to apply for a waiver but, as noted above, would not increase risk for insured depository institutions.

The Chamber believes the Final Rule could expand on this change to the 2018 SOP by excluding minor crimes of dishonesty entirely. This could include, for example, small dollar theft/shoplifting and small dollar theft of services (such as transportation fare evasion). If the FDIC has concerns with an outright exclusion of the aforementioned activities then it should consider excluding convictions after a certain time period (possibly 30 months).

d. Expungement

The Chamber supports the FDIC's action to clarify the treatment of records of expungement, but believes further clarification is necessary. The Proposed Rule updates the language in the 2018 SOP, but it's unclear that it covers a conviction or program that has been pardoned, sealed, *or* [emphasis added] expunged. The 2018 SOP notes that the *"a conviction that has been completely expunged is not considered a conviction of record and will not require an application"* then goes onto state, if an order of expungement has been issued, "then the jurisdiction . . . cannot allow the conviction or program entry to be used for any subsequent purpose …" which logically leads to the conclusion that in some cases an "expungement" cannot be relied upon because the records still exist. This circumstance might arise, for example, when a jurisdiction expunges the public records (i.e. those available to employers), but maintains the records and makes them available to government organizations such as law enforcement. Complicating matters, these laws vary from state to state.[6]

The Chamber recommends the Final Rule stating:

"*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 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."*

III. Simplify the Waiver Application Process

The Final Rule should simplify the waiver application process and ensure it is transparent and easy to navigate. Some banks have "banned the box" –removing the check box that asks if applicants have a criminal record from hiring applications in order to remove the stigma from the application process. However, the Section 19 process may frustrate the application process much more substantially and implies a stigma of its own.

Requiring a bank to seek a waiver for an applicant will likely put that an applicant at a disadvantage to others applying for the position. This is not because

[6] The Collateral Consequences Resource Center has completed a "Survey of law enforcement access to sealed non-conviction records," (June 26, 2019) that illustrates "expungement" varies state by state, available at https://ccresourcecenter.org/2019/06/26/national-survey-of-law-enforcement-access-to-sealed-non-conviction-records/

banks are unwilling to commit to the application process, it's because this process can take be lengthy and the results are uncertain – this simply is not practical when banks need to hire employees to serve their customers. Another consideration is the difference in the economies of scale of financial institutions. Larger institutions likely have the requisite legal resources to understand their obligations under the application process; furthermore, they likely have some familiarity with the process simply due to the number of applicants they have reviewed for employment over the years. This stands in stark contrast to an applicant for employment that may seek a waiver from the FDIC.

Applicants may also seek a waiver from the FDIC (in contrast to the "bank-sponsored applications describe above), but this is likely an intimidating endeavor. These applicants do not likely have the legal resources of financial institutions and are not likely accustomed to interaction with the FDIC. Therefore, they are immediately at a disadvantage for completing a successful waiver application. Furthermore, they may not know such an application is necessary until very late in the hiring process, which could incite frustration for reentering the workforce.

IV. Identify Statutory Limitations and Recommend Changes to Congress

Finally, the FDIC should identify any limitations they have identified under the statute that would prevent them from codifying changes to Section 19. The Chamber appreciates the willingness of the FDIC to review Section and shares the Agency's objective of expanding and strengthening the workforce for insured depository institutions without undermining safety and soundness. We also understand that the FDIC may be constrained by an outdated statute from making changes to Section 19 that would achieve our shared objective.

The FDIC should recommend statutory changes to Congress. In addition to identifying where it believes recommendations from the public are not permissible under Section 19, the FDIC should recommend specific reforms to Congress where it believes its policy objectives are unable to be realized by the statute. For example, the FDIC may evaluate whether the 10-year prohibition period for certain offenses is appropriate or if certain offenses currently listed should be provided an exception or reduced period.[7] Additionally, the FDIC should strongly consider whether the

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[7] *12 U.S.C. 1829(a)*

suggested penalty is appropriate and whether it would deter or prevent insured depository institutions from hiring the formerly incarcerated.[8]

Conclusion

The Chamber strongly supports the FDIC's intention to clarify its application of Section 19 of the Federal Deposit Insurance Act. Furthermore, we believe codifying previously issued statements of policy is a prudent means for providing the legal certainty insured depository institutions require. We hope you will take our insights and recommendations for how to strengthen the workforce for insured depository institutions under consideration and look forward to working with you.

Very Respectfully,

Bill Hulse
Director
Center for Capital Markets Competitiveness

[8] *12 U.S.C. 1829(b) states,* "Whoever knowingly violates subsection (a) shall be fined not more than $1,000,000 for each day such prohibition is violated or imprisoned for not more than 5 years, or both."