



Federal Deposit Insurance Corporation

550 17th Street NW, Washington, D.C. 20429-9990

Division of Risk Management Supervision

April 26, 2011

TO: Board of Directors

FROM: Sandra L. Thompson
Director

SUBJECT: Amendments to the Statement of Policy for Section 19 of the FDI Act

EXECUTIVE SUMMARY

The Division of Risk Management Supervision (RMS) recommends that the Board of Directors (Board) amend the Statement of Policy for Section 19 of the Federal Deposit Insurance (FDI) Act (Statement of Policy) to clarify: (i) the applicability of Section 19 on bank and thrift holding company institution-affiliated parties; (ii) the term “complete expungement;” and (iii) the factors for considering de minimis convictions.

The recommended amendments are incorporated into the revised Statement of Policy, attached as Exhibit A (redline format) and Exhibit B (clean format), and are described more fully in this memorandum. In addition, RMS recommends that the Board authorize the Executive Secretary to publish the notice in the Federal Register, attached as Exhibit C, which describes the amendments in detail. The Legal Division (Legal) has determined that solicitation of public comment is not necessary because the Administrative Procedure Act does not generally require public comment regarding statements of policy,¹ and because the proposed revisions are limited and are largely clarifying in nature. Further, the recommended amendments will reduce regulatory burden.

Concur:

Michael H. Krimminger
General Counsel

¹ 5 U.S.C. § 553(b)(A).

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

The Statement of Policy was last updated on November 16, 1998, to address when an application seeking the FDIC's consent must be filed by an insured depository institution (insured institution), to provide for blanket approval for certain de minimis crimes, and to allow for a waiver of the institution filing requirement where an individual can demonstrate substantial good cause for such a waiver. Over 12 years have elapsed since the revised Statement of Policy became effective, and minor changes are recommended to bring the policy in line with current sentencing guidelines. Further, the revised Statement of Policy clarifies the FDIC's policy regarding the applicability of Section 19 on bank and thrift holding company IAPs, the term "complete expungement," and de minimis convictions.

ANALYSIS OF PROPOSED CHANGE

Applicability of Section 19 to Bank and Thrift Holding Companies

The Financial Services Regulatory Relief Act (FSRRA) of 2006² modified Section 19 to address IAPs affiliated with Bank Holding Companies and Savings and Loan Holding Companies. RMS and Legal introduced a technical change to the Statement of Policy that provided the public with a better understanding of the FDIC's scope given the Federal Reserve Systems' and Office of Thrift Supervision's (OTS) new authority under Section 19. On December 17, 2007,³ the FDIC's Board approved the addition of a footnote to the Statement of Policy to address FSRRA, which stated:

"In addition to the requirement to file an application with the FDIC, such individuals may also need to comply with any filing requirements established by the Board of Governors of the Federal Reserve System under 12 U.S.C. §1829(d), in the case of a bank holding company, or with the Office of Thrift Supervision under 12 U.S.C. §1829(e), in the case of a savings and loan holding company."

RMS and Legal staff (staff) recommend a technical change to eliminate the current footnote, and move new, clarifying language into the Statement of Policy's "Scope of Section 19" discussion, as follows:

² Pub.L. 109-351, §710

³ A minor correction was issued at 73 Fed. Reg. 5270, January 29, 2008.

“Individuals who file an application with the FDIC under the provisions of Section 19 who are participating in the affairs of a bank or savings and loan holding company may also have to comply with any filing requirements of the Board of the Governors of the Federal Reserve System under 12 U.S.C. §1819(d) in the case of a bank holding company, and the Office of Thrift Supervision under 12 U.S.C. §1819(e), in the case of a savings and loan holding company until the Transfer Date as that term is used in the Dodd-Frank Wall Street Reform Act (Public Law 111-203, §311, July 21 2010). Upon the Transfer date applications related to savings and loan holding companies should be filed with the Board of Governors of the Federal Reserve System.”

As noted, the proposed language takes into account that the OTS will cease as a federal agency on July 21, 2011.

Further, staff recommends adding a sentence to the “Scope of Section 19” discussion to clarify the applicability of the Statement of Policy, as follows:

“This Statement of Policy applies only to insured institutions, their institution-affiliated parties, and those participating in the affairs of an insured depository institution.”

Clarification of “Complete Expungement”

The Statement of Policy currently addresses how the FDIC considers a conviction that is set aside by an expungement. However, many questions have been raised as to the nature of the expungement. The Statement of Policy currently states: *“A conviction which has been completely expunged is not considered a conviction of record and will not require an application.”*

Historically, it has been the FDIC’s position that unless the expungement is complete, an application would be required. To clarify the question of what is a complete expungement, the FDIC will not require an application if the records of conviction are not accessible by any party, including law enforcement, even by court order. In all other circumstances an application will be required. Staff recommends adding the following language to the Statement of Policy:

“For an expungement to be considered complete, no one, including law enforcement, can be permitted access to the record even by court order under the state or federal law which was the basis of the expungement.”

By adding such clarifying language, the agency can look to the accessibility of the expunged record(s) to determine if an application is required.

Change in De Minimis factors Considered under Section 19

In the 1998 Statement of Policy, the FDIC created a category of covered offenses deemed to be de minimis due to the minor nature of the offenses and the low risk that the covered party would pose to an insured institution based on the conviction. Based on its experience in the processing and approving of numerous applications involving such minor crimes, the FDIC defined a category of offenses to which it would grant blanket approval under Section 19 without the need

to file an application. Staff proposes two limited changes related to the de minimis offenses subsection of the Statement of Policy. The existing provisions that currently limit the application of the de minimis exception to situations in which (1) the individual has only one conviction or program entry and (2) that conviction or program entry occurred at least five years ago, would be retained in the Statement of Policy without change.

The first proposed change addresses the maximum sentence, in terms of jail time and/or fine, which are covered offenses. The current language states that if the offense was punishable by imprisonment for a term of less than one year and/or a fine of less than \$1,000, and the individual did not serve time in jail, the covered offense is considered de minimis, and a Section 19 application is not required.

The FDIC has received a number of applications where a Section 19 application was outside the de minimis factors by, literally, one day and/or one dollar, due to the potential fine or incarceration term as prescribed by a state jurisdiction. In many states, the potential fine or penalty for a number of minor crimes is \$1,000 or less, or the conviction has the potential for an incarceration of one year or less.⁴ Therefore, to bring the Statement of Policy in line with most state sentencing guidelines, staff recommends clarifying this aspect of the Statement of Policy so that the de minimis offenses provision will cover offenses that were punishable by imprisonment for a term of one year or less and/or a fine of \$1,000 or less. The change will remove any uncertainty in the existing language and will add greater clarity to the public and insured depository institutions in evaluating whether a conviction falls within the de minimis exception to the requirement to file an application. Therefore, staff recommends the de minimis language for the imprisonment and fine discussion be revised to reflect the following:

“The offense was punishable by imprisonment for a term of one year or less and/or a fine of \$1,000 or less, and the individual did not serve time in jail.”

The proposed clarifying change should not have an adverse impact on the Deposit Insurance Fund.

A second clarification relates to an offense that involves an insured institution or insured credit union. Under the Statement of Policy, the de minimis exception does not apply when there is a conviction that involves an insured depository institution or insured credit union. Writing a check that is returned for insufficient funds (i.e., a bad check) typically involves such institutions because it involves depositing the check into the banking system at some point. However, the staff recommends that a conviction for issuing a bad check that does not cause loss to an insured institution or insured credit union, be subject to the de minimis offense exception. Therefore, staff recommends, subject to meeting the other provisions of the de minimis offenses exception, the FDIC clarify the language to allow, in certain limited circumstances, convictions for bad checks to fit within the de minimis rule. If there is one conviction for issuing a bad check based on one or more checks which have an aggregate face value of \$1,000 or less, and no insured financial institution or insured credit union was a payee on any of the checks, the conviction will

⁴ Historically, felonies have generally been crimes punishable by imprisonment for more than one year (see e.g. Black's Law Dictionary, Sixth Edition (1990)), while misdemeanors are typically punishable by imprisonment for one year or less. The proposed changes track this distinction.

qualify under the de minimis offense exception, and a Section 19 application will not be required.

The inclusion in de minimis for certain bad checks is to deal with the inadvertent or unintentional passing of a bad check, where there was no loss to an insured institution or insured credit union, and the check was not part of a pattern of criminal practice. Staff recommends that the following language be added to the de minimis discussion in the Statement of Policy:

“Conviction of a crime based on the writing of a “bad” or insufficient funds check shall be considered a de minimis offense under this provision even if it involved an insured depository institution or insured credit union if the following applies:

- *All other requirements of the de minimis offense provisions are met;*
- *The aggregate total face value of the “bad” or insufficient funds checks cited in the conviction was \$1,000 or less; and*
- *No insured depository institution or insured credit union was a payee on any of the bad or insufficient funds checks that were the basis of the conviction.*

This proposed change should not have a material impact on the Deposit Insurance Fund.

Staff Contacts

Division of Risk Management Supervision: Martin P. Thompson
Senior Review Examiner
(202) 898-6767

Legal Division: Michael P. Condon
Counsel
(202) 898-6536

Exhibit A

FDIC STATEMENT OF POLICY FOR SECTION 19 OF THE FDI ACT

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

Section 19 imposes a duty upon the insured institution to make a reasonable inquiry regarding an applicant's history, which consists of taking steps appropriate under the circumstances, consistent with applicable law, to avoid hiring or permitting participation in its affairs by a person who has a conviction or program entry for a covered offense. The FDIC believes that at a minimum, each insured institution should establish a screening process which provides the insured institution with information concerning any convictions or program entry pertaining to a job applicant. This would include, for example, the completion of a written employment application which requires a listing of all convictions and program entries. The FDIC will look to the circumstances of each situation to determine whether the inquiry is reasonable. Upon notice of a conviction or program entry, an application seeking the FDIC's consent prior to the person's participation must be filed.

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

A. Scope of Section 19

Section 19 covers institution-affiliated parties, as defined by 12 U.S.C. 1813(u), and others who are participants in the conduct of the affairs of an insured institution. This Statement of Policy applies only to insured institutions, their institution-affiliated parties, and those participating in the affairs of an insured depository institution. Therefore, all employees of an insured institution fall within the scope of section 19. In addition, those deemed to be de facto employees as determined by the FDIC based upon generally

applicable standards of employment law, will also be subject to section 19. Whether other persons who are not institution-affiliated parties are covered depends upon their degree of influence or control over the management or affairs of an insured institution. For example, section 19 would not apply to persons who are merely employees of an insured institution's holding company, but would apply to its directors and officers to the extent that they have the power to define and direct the policies of the insured institution. Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an insured institution or its holding company will be covered if they are in a position to influence or control the management or affairs of the insured institution. Those who exercise major policymaking functions of an insured institution would be deemed participants in the affairs of that institution and covered by section 19. Typically, an independent contractor does not have a relationship with the insured institution other than the activity for which the insured institution has contracted. Under 12 U.S.C. 1813(u), independent contractors are institution-affiliated parties if they knowingly or recklessly participate in violations, unsafe or unsound practices or breaches of fiduciary duty which are likely to cause significant loss to, or a significant adverse effect on, an insured institution. In terms of participation, an independent contractor who influences or controls the management or affairs of the insured institution, would be covered by section 19. Further, "person" for purposes of section 19 means an individual, and does not include a corporation, firm or other business entity.

Deleted: In addition

Individuals who file an application with the FDIC under the provisions of Section 19 who are participating in the affairs of a bank or savings and loan holding company may also have to comply with any filing requirements of the Board of the Governors of the Federal Reserve System under 12 U.S.C. §1819(d) in the case of a bank holding company, and the Office of Thrift Supervision under 12 U.S.C. §1819(e), in the case of a savings and loan holding company until the Transfer Date as that term is used in the Dodd-Frank Wall Street Reform Act (Public Law 111-203, §311, July 21 2010). Upon the Transfer date applications related to savings and loan holding companies should be filed with the Board of Governors of the Federal Reserve System.

Section 19 specifically prohibits a person subject to its coverage from owning or controlling an insured institution. For purposes of defining "control" and "ownership" under section 19, the FDIC has adopted the definition of "control" set forth in the Change in Bank Control Act (12 U.S.C. 1817(j)(8)(B)). A person will be deemed to exercise "control" if that person has the power to vote 25 percent or more of the voting shares of an insured institution (or ten percent of the voting shares if no other person has more shares) or the ability to direct the management or policies of the insured institution. Under the same standards, person will be deemed to "own" an insured institution if that person owns 25 percent or more of the insured institution's voting stock, or ten percent of the voting shares if no other person owns more. These standards would also apply to an individual acting in concert with others so as to have such ownership or control. Absent the FDIC's consent, persons subject to the prohibitions of section 19 will be required to divest their ownership of shares above the foregoing limits.

B. Standards for Determining Whether an Application Is Required

Except as indicated in paragraph (5), below, an application must be filed where there is present a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or where such person has entered a pretrial diversion or similar program regarding that offense. For an expungement to be considered complete, no one, including law enforcement, can be permitted access to the record even by court order under the state or federal law which was the basis of the expungement.

(1) Convictions. There must be present a conviction of record. Section 19 does not cover arrests, pending cases not brought to trial, acquittals, or any conviction which has been reversed on appeal. A conviction for which a pardon has been granted will require an application. A conviction which has been completely expunged is not considered a conviction of record and will not require an application.

(2) Pretrial Diversion or Similar Program. Program entry, whether formal or informal, is characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution, or other noncriminal or nonpunitive alternatives. Whether a program constitutes a pretrial diversion is determined by relevant federal, state or local law, and will be considered by the FDIC on a case-by-case basis. Program entries prior to November 29, 1990, are not covered by section 19.

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

Whether a crime involves dishonesty or breach of trust will be determined from the statutory elements of the crime itself. All convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances shall require an application.

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

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

- There is only one conviction or program entry of record for a covered offense;
- The offense was punishable by imprisonment for a term of one year or less and/or a fine of \$1,000 or less, and the individual did not serve time in jail;
- The conviction or program was entered at least five years prior to the date an application would otherwise be required; and
- The offense did not involve an insured depository institution or insured credit union.

A conviction or program entry of record based on the writing of a "bad" or insufficient funds check(s) shall be considered a *de minimis* offense under this provision even if it involved an insured depository institution or insured credit union if the following applies:

- All other requirements of the *de minimis* offense provisions are met;
- The aggregate total face value of the bad or insufficient funds check(s) cited in the conviction was \$1000 or less; and
- No insured depository institution or insured credit union was a payee on any of the bad or insufficient funds checks that were the basis of the conviction.

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

C. Procedures

When an application is required, forms and instructions should be obtained from, and the application filed with, the appropriate FDIC Regional Director. The application must be filed by an insured institution on behalf of a person unless the FDIC grants a waiver of that requirement. Such waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown.

D. Evaluation of Section 19 Applications

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

- (1) The conviction or program entry and the specific nature and circumstances of the covered offense;

Deleted: •
Deleted: ¶
Formatted: Indent: Left: 0", Hanging: 0.13", Tabs: 0.13", List tab + Not at 0.75"
Formatted: Bullets and Numbering
Deleted: •
Deleted: than one year
Deleted: than \$1000
Deleted: ¶
Deleted: •
Deleted: •
Deleted: ¶
Formatted: Indent: Left: 0", Hanging: 0.13", Bulleted + Level: 1 + Aligned at: 0.5" + Tab after: 0.75" + Indent at: 0.75", Tabs: 0.13", List tab + Not at 0.75"

(2) Evidence of rehabilitation including the person's reputation since the conviction or program entry, the person's age at the time of conviction or program entry, and the time which has elapsed since the conviction or program entry;

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

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

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

(6) The degree of ownership the person will have of the insured institution

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

(8) The opinion or position of the primary Federal and/or state regulator; and (9) Any additional factors in the specific case that appear relevant.

The foregoing criteria will also be applied by the FDIC to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban prior to its expiration date.

Some applications can be approved without an extensive review because the person will not be in a position to constitute any substantial risk to the safety and soundness of the insured institution. Persons who will occupy clerical, maintenance, service or purely administrative positions, generally fall into this category. A more detailed analysis will be performed in the case of persons who will be in a position to influence or control the management or affairs of the insured institution. Approval orders will be subject to the condition that the person shall be covered by a fidelity bond to the same extent as others in similar positions. In cases in which a waiver of the institution filing requirement has been granted to an individual, approval of the application will be conditioned upon that person disclosing the presence of the conviction to all insured institutions in the affairs of which he or she wishes to participate. When deemed appropriate, approval orders may also be subject to the condition that the prior consent of the FDIC will be required for any proposed significant changes in the person's duties and/or responsibilities. Such proposed changes may, in the discretion of the Regional Director, require a new application. In situations in which an approval has been granted for a person to participate in the affairs of a particular insured institution and subsequently seeks to participate at another insured institution, approval does not automatically follow. In such cases, another application must be submitted.

Deleted: By order of the Board of Directors, November 16, 1998. ¶
[Source: 63 Fed. Reg. 66184 December 1, 1998]

Exhibit B

FDIC STATEMENT OF POLICY FOR SECTION 19 OF THE FDI ACT

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

Section 19 imposes a duty upon the insured institution to make a reasonable inquiry regarding an applicant's history, which consists of taking steps appropriate under the circumstances, consistent with applicable law, to avoid hiring or permitting participation in its affairs by a person who has a conviction or program entry for a covered offense. The FDIC believes that at a minimum, each insured institution should establish a screening process which provides the insured institution with information concerning any convictions or program entry pertaining to a job applicant. This would include, for example, the completion of a written employment application which requires a listing of all convictions and program entries. The FDIC will look to the circumstances of each situation to determine whether the inquiry is reasonable. Upon notice of a conviction or program entry, an application seeking the FDIC's consent prior to the person's participation must be filed.

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

A. Scope of Section 19

Section 19 covers institution-affiliated parties, as defined by 12 U.S.C. 1813(u), and others who are participants in the conduct of the affairs of an insured institution. This Statement of Policy applies only to insured institutions, their institution-affiliated parties, and those participating in the affairs of an insured depository institution. Therefore, all employees of an insured institution fall within the scope of section 19. In addition, those

deemed to be de facto employees as determined by the FDIC based upon generally applicable standards of employment law, will also be subject to section 19. Whether other persons who are not institution-affiliated parties are covered depends upon their degree of influence or control over the management or affairs of an insured institution. For example, section 19 would not apply to persons who are merely employees of an insured institution's holding company, but would apply to its directors and officers to the extent that they have the power to define and direct the policies of the insured institution. Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an insured institution or its holding company will be covered if they are in a position to influence or control the management or affairs of the insured institution. Those who exercise major policymaking functions of an insured institution would be deemed participants in the affairs of that institution and covered by section 19. Typically, an independent contractor does not have a relationship with the insured institution other than the activity for which the insured institution has contracted. Under 12 U.S.C. 1813(u), independent contractors are institution-affiliated parties if they knowingly or recklessly participate in violations, unsafe or unsound practices or breaches of fiduciary duty which are likely to cause significant loss to, or a significant adverse effect on, an insured institution. In terms of participation, an independent contractor who influences or controls the management or affairs of the insured institution, would be covered by section 19. Further, "person" for purposes of section 19 means an individual, and does not include a corporation, firm or other business entity.

Individuals who file an application with the FDIC under the provisions of Section 19 who are participating in the affairs of a bank or savings and loan holding company may also have to comply with any filing requirements of the Board of the Governors of the Federal Reserve System under 12 U.S.C. §1819(d) in the case of a bank holding company, and the Office of Thrift Supervision under 12 U.S.C. §1819(e), in the case of a savings and loan holding company until the Transfer Date as that term is used in the Dodd-Frank Wall Street Reform Act (Public Law 111-203, §311, July 21 2010). Upon the Transfer date applications related to savings and loan holding companies should be filed with the Board of Governors of the Federal Reserve System.

Section 19 specifically prohibits a person subject to its coverage from owning or controlling an insured institution. For purposes of defining "control" and "ownership" under section 19, the FDIC has adopted the definition of "control set forth in the Change in Bank Control Act (12 U.S.C. 1817(j)(8)(B)). A person will be deemed to exercise "control" if that person has the power to vote 25 percent or more of the voting shares of an insured institution (or ten percent of the voting shares if no other person has more shares) or the ability to direct the management or policies of the insured institution. Under the same standards, person will be deemed to "own" an insured institution if that person owns 25 percent or more of the insured institution's voting stock, or ten percent of the voting shares if no other person owns more. These standards would also apply to an individual acting in concert with others so as to have such ownership or control. Absent the FDIC's consent, persons subject to the prohibitions of section 19 will be required to divest their ownership of shares above the foregoing limits.

B. Standards for Determining Whether an Application Is Required

Except as indicated in paragraph (5), below, an application must be filed where there is present a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or where such person has entered a pretrial diversion or similar program regarding that offense. For an expungement to be considered complete, no one, including law enforcement, can be permitted access to the record even by court order under the state or federal law which was the basis of the expungement.

(1) Convictions. There must be present a conviction of record. Section 19 does not cover arrests, pending cases not brought to trial, acquittals, or any conviction which has been reversed on appeal. A conviction for which a pardon has been granted will require an application. A conviction which has been completely expunged is not considered a conviction of record and will not require an application.

(2) Pretrial Diversion or Similar Program. Program entry, whether formal or informal, is characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution, or other noncriminal or nonpunitive alternatives. Whether a program constitutes a pretrial diversion is determined by relevant federal, state or local law, and will be considered by the FDIC on a case-by-case basis. Program entries prior to November 29, 1990, are not covered by section 19.

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

Whether a crime involves dishonesty or breach of trust will be determined from the statutory elements of the crime itself. All convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances shall require an application.

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

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

- There is only one conviction or program entry of record for a covered offense;
- The offense was punishable by imprisonment for a term of one year or less and/or a fine of \$1,000 or less, and the individual did not serve time in jail;
- The conviction or program was entered at least five years prior to the date an application would otherwise be required; and
- The offense did not involve an insured depository institution or insured credit union.

A conviction or program entry of record based on the writing of a “bad” or insufficient funds check(s) shall be considered a *de minimis* offense under this provision even if it involved an insured depository institution or insured credit union if the following applies:

- All other requirements of the *de minimis* offense provisions are met;
- The aggregate total face value of the bad or insufficient funds check(s) cited in the conviction was \$1000 or less; and
- No insured depository institution or insured credit union was a payee on any of the bad or insufficient funds checks that were the basis of the conviction.

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

C. Procedures

When an application is required, forms and instructions should be obtained from, and the application filed with, the appropriate FDIC Regional Director. The application must be filed by an insured institution on behalf of a person unless the FDIC grants a waiver of that requirement. Such waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown.

D. Evaluation of Section 19 Applications

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

- (1) The conviction or program entry and the specific nature and circumstances of the covered offense;

- (2) Evidence of rehabilitation including the person's reputation since the conviction or program entry, the person's age at the time of conviction or program entry, and the time which has elapsed since the conviction or program entry;
- (3) The position to be held or the level of participation by the person at an insured institution;
- (4) The amount of influence and control the person will be able to exercise over the management or affairs of an insured institution;
- (5) The ability of management of the insured institution to supervise and control the person's activities;
- (6) The degree of ownership the person will have of the insured institution
- (7) The applicability of the insured institution's fidelity bond coverage to the person;
- (8) The opinion or position of the primary Federal and/or state regulator; and (9) Any additional factors in the specific case that appear relevant.

The foregoing criteria will also be applied by the FDIC to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban prior to its expiration date.

Some applications can be approved without an extensive review because the person will not be in a position to constitute any substantial risk to the safety and soundness of the insured institution. Persons who will occupy clerical, maintenance, service or purely administrative positions, generally fall into this category. A more detailed analysis will be performed in the case of persons who will be in a position to influence or control the management or affairs of the insured institution. Approval orders will be subject to the condition that the person shall be covered by a fidelity bond to the same extent as others in similar positions. In cases in which a waiver of the institution filing requirement has been granted to an individual, approval of the application will be conditioned upon that person disclosing the presence of the conviction to all insured institutions in the affairs of which he or she wishes to participate. When deemed appropriate, approval orders may also be subject to the condition that the prior consent of the FDIC will be required for any proposed significant changes in the person's duties and/or responsibilities. Such proposed changes may, in the discretion of the Regional Director, require a new application. In situations in which an approval has been granted for a person to participate in the affairs of a particular insured institution and subsequently seeks to participate at another insured institution, approval does not automatically follow. In such cases, another application must be submitted.