

Robert E. Feldman, Executive Secretary
Attention: Comments, Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

February 25, 2020

Re: Comment on the Federal Depository Insurance Corporation’s Proposed Rule, “Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals”

The Brennan Center for Justice at New York University School of Law welcomes the opportunity to submit comments on the Federal Deposit Insurance Corporation’s (“FDIC” or “the Corporation”) proposed rule to codify agency policy related to Section 19 of the Federal Deposit Insurance Act (the “Regulation”). Section 19 bars employment of someone convicted of a crime of dishonesty from working for an insured institution without the consent of the FDIC — functionally prohibiting many people with minor criminal convictions from being employed by banks.¹ The Regulation implements this statute and provides for exceptions.

The Brennan Center is a non-partisan public policy and law institute that focuses on improving America’s systems of democracy and justice.² The Brennan Center’s Justice Program seeks to ensure a rational, efficient, effective, and fair criminal justice system. As part of that mission, we seek to reduce mass incarceration by reducing racial and economic disparities in the criminal justice system while also advocating for systemic reforms that will reduce the criminal justice system’s size and severity. We commend the FDIC for continuing to evaluate and refine its rules to ensure greater access to employment for those with criminal convictions. However, we urge the FDIC to make several additional changes that will increase employment opportunities for those with criminal backgrounds while simultaneously maintaining the safety of the nation’s depository institutions.

Currently, 2.1 million people are behind bars in America. Our country’s rate of incarceration, with nearly 1 out of every 100 adults in prison or jail, is nearly eight times higher than the rates in

¹ Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals, 84 Fed. Reg. 68,353 (Dec. 16, 2019) (to be codified at 12 C.F.R. pt. 303).

² This letter does not purport to represent the views, if any, that the New York University School of Law may have.

Western Europe and other democracies.³ The U.S. prison population is largely drawn from the most disadvantaged part of the nation's population, consisting mostly of young men of color, often without a strong educational background. Additionally, nearly 5 million people are on probation or parole while each year, more than 10 million people cycle through county and city jails.⁴ As another consequence of mass incarceration, more than 70 million people in the United States have a criminal record of some kind.⁵

Mass incarceration produces significant economic hardships for those who encounter our justice system. It costs taxpayers nearly \$200 billion and carries a major depressive effect on the economy: by some accounts, experience in incarceration can lead to a nearly 20 percent decrease in earnings. And those burdens are not evenly distributed; instead, they perpetuate racial disparities in American society.⁶

While we applaud the FDIC for codifying and loosening rules that can negatively impact the economic prospects of so many with minor criminal records, we believe the Corporation's guidance can be expanded to offer opportunities to even more people. Consistent with the FDIC's request for comments on its treatment of expungements, *de minimis* offenses, and "all aspects" of Section 19, we include suggestions for further expanding the *de minimis* exceptions, clarifying expungement rules to include a broader cross-section of eligible individuals, and ensuring that individuals with criminal justice debt are not unfairly barred from employment at FDIC-insured institutions.

³ See "The State of Justice Reform 2017: The State of Prisons," VERA INST. OF JUSTICE (2017), <https://www.vera.org/state-of-justice-reform/2017/the-state-of-prisons> (last visited Feb. 21, 2020) (offering statistics on the scale of the American criminal justice system); compare *id.* with "QuickFacts: United States," U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Feb. 21, 2020) (estimating the size of the adult population at 255 million, compared to roughly 2.1 million behind bars).

⁴ See JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, NCJ 252156, PRISONERS IN 2017 15 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> (noting the disproportionate incarceration of young Black men); DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, NCJ 251148, PROBATION AND PAROLE IN THE UNITED STATES, 2016 1 (2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6188>; ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, NCJ 251774, JAIL INMATES IN 2017 2 tbl.1; *id.* at 8 (2019), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6547>; Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INSTITUTE n.2 (JULY 9, 2015), <https://www.prisonpolicy.org/reports/income.html> (noting low pre-incarceration education levels for people in prison).

⁵ "NGI Monthly Fact Sheet," FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/file-repository/ngi-monthly-fact-sheet/view> (last visited Feb. 18, 2020) (showing 77.7 million criminal fingerprint records as of November 2019); see also Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUSTICE (Nov. 17, 2015), <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas>.

⁶ Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> (putting the cost of operating the nation's judicial and legal apparatus at \$186 billion); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM SOC. REV. 526, 536 (2002), <https://scholar.harvard.edu/brucewestern/publications/impact-incarceration-wage-mobility-and-inequality> (estimating a reduction in earnings of between 16 and 19 percent); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937, 957-60 (2003) <https://scholar.harvard.edu/pager/publications/mark-criminal-record> (documenting the racially disparate impacts of a criminal record).

I. The De Minimis Exception Can Be Safely and Reasonably Expanded.

We applaud the FDIC’s efforts to clarify the *de minimis* exception, which provides that the Corporation’s “approval is automatically granted and an application is not required” for people convicted of some types of covered offenses.⁷ Among other things, the rule states that people convicted of minor shoplifting offenses need not seek FDIC approval before affiliating with an insured depository institution; nor, the Regulation states elsewhere, do people convicted of drug offenses that amount to “simple possession.”⁸ These are steps in the right direction.

However, we counsel against using time spent in prison or jail to define the broader limits of the *de minimis* exception. Currently, the exception also extends to people convicted of a covered offense punishable by a year or less in prison or a fine of \$2,500, provided they were only actually incarcerated for “three (3) days or less.”⁹ Functionally, this rule precludes nearly anyone who has spent time in jail, and almost all people who have been sentenced to a term of imprisonment, from taking advantage of the *de minimis* exception. We recommend expanding the limits of the exception to recognize the over-use of incarceration in the American criminal justice system.

Many Minor Offenses Carry a Prison Sentence of One Year or More, Limiting the Reach of the *De Minimis* Exception.

Because most prison sentences start at one year (almost by definition), excluding people who commit offenses “punishable by” more than a year in prison would exclude most people who ever pass through the doors of such a facility.¹⁰ The rule likely exists to ensure that people who commit offenses serious enough to warrant imprisonment do not receive *de minimis* treatment. But our research demonstrates that nearly 40 percent of the American prison population is unnecessarily incarcerated — and that 25 percent of incarcerated people should never have been sent to prison in the first place.¹¹

Our nation’s use of incarceration as a punishment of first rather than last resort makes incarceration a weak proxy for offense severity. As a result, using time spent in prison to circumscribe the *de minimis* exception may prevent it from benefiting all people who have committed minor offenses. In New York, for example, the one-year limit would render ineligible anyone convicted of a lower-

⁷ Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals, 84 Fed. Reg. at 68,360-61.

⁸ *Id.* at 68,359, 68,361.

⁹ *Id.* at 68,360. The regulation specifically refers to “three (3) days or less of jail time,” but goes on to define “jail time” as “any significant restraint on an individual’s freedom of movement.” *Id.* Thus, spending more than three days in prison or (presumably) home confinement would also disqualify someone from taking advantage of the *de minimis* exception.

¹⁰ “FAQ Detail: What is the difference between jails and prisons?”, BUREAU OF JUSTICE STATISTICS (last visited Feb. 12, 2020), <https://www.bjs.gov/index.cfm?ty=qa&iid=322>.

¹¹ LAUREN-BROOKE EISEN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 8, 24-26 (2016), <https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated>.

grade felony,¹² such as *possessing* a stolen laptop, or selling *any* drug in *any* amount.¹³ These offenses are only slightly more serious than crimes that the FDIC explicitly notes do not require an application — shoplifting and drug possession — but would fall outside the line.

By Excluding People Who Have Spent Time in Jail, the Current Phrasing of the *De Minimis* Exception Risks Entrenching Racial and Economic Disparities.

The *de minimis* exception’s exclusion of people who have spent time behind bars is especially problematic when it comes to jails. According to the Regulation, “jail time” includes “any significant restraint on an individual’s freedom of movement,” a definition broad enough to encompass *pretrial* detention in a jail.¹⁴ But pretrial jail detention is a common experience in the criminal justice system — and, critically, people detained in a jail pretrial have not been convicted of committing any crime. People enter American jails more than ten million times every year, and the average amount of time someone spends there is 26 days — far above the Regulation’s three-day cutoff.¹⁵ Jail stays are even longer in New York City, the heart of the banking industry. There, the average length of a jail stay is 75 days, and just 29 percent of people are detained for “four or fewer days.”¹⁶ As a result, confining the *de minimis* exception to people who served just “three (3) days or less of jail time” could render it irrelevant for almost all people who were detained in jail at all before their trial and conviction.

This in turn could have disturbing implications for racial justice. Many jurisdictions use a “money bail” system, in which whether someone enters jail before trial depends on whether they can afford to post bail or pay a bondsman to do it for them. In fact, nearly two-thirds of the more than 740,000 people in U.S. jails are there awaiting trial, a population that grew 433 percent between 1970 and 2015, according to the Vera Institute of Justice.¹⁷ Vera attributes this growth to an increased reliance on money bail.¹⁸ This bail process has limited or no relevance on personal characteristics that would be pertinent to an employer, and is especially irrelevant to the type of trustworthiness that Section 19 is intended to address, and that banks in particular value in their employees.

¹² In New York State, sentences of incarceration are capped at 364 days for a misdemeanor. N.Y. PENAL LAW § 70.15(1). Felony sentences begin at a little over a year. *Id.* at § 70.00(3); *but see id.* at § 70.00(4) (permitting judges to impose a more lenient sentence in some cases).

¹³ N.Y. PENAL LAW § 165.45(1) (making possession of stolen property worth more than \$1,000 a Class E felony); N.Y. PENAL LAW § 220.31.

¹⁴ Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals, 84 Fed. Reg. at 68,360.

¹⁵ Zeng, *supra* note 4 at 2 tbl.1; *id.* at 8 tbl.8.

¹⁶ NEW YORK CITY DEP’T OF CORRECTION, NYC DEPARTMENT OF CORRECTION AT A GLANCE: INFORMATION FOR THE 12 MONTHS OF FY 2019 (2019) 1, https://www1.nyc.gov/assets/doc/downloads/press-release/DOC_At_Glance_FY2019_072319.pdf.

¹⁷ LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUSTICE, JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 1 (2019), <https://www.vera.org/publications/for-the-record-justice-denied-pretrial-detention>; *see also* Zeng, *supra* note 4, at 5 tbl.3.

¹⁸ Digard & Swavola, *supra* note 17, at 1.

Said more simply, in many places, whether someone has spent time in jail depends more on their wealth than public safety. And such money bail systems disproportionately burden people of color, who are less likely to be able to afford to pay for their release, and less likely to have a family member who can pay on their behalf.¹⁹ Given the racial disparities already present in American jails — Black people remain 3.6 times more likely to be incarcerated in local jails than white people²⁰ — tying the reach of the *de minimis* exception to how long someone has spent there may reinforce those disparities, and disproportionately benefit job applicants who are white, wealthy, or both.

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To summarize, recognizing the American justice system’s overuse of incarceration, we recommend that the *de minimis* exception be extended to people who have served more than a trivial period of time in prison, and to people convicted of crimes “punishable by” more than one year in prison. Three years may be a preferable cutoff, as it would also capture minor felonies. Second, we recommend that the Regulation be revised to clarify that time spent in pretrial detention is irrelevant to someone’s eligibility for the *de minimis* exception. This could be accomplished by modifying the Regulation’s definition of “jail time” to encompass only time spent incarcerated *as a punishment or a sanction*.²¹

II. The FDIC should Clarify its Definition of “Expungement” by Removing the Word “Complete.”

Under the Regulation, “a conviction that has been completely expunged . . . will not require an application.” Changes made in 2018, and incorporated into this new Regulation, clarify that whether an expungement is “complete” does not depend on whether records of the conviction exist in some form: “The failure to destroy or seal the records will not prevent the expungement from being complete for the purposes of Section 19.”²²

¹⁹ See Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUSTICE (Dec. 10, 2019) (detailing racial disparities in bail practices), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>; Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL’Y INITIATIVE (Oct. 9, 2019) (demonstrating that people of color are over-represented in jails), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/; see also Taryn A. Merkl, *New York’s Upcoming Bail Reform Changes Explained*, BRENNAN CTR. FOR JUSTICE (Dec. 10, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-upcoming-bail-reform-changes-explained>.

²⁰ RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, DIVIDED JUSTICE: TRENDS IN BLACK AND WHITE JAIL INCARCERATION, 1990-2013 22 (2018), <https://www.vera.org/publications/divided-justice-black-white-jail-incarceration>.

²¹ See Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals, 84 Fed. Reg. at 68,360 (defining “jail time” in a sentence beginning, “The FDIC considers jail time to include...”).

²² See *id.* 68,353-55 (describing the history of the Statement of Policy and its proposed codification in the C.F.R.); *id.* at 68,360.

While we commend the 2018 changes and clarifications of language around expungement, we suggest that the FDIC eliminate the word “complete” before “expungement” in this section. Most states provide an expungement option of some kind for those with criminal records.²³ These processes vary significantly, however, depending on the jurisdiction. For example, some states offer broad relief, denominated as “sealing” in some cases and “expungement” in others, which may permit an applicant to legally deny that the sealed or expunged conviction ever even existed.²⁴ But in some states that right comes with several exceptions.²⁵ And apart from sealing or expungement, some states also offer certificates of rehabilitation, which provide less relief but are specifically intended to relieve licensing restrictions.²⁶

The FDIC’s language addresses this disparity in how states implement the philosophy of expungement, but places the on burden the insured institution or the Corporation to determine the meaning and “completeness” of expungement. According to the FDIC’s own brochure, *Your Complete Guide to Section 19*, “if the records are not destroyed or sealed, the FDIC will look to the intent of the order or the statute in effect when the expungement was granted to determine if it is ‘complete’ for Section 19 purposes.” The wide variety in expungement practices creates a significant level of ambiguity for those tasked with interpreting unfamiliar state law.

III. The FDIC Should Not Require Repayment of Fees or Fines Before Submission of an Application.

The current rule states that, “Before an application is considered by the FDIC, all of the sentencing requirements associated with a conviction or conditions imposed by the pretrial diversion, or similar program, including but not limited to, imprisonment, fines, condition of rehabilitation, and probation requirements, must be completed, and the case must be considered final by the procedures of the applicable jurisdiction.”²⁷ This policy has the potential to further entrench poverty by barring employment at an FDIC-insured institution for individuals who might be compliant with other conditions of their sentence but continue to pay down fines associated with their conviction.

²³ See “Judicial Expungement, Sealing, and Set-aside,” RESTORATION OF RIGHTS PROJECT (last visited Feb. 14, 2020), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/> (documenting widespread adoption of sealing and expungement practices).

²⁴ See, e.g., COLO. REV. STAT. § 24-72-706(1) (describing broad sealing authority); *id.* at § 24-72-703(2)(b) (“the defendant and all criminal justice agencies may properly reply, upon an inquiry into the matter, that public criminal records do not exist with respect to the petitioner or defendant”).

²⁵ See, e.g., MO. REV. STAT. § 610.140(9), (10) (enumerating cases in which an applicant must acknowledge an expunged conviction, but otherwise providing a limited right to deny the conviction’s existence).

²⁶ See, e.g., N.Y. CORR. LAW § 701 (“certificate of relief from civil disabilities,” providing relief from, among other things, licensing restriction). Note, however, that licensing authorities retain the discretion to restrict an individual’s license on the basis of a previous conviction. *Id.* at § 701(3).

²⁷ Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals, 84 Fed. Reg. at 68,354, 68,360.

Since 2008, almost every state has increased criminal and civil court fees or added new ones, and the categories of offenses that trigger fines have also been expanded.²⁸ This increase in fees and fines has exacted a steep human cost as indigent people may face hundreds or thousands of dollars in accumulated debt that they are unable to pay. Fees and fines are also frequently assessed in a racially discriminatory way. For example, a 2017 report by the U.S. Commission on Civil Rights found that municipalities that rely heavily on revenue from fees and fines have a higher than average share of Black and Latino residents.²⁹ In a recent examination of fee and fine practices in Florida, Texas, and New Mexico, the Brennan Center found that from 2012 to 2018, those three states alone amassed a total of almost \$1.9 billion in uncollected debt and that the amount of unpaid debt within that time frame has grown year after year in those states.³⁰

Fee and fine debt represent a growing burden for many Americans. People struggling financially are saddled with debt that makes it nearly impossible for them to support themselves and their families. For those who have complied with other conditions of their sentence, their ability to pay off criminal justice debt should not be held against them when it comes to eligibility for future employment. Further, for the purposes of Section 19, whether one can pay their fines often has no bearing on the trustworthiness that Section 19, in particular, is intended to address. For these reasons, we urge the FDIC to modify the regulation by eliminating “fines” entirely from its list of sentencing requirements that must be complied with prior to application.

IV. The Regulation’s Treatment of People Whose Convictions Were Reversed on Appeal Should be Clarified.

We applaud the FDIC for clarifying that Section 19 does not apply to “any conviction that has been reversed on appeal.”³¹ Left unmodified, this guidance would expand opportunities for justice-involved people and square with prevailing legal practice.³² It would also be easy for hiring managers to follow, and offer clear guidance to job applicants.

However, the Regulation adds a condition, stating that Section 19 does apply, and appears to require application to the FDIC, where an applicant’s conviction was “set aside or reversed *after the*

²⁸ MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUSTICE, THE STEEP COST OF CRIMINAL JUSTICE FINES AND FEES 6 (2019), https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final5.pdf.

²⁹ U.S. COMM’N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 3 (2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

³⁰ MENENDEZ ET AL. *supra* note 28, at 10.

³¹ Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals, 84 Fed. Reg. at 68,359.

³² In New York State, for example, a conviction “that is subsequently vacated on direct appeal no longer exists” and cannot be used as the basis for subjecting a defendant to the state’s recidivist sentencing laws. *See* *People v. Thomas*, 33 N.Y.3d 1, 8, (2019); *cf.* *People v. Bell*, 138 A.D.2d 298, 300 (1st Dep’t 1988) (Sullivan, J., dissenting) (“following its reversal, defendant’s earlier conviction was no longer a conviction”), *modified*, 73 N.Y.2d 143, 165 (1989) (adopting the reasoning in Judge Sullivan’s dissent and affirming as modified).

*applicant has completed sentencing.*³³ From context, it is not clear whether this language is intended to require applications from people whose convictions are reversed after *-serving* their sentence, or after sentence has been *imposed*. Significantly, though, either reading would create confusion. Because sentencing generally quickly follows conviction, convictions are rarely (if ever) reversed before sentence is imposed.³⁴ And due to appellate delays, whether a conviction is reversed before or after a sentence is *served* can depend on mere chance.³⁵ To remedy this confusion, we recommend removing these exceptions and providing a simple, clear rule — that convictions reversed on appeal do not require application to the FDIC.

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In summary, while the proposed Regulation attempts to provide necessary clarity to job applicants with criminal records, we believe it can be clarified even further, and expanded. First, the FDIC should consider broadening the *de minimis* exception to account for the overuse of imprisonment and pretrial incarceration in America’s criminal justice system. Second, job applicants should be able to apply to the FDIC while continuing to repay any criminal justice debt — not only after that debt has been repaid in full. And third, the FDIC should clarify its treatment of expunged convictions and convictions reversed on appeal. These changes will further increase opportunities for people with a criminal record, better acknowledge the complex realities of crime and punishment in America, and ensure that FDIC policy is efficient and easy for industry professionals to follow.

³³ Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals, 84 Fed. Reg. at 68,360 (emphasis added). Technically the regulation states that such convictions are “treated consistent with pretrial diversions,” but unless the program entry predates November 29, 1990 (*id.*), application is also required in those cases. 18 U.S.C. § 1829(a)(1)(A).

³⁴ See, e.g., N.Y. CRIM. PROC. L. § 380.30(1) (“Sentence must be pronounced without unreasonable delay.”). Indeed, appeal from conviction, before the imposition of sentence, is arguably a legal impossibility.

³⁵ See NICOLE L. WATERS & JAMES GREEN, BUREAU OF JUSTICE STATISTICS, NCJ 248874, CRIMINAL APPEALS IN STATE COURTS 7 fig.6 (2015), <https://www.bjs.gov/content/pub/pdf/casc.pdf> (documenting the average time to decision for criminal appeals — more than a year).

Respectfully submitted,

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