as released by the Wireless Telecommunications Bureau, with an update reflecting this change in status. As a general matter, the Attachment contains an updated inventory of all licenses that will be made available in Auction No. 22. Future public notices could include information about other Commission licenses in conjunction with Auction No. 22. Additionally, in this Public Notice, the Bureau seeks comment on procedural issues relating to the auction of the D, E, and F block licenses in Auction No. 22.

I. Reserve Price or Minimum Opening Bid

2. Based on the approach taken in the *Procedural Public Notice,* for each D, E, and F block license for which there was a winning bidder in the 1996 D, E, and F block auction, the Bureau proposes to establish as the minimum opening bid an amount equal to ten percent of the corresponding net high bid for the market in the 1996 auction, but in no event lower than the upfront payment for that license in Auction No. 22. For each D, E, and F block license for which there was no winning bidder in the 1996 auction, the Bureau proposes to establish as the minimum opening bid an amount equal to 3.33 percent of the most recent net high bid for the C block license in the same Basic Trading Area (''BTA''), but in no event lower than the upfront payment amount for that license in Auction No. 22. Thus, for licenses with minimum opening bids that otherwise would be lower than upfront payment amounts, the Bureau proposes to establish minimum opening bids that equal the upfront payment amounts. Minimum opening bid amounts are provided in the Attachment.

II. Upfront Payments and Initial Maximum Eligibility for Each Bidder

3. The Bureau proposed in the *Procedural Public Notice* to set the upfront payment amount for each license in Auction No. 22 at $0.06 * MHz * Population (''Pops'') (rounded up to the next dollar). The Bureau seeks comment on its proposal to apply the same upfront payment amount to each of the D, E, and F block licenses to be auctioned.

4. In accordance with the Commission rule governing C block applicants, the Bureau stated in the *Procedural Public Notice* that the upfront payment amount for ''former defaulters'' (i.e., applicants that have ever been in default on any Commission licenses or have ever been delinquent on any non-tax debt owed to any Federal agency) will be fifty percent more than the normal amount required to be paid. Consistent with this rule, any former defaulter that applies to bid on ''all markets'' or designates D, E, or F block licenses *in addition to* at least one C block license will be subject to the higher upfront payment requirement. Former defaulters that apply to bid *only* on D, E, or F block licenses will not be subject to the higher upfront payment requirement.

5. In the *Procedural Public Notice,* the Bureau proposed that the amount of the upfront payment submitted by a bidder will determine the initial maximum eligibility (as measured in bidding units) for each bidder. Upfront payments will not be attributed to specific licenses, but instead will be translated into bidding units to define a bidder's initial maximum eligibility, which cannot be increased during the auction. Thus, in calculating the upfront payment amount, an applicant must determine the *maximum* number of bidding units it may wish to bid on (or hold high bids on) in any single round, and submit an upfront payment covering that number of bidding units. The Bureau seeks comment on its proposal to use this same approach for the D, E, and F block licenses to be auctioned.

III. Attribution Rules

5. As stated in the *Procedural Public Notice,* the attribution rules set forth in Section 24.709 of the Commission's rules will apply to Auction No. 22.

IV. Other Auction Procedural Issues

6. In the *Procedural Public Notice,* the Bureau set forth proposals for Auction No. 22 with respect to the following issues: (1) Auction sequence and license groupings; (2) structure of bidding rounds, activity requirements, and criteria for determining reductions in eligibility; (3) minimum accepted bids; (4) activity rule waivers and reducing eligibility; (5) information regarding bid withdrawal and bid removal; (6) stopping rule; and (7) information relating to auction delay, suspension or cancellation. Because the remaining D, E, and F block licenses will be included in Auction No. 22, the Bureau proposes to adopt these same proposals for the auction of these licenses.

Federal Communications Commission.

Daniel B. Phythyon,

Chief, Wireless Telecommunications Bureau.

[FR Doc. 98–32016 Filed 11–27–98; 11:51 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act Concerning Participation in the Conduct of the Affairs of an Insured Institution by Persons Who Have Been Convicted of Crimes Involving Dishonesty, Breach of Trust or Money Laundering or Who Have Entered Pretrial Diversion Programs For Such Offenses

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final policy statement.

SUMMARY: The FDIC is updating its statement of policy (SOP), which is issued pursuant to section 19 of the Federal Deposit Insurance Act (12 U.S.C. 1829). 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 in connection with such an offense. Section 19 was significantly expanded by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101–73, 103 Stat.183 (1989) and the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 (Crime Control Act), Pub. L. No. 101–647, 104 Stat. 4789 (1990). As a result, the two existing policy statements for section 19 are outdated, and the new SOP is intended to replace them and to supersede prior guidelines. While the SOP maintains the FDIC's current requirement that an application seeking the FDIC's consent must be filed by an insured depository institution (insured institution), it provides blanket approval for certain de minimis crimes, and allows for a waiver of the institution filing requirement where an individual can demonstrate substantial good cause for such a waiver. Other significant provisions include the exclusion from section 19's coverage of a conviction that has been completely expunged, pretrial diversion and similar programs entered before November 29, 1990, and youthful offender adjudgments. The SOP clarifies that the scope of section 19's coverage applies to employees of an insured institution, and also to other persons who are in a position to influence or control the management or affairs of an insured institution.

EFFECTIVE DATE: December 1, 1998.

FOR FURTHER INFORMATION CONTACT: James M. Orlowsky, Review Examiner, Division of Supervision (202) 898–6763

or Andrea Winkler, Counsel, Legal Division (202) 898–3727, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

I. Background

As amended by FIRREA and the Crime Control Act, 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, 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. 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 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.

A proposed SOP was published in the **Federal Register** on July 24, 1997 (62 FR 39840 (1997)). The FDIC invited comments on all aspects of the proposal, as well as on a number of specific aspects of the SOP. Comments were due by September 22, 1997. The FDIC received a total of 19 comment letters: 12 from banks, savings associations or bank holding companies; two from law firms; one from a state banking department; and four from trade associations. Based upon the comments, as discussed below, the final SOP is a significant revision of the proposal.

II. Final Statement of Policy

A. Scope of Section 19

(1) Participation

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 depository institution. Therefore, all employees of an insured institution fall within the scope of section 19. The proposed SOP indicated that, additionally, persons employed by an institution's holding company or an affiliate, subsidiary or joint venture of an insured institution or of its holding company may be within the scope of section 19 where such person is engaged in performing banking or banking-related activities on a regular and material basis. For independent contractors, the proposal indicated that participation by an independent contractor or an employee of an independent contractor would occur where either is performing banking or banking-related activities on behalf of, or for the benefit of, an insured institution on a regular and material basis so as to be involved in the ordinary course of operations or to be exercising control over such operations. The proposal did not define what constitutes such activities. The SOP stated that ''person,'' for purposes of section 19, means a natural person, and does not include a corporation, firm, or other business entity.

The FDIC received fourteen comments relevant to what constitutes ''participation'' and what classes of individuals should be considered ''participants.'' Ten of the comments were received from banks, savings associations or bank holding companies; one from a law firm; one from a state banking department; and two from trade associations. In general, the commenters expressed the view that the FDIC's definition of participation was overly broad and ambiguous, particularly with regard to affiliates and independent contractors, and did not adequately consider the risk of particular positions to the safety and soundness of an insured institution or its depositors. For example, one commenter indicated that under the proposal, section 19 could cover a computer technician employed by the institution's holding company who periodically performs routine maintenance at the institution's facilities, despite the low level of risk associated with the position. Concern was expressed that the proposal might have a crippling effect on independent contractors who employ large numbers of employees. Commenters felt that although independent contractors engage in activities that are related to banking, many do not exercise any decision-making authority with regard to the activities of the insured institution, and thus should not be subject to section 19. For example, if having access to sensitive bank data is a banking-related activity, then providers of automated teller machines and securities systems firms might arguably be included within the scope of section 19. Commenters requested that the FDIC specifically define the positions or types of independent contractors and activities that are covered by section 19.

After considering the comments, the FDIC believes that it is not the purpose of the SOP to define precisely what activities constitute ''participation.'' Rather, agency and court decisions should provide the guide as to what standards should be applied. As a general proposition, participation will be determined by the degree of influence or control over the management or affairs of an insured institution. Furthermore, given the changes in banking, including financial modernization and the rapid pace of technology, a listing of activities in the SOP is neither practical nor advisable. The FDIC must maintain flexibility in such determinations, and in reaching such determinations, the FDIC will consider the facts and circumstances and the degree of involvement of the individual in the institution's affairs. Under this standard, persons who function as ''de facto'' employees regardless of their relationship to the institution, will be covered by section 19. Likewise, the SOP need not specifically define what activities constitute direct as distinguished from indirect participation. The relevant inquiry is whether the individual personally participates in an institution's affairs, or whether the individual does so through another person or entity, i.e., ''indirectly.''

The final SOP adopts the standard that whether persons, other than institution-affiliated parties of an insured institution, are participants covered by section 19 depends upon their degree of influence or control over the management or affairs of an insured institution. It retains the definition of ''person'' set forth in the proposed SOP as not including corporations, firms or other business entities. Thus, section 19 would not apply to persons who are simply employees of a bank holding company, but would apply if those persons were in a position to influence or control the management or affairs of the insured institution. To the extent that the holding company's officers and directors have the power to define and direct the policies of the subsidiary insured institution, such persons would be deemed to be participants in the affairs of those subsidiaries, and therefore covered by section 19.

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. In those cases in which such individuals exercise policymaking functions for the insured institution, they should be deemed ''participants.'' For example, officers of an electronic data processing (EDP) affiliate would not typically exercise a controlling

influence to the extent that the affiliate simply provides a processing service to the bank. On the other hand, if a mortgage banking affiliate sends loans to an insured institution that the institution is obligated to purchase, then the officers of the affiliate may be participants in the insured institution's affairs. Where an employee of an EDP service has access to sensitive bank records and the ability to manipulate data so as to influence or control the management or affairs of an insured institution, that person will be covered by section 19. The degree of such influence may be controlled by reliance upon the safeguards and internal controls put in place by the affiliate and the bank.

Insured depository institutions continue to out source increasing numbers of banking tasks. To the extent that independent contractors are utilized, an analysis similar to that for affiliates may be applied. Typically an independent contractor does not have a relationship with the insured institution other than the activity contracted for by the depository institution. Independent contractors are not considered institution-affiliated parties unless they knowingly or recklessly participate in violations, unsafe or unsound practices or breaches of fiduciary duty which result in the consequences set forth in 12 U.S.C. 1813(u). Those who do so, and who have been convicted of or entered pretrial diversion programs for covered offenses would, of course, be covered by section 19. In terms of participation, however, the typical independent contractor does not influence or control the bank's management or affairs. This would also be true of consultants who perform a specific defined task for the insured institution. Additionally, it has been determined that ''person'' within the context of section 19 means individuals, but not companies. This approach may eliminate coverage for many independent contractors. It would eliminate, for example, marketers of special promotions and similar independent contractors whose activity is not commonly thought to pose a risk to the operation of a financial institution. To the extent that any officer of such a company or any individual contractor attempts to use their position to influence or control the management or affairs of a financial institution, they would be covered as participants.

The FDIC is aware that an effort can be made to evade the coverage of section 19 by ''converting'' an employee to an independent contractor. In those cases, generally applicable standards of employment law will be used to identify such arrangements, and to find that the person is a ''de facto'' employee. This same analysis will be used where an individual is employed by the holding company simply to avoid section 19 coverage.

The FDIC believes that the approach adopted in the final SOP preserves the distinction between employees and independent contractors for contractual, regulatory and tax purposes, and avoids the criticism that the FDIC is imposing an excessive regulatory burden upon institutions without commensurate benefit. Furthermore, the FDIC expects that the relationship between an independent contractor and an insured institution is to be governed by a written contract, through which the insured institution may require typical safeguards such as warranties and bond coverage.

(2) ''Ownership'' and ''Control''

Section 19 specifically prohibits a person subject to its coverage from owning or controlling an insured institution. The proposed SOP did not specifically define ''own'' or ''control,'' although the accompanying Preamble indicated that the FDIC was using the definition of ''control'' set forth in Regulation Y (12 CFR Part 225) which the Board of Governors of the Federal Reserve System (Federal Reserve Board) uses to implement the Change in Bank Control Act (CBCA) (12 U.S.C. 1817(j)). The proposal stated that a controlling shareholder or a member of a control group subject to section 19 could not, without the prior written consent of the FDIC engage in the following conduct: (i) exercise any voting rights in any shares of stock of an insured institution or its holding company; (ii) own or control such shares of stock so as to result in controlling the management or policies of an insured institution; (iii) control such shares of stock so as to result in controlling the management or policies of an insured institution; (iv) solicit, procure, transfer, or attempt to transfer, vote, or attempt to vote any proxy, consent or authorization with respect to any voting rights in any insured institution; or (v) modify or set aside any voting agreement previously approved by the appropriate federal banking agency.

The FDIC received six comments regarding the issue of ownership and control-three from depository institutions; one from a state banking department; and two from trade associations. Most commenters supported the conclusion that ''control'' should have the same meaning as set forth in the CBCA. Generally, the commenters indicated that absent an influence on the operations of an insured operation, mere ownership should not impose a section 19 obligation, nor should the ownership of a *de minimis* interest in the outstanding shares of an institution.

As a general rule, since the 1990 Crime Control Act amendments, the FDIC has followed the interpretation found in the CBCA regarding ''control.'' ''Control'' under the CBCA occurs where the person has the power to direct the management or policies of an institution (12 U.S.C. 1817(j)(8)(B)). The statute and the FDIC's implementing regulation (12 CFR Part 303) deem the power to vote 25 percent or more of a class of voting securities to constitute such control. In addition, the FDIC's regulation creates a presumption of control, i.e., that the person can direct management or policies of the institution, where the person owns, controls, or has the power to vote ten percent or more of the institution's voting securities if that person is the largest shareholder.

The FDIC agrees with the commenters that ''own'' must mean more than simply owning a few shares. In order to give meaning to the ownership prohibition contained in section 19, the FDIC will apply the 25 percent limitation regarding the power to vote shares to include an ownership limitation of 25 percent. The FDIC will also apply the ten percent limitation to ownership of voting shares where that person is the largest shareholder. Consequently, a person would be prohibited from owning or having the power to vote 25 percent or more of an institution's voting shares, or ten percent of those shares where that person is the largest shareholder. These standards would also apply to an individual acting in concert with others so as to have such ownership or control. The FDIC believes that this approach will avoid the absurd result of requiring a convicted person who owns one share or ten shares of stock in a large publicly traded insured depository institution from having to divest his or her ownership interest.

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. Section 19 does not contain specific statutory prohibitions regarding specific activities relating to the voting of stock. Therefore, the FDIC has decided not to incorporate into the final SOP any prohibitions on specific voting activities other than the aforementioned limitations regarding ownership, control, and participation.

It should be noted that while the Preamble accompanying the proposed

SOP referred to the Federal Reserve Board's Regulation Y (12 CFR Part 225) as enunciating the standards for ''own'' and ''control,'' the FDIC has decided that use of its own regulations in this area would be more appropriate. Regulation Y has wide reaching attribution rules for stock ownership among family members. An attempt to restrict ownership or control of shares by family members simply because of a person's conviction raises significant due process issues that are best avoided, however, control of a convicted person's shares by family members may be precluded where such control is detrimental to the bank, based upon the facts in a particular case.

B. Standards for Determining Whether an Application Is Required

The Proposed SOP contained the requirement that an application seeking the consent of the FDIC prior to engaging in banking activities be submitted in all cases in which any adult or minor treated as an adult was convicted or entered into a pretrial diversion program with regard to a covered offense. As discussed more fully in section (5), below, based upon its experience in processing section 19 applications, and in light of comments received, the final SOP reflects the FDIC's determination that it will provide automatic approval and dispense with the application requirement in certain cases involving *de minimis* crimes.

(1) Convictions

The proposal required that there be a conviction of record, and excluded arrests, pending cases not brought to trial, acquittals, or any conviction which has been reversed on appeal. Under the proposed SOP, a conviction with regard to which an appeal is pending required an application until or unless reversed. The proposal stated that a conviction which has been expunged, or for which a pardon has been granted, required an application.

The FDIC received seven comments regarding the issue of expunged convictions—five from depository institutions; one from a law firm; and one from a trade association. The commenters overwhelmingly favored excluding expunged convictions from section 19's coverage. As the commenters pointed out, under most state laws, an expunged conviction is deemed not to have occurred, and is not a conviction ''of record.'' Further problems arise regarding the ability of an institution to discover whether someone has an expunged criminal record, and in some states, laws prohibit and punish disclosure of information regarding expunged records.

Historically, the FDIC has taken the position that convictions which have been completely expunged are not covered by section 19. The FDIC proposed a change in that position in the proposed SOP based upon the rationale that the Crime Control Act amendments require a person who has entered into a pre-trial diversion or similar program to file a section 19 application. This requirement appears to create an anomalous result when compared with the FDIC policy that those with expunged convictions need not file.

Based upon the comments, however, and because it appears that expunged convictions do not constitute convictions of record, the final SOP excludes expunged convictions from the coverage of section 19. Furthermore, institutions have been advised in the past that expunged convictions were not covered by section 19. Excluding expunged convictions would avoid the significant practical problems of a change in policy which would require those previously allowed to work at institutions to now file section 19 applications. Therefore, the final SOP adopts the FDIC's current interpretation that persons with completely expunged convictions are not required to file section 19 applications.

(2) Pretrial Diversions

The proposed SOP defined a pretrial diversion as a program entry, as determined by relevant federal, state or local law, whether formal or informal, which 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. The FDIC received two comments on the issue of what should constitute a ''pretrial diversion program,'' one from a law firm and one from a trade association. Each made suggestions as to whether certain specific programs ought to be included in the definition.

The FDIC believes that it would be impractical to attempt to identify in the SOP all of the specific programs which might constitute pretrial diversion programs. As is the current practice, the final SOP states that the FDIC will continue to determine whether a program constitutes a pretrial diversion on a case-by-case basis. In addition, in 1990, the Crime Control Act amendments made pretrial diversion programs subject to section 19 for the first time. Persons working in financial institutions at the time of the 1990 amendments who had previously entered into a pre-trial diversion program would be unaware that they were suddenly prohibited from working in banking. In order to avoid the issue of retroactive application, and to provide a ''bright line'' test, the FDIC has decided to except pre-trial diversions entered before November 29, 1990, from section 19's coverage. In addition, since most offenses eligible for pre-trial diversion are relatively minor, and since only those offenses more than seven and a half years old would be excluded from coverage, the risk to financial institutions from this proposal is slight.

(3) Covered Offenses Involving Dishonesty or Breach of Trust

The proposed SOP indicated that for section 19 to apply, the conviction or program entry must be for a criminal offense involving dishonesty, breach of trust or money laundering. Under the proposal, ''dishonesty'' was defined as 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.

The proposed SOP made clear that all convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances required an application (drug offenses). The proposal indicated that a ''controlled substance'' shall mean those so defined by federal law. While the proposal acknowledged that use of a controlled substance does not per se constitute a covered offense, the circumstances of the offense may contain elements of dishonesty or breach of trust or money laundering, and that the FDIC would determine on a case-by-case basis whether to approve an application regarding a person convicted of such an offense.

The FDIC received three comments regarding the definitions of ''dishonesty'' and ''breach of trust''—two from insured institutions and one from a law firm. The commenters requested clarification of what

constitutes a conviction involving ''dishonesty'' and ''breach of trust,'' and requested that the SOP contain a specific list of crimes to which section 19 will apply, or safe harbors to which it will not apply. Concern was expressed that crimes of violence may not be covered, while one expressed the view that all crimes are dishonest.

With regard to drug offenses, the FDIC received four comments-three from insured institutions and one from a bank holding company-all of which were generally unfavorable regarding the approach the proposal took regarding drug offenses. The commenters felt that no application should be required of those convicted of using or possessing drugs, citing concerns regarding laws pertaining to disabilities and rehabilitation. In addition, concern was expressed regarding the proposed case-by-case method of reviewing the underlying circumstances of each drug offense to determine whether an application should be approved.

After considering the comments, the FDIC has altered its approach in the final SOP. The FDIC has generally acknowledged that not all crimes are covered by section 19, and that many crimes involving violence do not have dishonesty and breach of trust as elements. The FDIC believes that whether a crime involves ''dishonesty'' or ''breach of trust'' must be determined from the statutory elements of the crime itself, rather than the factual circumstances surrounding a crime, and the final SOP adopts this approach. To do otherwise would require insured institutions and the FDIC to analyze the factual background of every conviction, including such offenses as disturbing the peace. For many convictions, records of a factual background are not available. All convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances shall require an application. A ''controlled substance'' shall mean those so defined by federal law.

(4) Youthful Offender Adjudgments

The proposed SOP indicated that 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.

The FDIC received three comments-all from insured institutions, which strongly favored the stated approach. Historically, the FDIC has followed the approach of exempting youthful offender adjudgments from the coverage of section 19, with no perceived ill effects upon institutions. Furthermore, it is questionable whether the institution or the FDIC would be able to obtain records regarding such adjudgments. Therefore, the final SOP adopts, without change, the position set forth in the proposed SOP.

(5) *De minimis* Offense

The proposed SOP required any person with a conviction or program entry concerning a covered offense to submit an application. The FDIC received six comments—four from insured institutions or holding companies, one from a law firm and one from a trade association—regarding whether there should be an exemption for a *de minimis* crime. All commenters favored an approach whereby a *de minimis* crime would not require an application, although there was no general consensus as to the precise definition of such offenses.

Suggestions were made that a *de minimis* offense should include any misdemeanor committed by a juvenile, any one-time crime of dishonesty or breach of trust where the amount of loss was small, and a single misdemeanor committed by an adult. Further, commenters suggested that there should be a distinction between felonies and misdemeanors, and consideration of the time that has elapsed since the conviction, a person's present integrity and the risk associated with the position sought. A list of the specific crimes or the factors which should be taken into account in determining whether an offense is *de minimis* was requested. An alternative suggestion was a streamlined approach with a shortened approval period based upon the level of risk the person's position presents to the institution.

Section 19 applies, without exception, to convictions for crimes involving dishonesty or breach of trust. The FDIC, therefore, must provide prior written consent before covered persons may participate in banking. However, based upon the comments, and in light of its experience in processing and approving many applications involving minimal offenses, the FDIC has determined to grant blanket approval, through the final SOP, to certain defined categories of offenses. Such offenses are considered to be of such a minimal nature and of such low risk that the affected person may be employed at any institution, in any position. The foregoing approach would have the advantage of addressing a large number of pretrial diversion applicants, since in most cases, the crimes involved in such programs are not serious ones which would involve risk to an insured institution.

The final SOP provides that approval is automatically granted and application will not be required where the covered offense is considered *de minimis*, because it meets 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 less than one year and/or a fine of less than $1000, and the individual did not serve time in jail; the conviction or program was entered at least five years prior to the application; and the offense did not involve an insured institution or insured credit union. The above factors generally encompass offenses that are less than felonies. This exception represents the FDIC's view that an individual should generally not be prohibited from participating in banking because of a singular offense of lesser consequence. The basic underlying premise of section 19 is to prevent risk to the safety and soundness of an insured institution or the interests of its depositors, and to prevent impairment of public confidence in the insured institution. We find it incongruous to accord blanket approval to individuals who have previously committed an offense against an insured institution or insured credit union, and an application therefore will be required in such cases. 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 wishes to participate.

C. Procedures

The proposed SOP indicated in the section regarding procedures that 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. It stated that an institution might believe that undertaking a minimal inquiry might not be necessary in certain circumstances, however, the FDIC believes that at a minimum, each insured institution should establish a screening process which provides the insured institution with information concerning any conviction or program entry pertaining to a job applicant. The

proposed SOP provided examples of what would constitute a reasonable inquiry, including, the completion of a written employment application which requires a listing of all convictions and program entries; (2) fingerprinting and (3) periodic inquiries to determine whether a person has a conviction or program entry. The proposed SOP indicated that the foregoing were not requirements, and that the FDIC would look to the circumstances of each situation to determine whether the inquiry is reasonable.

The procedures set forth in the proposed SOP were that upon notice of a conviction or program entry, an application seeking the FDIC's consent prior to the person's participation must be filed. When an application is required, forms and instructions should be obtained from, and the application filed with, the appropriate FDIC Regional Director.

The proposed SOP stated that the application must be filed by an insured institution on behalf of a person, but contained an exception to this requirement for a shareholder seeking to exercise voting rights if the insured institution has refused to file an application on that person's behalf. Where a person currently employed by an insured institution is discovered to have a conviction or program entry, the proposed SOP allowed that, upon request, the Regional Director could grant a conditional approval pending the processing of the application.

Fourteen comments were received pertaining to whether the screening process, including the idea of fingerprinting, was burdensome—nine from depository institutions, one from a bank holding company, one from a law firm and three from trade associations. The comments were generally not favorable, or found the proposed SOP confusing about what was being required. One commenter took exception to the FDIC imposing any duty upon insured depository institutions for making a reasonable inquiry into whether a person has a conviction or program entry based upon the argument that section 19 imposes no duty to discover such offenses, it only demands action once the presence of a conviction becomes known. The FDIC believes that the commenter's approach does not comport with the intent of the law which is designed as a preventive measure to protect against risk to the safety and soundness of insured institutions and their depositors.

(1) Fingerprinting

The issue of fingerprinting generated more discussion than any other. It is apparent that fingerprinting as a recommended practice, even though explicitly not required in the SOP, is not welcomed by the banking community. The smaller banks, especially, appear to be opposed to the practice. They maintain that because of the smaller communities they serve, they are familiar with their applicants and view fingerprinting as an unnecessary burden. Many commenters expressed concern that a recommendation or guideline that fingerprinting is advocated would be interpreted as an industry standard, and by field examiners as mandatory.

Others feared that bankers would deem fingerprinting a requirement and feared liability for any loss which could have been prevented by fingerprinting. Others suggested that a written application listing previous convictions or program entries would suffice, but that the screening process must be coordinated with the standards in the institution's fidelity bond to avoid any loss of insurance. One commenter stated that the SOP should only contain minimum standards, and that institutions should be encouraged to develop even stricter standards. Others suggested restricting fingerprinting to high-risk positions, or using bonding or other companies to perform such screening. The remainder of the comments addressed the difficulty of obtaining criminal background information and fingerprints, the delay and cost inherent in fingerprinting, the burdensome impact of the process would have upon small institutions, and the need to ensure that requirement of criminal background checks was consistent with other laws which protect against disclosure of criminal or arrest information.

After considering the comments, the FDIC has decided not to address fingerprinting in the final SOP. Instead, the FDIC will allow each insured institution to determine what screening methods it will use, and will look to the circumstances of each situation to determine whether an inquiry was reasonable. The FDIC believes that at a minimum, each institution should have a screening process to uncover information regarding a job applicant's convictions and program entries, which would include, for example, a written application listing such convictions and program entries, although other alternatives may be appropriate. The final SOP reflects this guidance.

(2) Periodic Inquiries

Seven commenters addressed the issue of periodic inquiries. The majority of comments were not favorable, and indicated that using periodic inquiry to determine whether current employees were subject to recent convictions would be burdensome on institutions and that such an inquiry was not mandated by section 19. Others stated that periodic inquires on recent convictions were not useful because employees would be afraid of losing their jobs. Others stated that there are regular channels by which institutions learn about recent convictions or program entries by their employees other than having routine inquires. Alternatively it was suggested that periodic inquiries should be optional or limited to high-risk positions, only required at the beginning of employment or only conducted at lengthy intervals such as every ten years.

Similar to the analysis regarding fingerprinting, after considering the comments, the FDIC believes that whether periodic background checks are used should be optional, and that the major responsibility should be upon the individual to bring to the institution's attention any change in ''conviction'' status for purposes of section 19.

(3) Who May Be an Applicant?

The proposed SOP requires that an application be filed by an institution rather than an individual. This policy is based upon the rationale that in determining whether to approve a section 19 application, the FDIC must assess whether the person's participation in an insured institution constitutes a risk to the safety and soundness of the insured institution or its depositors or impairs public confidence in the institution. In making this determination, the FDIC has traditionally considered the position the person will occupy at the institution, the extent of the supervision of the person that the institution will provide, the size and condition of the institution and the fidelity bond coverage by the institution's bonding company. Where an individual is filing an application without institution sponsorship, the FDIC may not have the foregoing information available to it. Furthermore, an application may be filed by an individual who has no prospect of employment by an insured institution, and is merely seeking agency certification for potential employment. On the other hand, the FDIC is mindful that such a requirement may be unfair to an individual in certain circumstances. Therefore, the notice accompanying the proposed SOP sought comments whether the FDIC should change this longstanding policy.

There were ten comments on this issue-seven from depository institutions, one from a bank holding company and two from trade associations. Only one commenter believed that individuals should be permitted to file a section 19 application, although one indicated that independent contractors, if covered by section 19, might be allowed to file applications without bank sponsorship since the FDIC would be able to assess from the application what services the independent contractor provides for the financial institution.

The remaining comments were opposed to permitting an individual to file a section 19 application without institution sponsorship. The reasons generally were that insured institutions should maintain control over the process because they are in the best position to have available information to determine when section 19 applications should be submitted on behalf of an individual based upon the person's position and the risk to the institution. Further, the FDIC's resources should be available to handle section 19 applications filed by institutions on an expedited basis, and such handling should not be delayed because the FDIC is reviewing applications by individuals who may or may not have a legitimate interest in working for an insured institution. Another concern expressed was that if an individual filed an application without institution sponsorship and received approval for a particular position, the individual could later be employed in that position at another institution without the prior notice or consent of the FDIC.

After considering the comments, the FDIC has decided to maintain its requirement that an institution file a section 19 application on behalf of an individual. However, the FDIC is aware that many institutions will not file applications on behalf of a convicted individual under any circumstance. For those with relatively minor convictions this appears to be a harsh result, and the FDIC has attempted to lessen this harsh effect by adopting the de minimis exception discussed above. In addition, the FDIC is mindful that others may not fall within the de minimis exception, yet the institution filing requirement may result in a harsh result. Therefore, while the final SOP retains the institution filing requirement, it provides that an individual may seek a waiver of this requirement where substantial good cause for granting a waiver is shown. For example, a waiver is likely to be granted where the person requesting consent is a shareholder seeking to exercise voting rights and the insured institution has refused to file an application on his or her behalf. The FDIC expects that waivers will be granted on an infrequent basis, and only in truly meritorious cases.

(4) Conditional Approvals

The proposed SOP provided for a conditional approval by the Regional Director upon request, pending the processing of an application. Two comments received from depository institutions strongly supported this approach. At the time the proposed SOP was issued, the FDIC had not proposed a de minimis exception to filing. In light of the fact that under this new approach, the number of applications will decrease, the FDIC believes it will be able to act in an expedited manner on an application where necessary. Therefore, there is no provision for conditional approval in the final SOP.

D. Evaluation of Section 19 Applications

The proposed SOP stated that 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. Factors listed as relevant to this determination were the conviction or program entry and the specific nature and circumstances of the covered offense; 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; the position to be held or the level of participation by the person at an insured institution; the amount of influence and control the person will be able to exercise over the management or affairs of an insured institution; the ability of management of the insured institution to supervise and control the person's activities; the degree of ownership the person will have of the insured institution; the applicability of the insured institution's fidelity bond coverage to the person; the opinion or position of the primary Federal and/or state regulator; and any additional factors in the specific case that appear relevant.

The proposed SOP indicated that 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. The proposal stated that 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, and that 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 that person subsequently seeks to participate at another insured institution, approval does not automatically follow. In such cases, another application must be submitted. The proposed SOP also indicated in its introduction that 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.

Only one comment was received, which requested that the FDIC define what constitutes a substantial change in duties so as to require a new application. The FDIC believes, however, that an institution should itself be aware whether a person's duties have changed to the extent that their influence and risk upon the institution would require a section 19 application.

The final SOP incorporates all of the standards and factors set forth in the proposed SOP. In addition, it addresses the policy regarding a waiver by stating that 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. The FDIC believes this is essential to ensuring that institutions are aware of the potential risks to safety and soundness posed by their employees and participants, and are

able to fully apprise their fidelity insurers of such risks.

The Board of Directors of the FDIC has rescinded two earlier policy statements regarding section 19—Consent to Service of Persons Convicted of Offenses Involving Dishonesty or Breach of Trust as Directors, Officers or Employees of Insured Banks (41 FR 42699 (Sept. 22, 1976)) and Applications Under Section 19 of the Federal Deposit Insurance Act (March 31, 1980), and adopted the following Statement of Policy for Section 19 of the FDI Act:

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 an 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. 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. In addition, ''person'' for purposes of section 19 means an individual, and does not include a corporation, firm or other business entity.

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.

(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 with regard to which an appeal is pending will require an application until or unless reversed. 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 less than one year and/or a fine of less than $1000, 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.

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.

By order of the Board of Directors.

Dated at Washington, DC, this 17th day of November, 1998.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

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