

FDIC Revises Regulations Under Section 19 for Banks Hiring Persons Convicted of Certain Crimes

September 4, 2024

The Federal Deposit Insurance Corporation (“FDIC”) has [approved](#) a final rule updating its regulations [\[1\]](#) on banks hiring candidates with criminal records (the “Final Rule”). The Final Rule is in response to amendments made to section 19 of the Federal Deposit Insurance Act (12 U.S.C. § 1829) (“Section 19”) by the Fair Hiring in Banking Act (the “FHB Act”). The FHB Act prohibits individuals convicted of certain crimes (“Covered Offenses”) from becoming employed by, or participating in the affairs of, an FDIC-insured depository institution (“IDI”). Our earlier advisory summarizing the FHB Act can be found [here](#).

The amendments to Section 19, which are discussed in the Final Rule, address, among other topics, the types of Covered Offenses covered by Section 19, the effect of the completion of sentencing or pretrial-diversion program requirements in the context of Section 19, and the FDIC’s procedures for reviewing applications filed under Section 19.

The Final Rule will be effective on October 1, 2024.

I. Overview of the Final Rule

The following is an overview of the Final Rule:

- **Certain older offenses.** The FHB Act excludes certain Covered Offenses from the scope of Section 19 based on the amount of time that has passed since the offense occurred or since the individual was released from incarceration. As a result, the Final Rule includes new language reflecting the statute’s exception of certain older offenses from the scope of Section 19.
- **De minimis offenses.** The FHB Act excludes specified “de minimis” offenses from the scope of Section 19. This category includes relatively minor offenses that are specified either in the FHB Act or by FDIC regulation. As a result, the Final Rule treats de minimis offenses—a category that includes the sub-category “designated lesser offenses”—as offenses that are excluded from the prohibitions of Section 19 (assuming certain conditions are met) and for which offenses no application is required.
- **Criminal offenses involving dishonesty.** The FHB Act excludes certain offenses from the definition of “criminal offenses involving dishonesty,” including “an offense involving the possession of controlled substances.” Historically, the FDIC has required an individual to obtain the agency’s written consent upon application in regard to drug-related offenses—aside from simple-possession offenses. In light of the FHB Act, the FDIC believes Congress intended to exclude at least the offenses of simple possession and possession with intent to distribute from the “involving dishonesty” category because of the statute’s use of

the phrase “involving the possession of controlled substances.” Additionally, the Final Rule shifts the FDIC’s position away from its previous presumption that other drug-related offenses are subject to Section 19 as crimes involving dishonesty, breach of trust, or money laundering. The revisions to the Final Rule treat drug offenses the same way as all other types of crimes that do not automatically trigger the need for an application, but which may require an application depending on the elements of the underlying criminal offense.

- **Expunged, sealed, and dismissed criminal records.** The FHB Act excludes certain convictions from the scope of Section 19 that have been expunged, sealed, or dismissed. The existing FDIC regulations already exclude most of those offenses. However, the Final Rule modestly broadens the statutory language concerning such offenses to harmonize the FDIC’s current regulations concerning expunged and sealed records with the statutory language.
- **Pretrial-diversion or similar program.** The FHB Act prohibits, without the prior written consent of the FDIC, the participation in an IDI by any person who: (i) has been convicted of a crime involving dishonesty, breach of trust, or money laundering; or (ii) has agreed to enter into a pretrial diversion or similar program in connection with the prosecution for such an offense. The Final Rule provides that when an offense covered by Section 19 is either: (a) reduced by a person either entering into a program in regard to an offense that would otherwise not be covered by Section 19 or (b) dismissed upon the person’s successful completion of a program, the offense remains a Covered Offense for purposes of Section 19. The Covered Offense will require an application unless it qualifies as a de minimis offense.
- **Standards for FDIC review of Section 19 applications.** The FHB Act prescribes standards for the FDIC’s review of applications submitted under Section 19. As a result, the Final Rule provides additional details regarding how the FDIC will process new and pending applications under the provisions of the amended law. Prospective applicants may contact the appropriate regional office as instructed on the FDIC’s website for [Section 19 Applications](#).

The Final Rule also provides interpretive language that addresses, among other topics, when an offense “occurred” or was “committed” under the FHB Act and whether offenses that would qualify as Covered Offenses which occurred in foreign jurisdictions are subject to Section 19.

II. Conclusion

IDIs should make reasonable, documented inquiries to verify an individual’s conviction history to comply with the Final Rule. IDIs should also consider taking steps to ensure they are making lawful inquiries to capture the FDIC’s requirements, while making prudent lawful employment decisions consistent with federal, state, and local laws.

This advisory is a general overview of the Final Rule and is not intended as legal advice. If you have any questions about this advisory, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenllp.com, Elizabeth A. Murphy at (516) 296-9154, or via email at emurphy@cullenllp.com, or Gabriela Morales at (516) 357-3850 or via email at gmorales@cullenllp.com.

Footnotes

[1] 12 C.F.R. Part 303, Subpart L and Part 308, Subpart M

Practices

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