

# Federal Deposit Insurance Act Section 19 Final Regulations

## *Side-by-Side Comparison with Advocacy Organization Comments/Recommendations*

On March 16, 2020, 29 organizations representing the interests of people with arrest and conviction records submitted comprehensive *comments and recommendations* to the Federal Deposit Insurance Corporation (“FDIC”) in response to *proposed regulations* (84 Fed. Reg. 68353, dated December 16, 2019) governing criminal record background checks under Section 19 of the Federal Deposit Insurance Act (“FDI Act”). On July 24, 2020, the FDIC Board released *final regulations*, which included the following provisions and commentary responding to the joint recommendations of the advocacy organizations (the regulations take effect 30 days after they are published in the Federal Register):

- Of special note, the final rule adopted the recommendation of the advocacy organizations to preclude consideration of all expunged records thus removing the “complete” expungement requirement, which excluded expungements that allowed certain entities to access the record for employment purposes.
- While far more limited than the recommendations of the advocacy organizations, the final regulations expanded the *de minimis* offenses (i.e., offenses for which approval is automatically granted and no application is required) as follows:
  - Includes up to two *de minimis* covered offenses, rather than just one.
  - Eliminates the waiting period when a single covered offense would be considered *de minimis*.
  - Decreases the waiting period for the second covered offense from 5 years after conviction or pretrial diversion program entry to 3 years; and decreases the waiting period for individuals who were 21 years or younger at the time of the underlying misconduct, from 30 months to 18 months.
  - Increases the small-dollar theft threshold from \$500 to \$1,000.
  - Includes as a *de minimis* offense the use of a false identification to circumvent age-based restrictions.
  - The final regulations declined to adopt the advocate recommendations to eliminate the “jail-time” rule, raise the bad-check threshold, recognize more lesser offenses, and expand the youth exception.
- Of special concern, the FDIC declined to adopt the following recommendations of the advocacy organizations in its final regulations:
  - More narrowly define “dishonesty” offenses and limit consideration of drug offenses and “pretrial diversion” programs.
  - Adopt reasonable “washout” periods limiting consideration of older offenses.
  - Streamline the application process to expand the take-up rate, liberalize the conditions that govern employer-sponsored applications, and expand the criteria that govern the rehabilitation determination.

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Joint Comments Recommendations	Final Regulations
<p>Ensure future opportunities to review the impact of codifying the Section 19 policy (“Retrospective Analysis”/Report Data)</p>	<p><u>No Response (Retrospective Analysis)</u>  <u>Declined (Report Additional Data)</u>: “Three commenters made proposals concerning transparency, asking that the FDIC improve its web resources, issue written denials (rather than ask an applicant to withdraw an application), and publicize more application data. The FDIC believes that its website, <a href="http://www.fdic.gov">www.fdic.gov</a>, specifically the brochure <i>Your Complete Guide to Section 19</i>, available at <a href="https://www.fdic.gov/regulations/applications/resources/brochure-section-19.pdf">https://www.fdic.gov/regulations/applications/resources/brochure-section-19.pdf</a>, provides sufficient and convenient resources in a single location. The FDIC also notes that a regulation is not the appropriate mechanism to apply such a requirement on the FDIC. As for the request concerning written denials, the FDIC cannot issue a denial if an individual chooses not to proceed with an application. The FDIC already publishes the orders for approvals and denials of Section 19 applications on its website—specifically, on the FDIC Enforcement Decisions and Orders page (<a href="https://orders.fdic.gov/s/searchform">https://orders.fdic.gov/s/searchform</a>), which is searchable—and aggregates numbers of all Section 19 applications processed in its annual report. A regulation is not the appropriate method to apply such a requirement on the FDIC.”</p>
<p>The FDIC should more narrowly define “dishonesty” offenses and expand the exception for drug offenses (Section 303.222)</p>	<p><u>Declined (General)</u>: “Two commenters proposed that the FDIC reduce the type of offenses covered by the [Standard Operating Procedure] SOP. The FDIC declines to adopt these proposals. The types of offenses covered by Section 19 are broadly defined in the statute as those involving dishonesty, breach of trust, or money laundering. The FDIC determines whether certain crimes involve such elements under Section 19 when the FDIC processes applications. A change to the text of Section 19 would require legislation. Moreover, the regulation will codify certain minor crimes as <i>de minimis</i>, which will exclude such crimes from requiring an application.”</p> <p><u>Declined (Drug Offenses)</u>: “The FDIC has declined to adopt a commenter’s proposal that the FDIC eliminate all drug-related convictions from being considered covered offenses under Section 19, or significantly narrow the scope of covered drug offenses. The FDIC maintains that an application is required for it to determine the nature of the offense and elements of the crime and therefore it will continue the current requirement that an application be filed, unless the offense is <i>de minimis</i>.”</p>
<p>The FDIC should adopt reasonable “washout” periods limiting consideration of older offenses (Section 303.222)</p>	<p><u>Declined</u>: “Four commenters requested that the FDIC establish a time limit on covered offenses, whereby offenses would be “washed out,” for Section 19 purposes, after a certain period-of-time has passed. The FDIC notes that certain covered offenses—such as money laundering—have a mandatory 10-year prohibition period, absent court approval, under 12</p>

	<p>U.S.C. § 1829(a)(2). Therefore, the FDIC could not grant a Section 19 waiver for an applicant convicted under a crime listed in § 1829(a)(2) without Congress amending Section 19. For covered offenses that are not specifically listed under § 1829(a)(2), the FDIC declines to provide a blanket washout rule. Section 19 has no maximum time limit for how long an individual is prohibited from participation at an [Insured Depository Institution] IDI. Congress would have to change Section 19 for the FDIC to implement such a proposal. However, the FDIC notes that the expanded <i>de minimis</i> framework provides significant regulatory relief.”</p>
<p>The FDIC’s definition of “complete expungement” should be narrowed to conform with states laws (Section 303.223(b))</p>	<p><u>Accepted (No longer requiring a “complete expungement” under state law):</u>  Section 303.223(c): “<i>Expungements.</i> If an order of expungement or an order to seal has been issued in regard to a conviction, or if a record has been otherwise expunged by operation of law, then the conviction shall not be considered a conviction of record and shall not require an application.”</p> <p><u>Explanatory Language:</u> “The Rule excludes all covered offenses that have been expunged or sealed by a court of competent jurisdiction or by operation of law.”</p> <p>“Six commenters asked that the FDIC significantly revise its policy on the expungement of criminal records, including proposals to eliminate the requirement of complete expungement. To support this view, commenters highlighted the variance in expungement practices between jurisdictions and the significant ambiguity for applicants and banks that are tasked with interpreting unfamiliar state law. In fact, only a few states and jurisdictions have expungement processes that result in a “complete expungement” under the standards set forth in the current SOP. After considering these comments, the FDIC has agreed to expand the scope of the SOP’s expungement language. The FDIC believes that these revisions will reduce regulatory burden upon banks and potential applicants by decreasing the number of required applications and reducing the time spent interpreting the expungement laws of various jurisdictions.”</p>
<p>The definition of “pretrial diversion” should be narrowed to advance the goal of rehabilitation promoted by the states and localities (Section 303.224)</p>	<p><u>Declined:</u> “One commenter requested that the FDIC narrow the definition of “pretrial diversion” in the SOP. The FDIC declines to adopt this proposal and believes that the existing SOP language adequately and fairly describes pretrial diversion program entries.”</p>
<p>Streamline the employer-sponsored and individual application process</p>	<p><u>Declined (Increase Take-up Rate):</u> “The two commenters asked that the FDIC simplify the application process to encourage a higher number of</p>

<p>to expand the take-up rate (Sections 303.225, 303.226, 303.228)</p> <ul style="list-style-type: none"> <li>-Eliminate the threshold “Waiver” that a bank first filed the petition</li> <li>-Expand the regional office authority</li> <li>-Reduce paperwork requirements (including rap sheet documents)</li> <li>-Decrease processing time</li> </ul>	<p>applicants, and one commenter asked that the FDIC commit to significantly increasing its application approval-rate. The FDIC anticipates that the expansion of the <i>de minimis</i> framework and the exclusion of all expungements and sealed-records orders from the scope of Section 19 will reduce the number of applications required. The FDIC, however, declines to commit to an increase in approval rates, since doing so would be arbitrary, and applications are reviewed on a case-by-case basis.”</p> <p><u>Declined (Eliminate the Bank Waiver Requirement):</u> “This section comes from the SOP and requires that an IDI is required to file an application on behalf of an individual under Section 19 to participate in its affairs unless the FDIC grants the individual a waiver for good cause shown to file on her or his own behalf.</p> <p><u>Declined (Expand Regional Office Authority):</u> “The FDIC believes that the current delegations are appropriate and provide more consistency and uniformity in decision-making. Moreover, the FDIC anticipates that the expansion of the <i>de minimis</i> framework will result in more decision making at the regional-office level, as regional office staff typically respond to inquiries as to whether the <i>de minimis</i> exception applies to particular offenses.”</p> <p><u>Declined (Reduce Paperwork/Rap Sheet Requirements):</u> “The FDIC declines to adopt the proposal concerning court records. Rap sheets generally do not contain the level of detail needed to adequately assess the circumstances surrounding a crime and sentencing, especially with regard to pretrial diversions. Moreover, the court documentation is used to confirm the information provided by the applicant.”</p> <p><u>Declined (Processing Time):</u> “Two commenters requested that the FDIC commit to reducing application-processing times by certain amounts. In response, the FDIC notes that while the agency tries to process applications quickly, the establishment of such a timeline would be an internal-processing matter and would not fall within the purpose or intent of the Rule. Moreover, application processing is dependent upon receipt of background investigation materials from other agencies, whose timeframes for action the FDIC does not control.”</p>
<p>Reasonably expand the criteria that qualify for the <i>de minimis</i> exception (Section 303.227)</p> <ul style="list-style-type: none"> <li>-Eliminate the “jail-time” rule</li> <li>-Raise the bad-check threshold</li> <li>-Recognize more lesser offenses</li> <li>-Expand the youth exception</li> </ul>	<p><u>Modified:</u> “The general criteria have been expanded, in response to comments, in two significant ways: (1) an individual with two convictions or program entries for covered offenses may be eligible for the <i>de minimis</i> exception, provided the other criteria are satisfied with respect to both convictions or program entries; and (2) the five-year waiting period has been eliminated when the individual has only one <i>de minimis</i> offense, and the waiting period has been reduced to three years when the individual has two <i>de minimis</i> offenses (or 18 months if the actions that resulted in both convictions or program entries all occurred when the individual was</p>

	<p>21 years of age or younger).”</p> <p><u>No Response (Eliminate Jail Time Rule)</u>: With regard to jail time, that final regulations indicate that, “[o]ne commenter asked that the FDIC expand the maximum potential incarceration-period for a covered offense from one year to three years, under the <i>de minimis</i> framework. The FDIC declines to further expand the <i>de minimis</i> exception beyond the significant revisions outlined in Section III and believes that the current threshold is appropriate.”</p> <p><u>Declined (Bad Check Threshold)</u>: “One commenter suggested that the FDIC increase the “bad” or insufficient funds check(s) threshold from \$1,000 to \$2,500. The FDIC declines to expand the <i>de minimis</i> framework as proposed, because the FDIC considers the current threshold appropriate.”</p> <p><u>Declined (Expand Youth Exception)</u>: “Two commenters asked that the FDIC expand the <i>de minimis</i> exception for offenses committed by persons aged 21 or younger. One proposal called for the elimination of the maximum-punishment factor. The FDIC declines to expand the <i>de minimis</i> framework beyond the significant revisions outlined in Section III, which revisions pertain, in part, to offenses committed by persons 21 years of age or younger.”</p>
<p>The FDIC should expand the criteria and evidence it takes into account in evaluating individual and employer-sponsored applications (Section 303.229)</p> <ul style="list-style-type: none"> <li>-Liberalize the conditions that apply when the FDIC approves bank-sponsored applications (Section 303.229(e))</li> <li>-Expand the criteria and evidence that the FDIC considers when evaluating rehabilitation (Section 303.229(a)(3))</li> </ul>	<p><u>Declined (Rehabilitation Factors)</u>: “One commenter made several proposals concerning an applicant’s rehabilitation, requesting that the FDIC do the following: provide a checklist of rehabilitation factors, assess rehabilitation relative to the position sought by the applicant, set maximum limits on rehabilitation time, and relax rehabilitation standards. The FDIC may provide additional information in the application instructions and in the publication <i>Your Complete Guide to Section 19</i>, but the Rule is not the appropriate forum to provide this information. The FDIC declines to adopt the other proposals. For bank-sponsored applications, the FDIC already considers rehabilitation relative to the position sought by the applicant. However, individual waivers allow a person to work in any position, so this proposal is not feasible for such applications. Rehabilitation, in the context of individual waivers, is not assessed relative to any potential position but rather to the nature of the covered offense. The FDIC does not adopt the proposal concerning setting maximum limits on rehabilitation time because the agency believes that such limits would be arbitrary. Nor does the FDIC adopt the proposal concerning the relaxation of rehabilitation standards. Rehabilitation in relation to the nature of the offense is one of the standards that is assessed when the FDIC processes applications, and the <i>de minimis</i> exception, as amended, provides sufficient flexibility.”</p> <p><u>Declined (Bank-Sponsored Conditions)</u>: “One commenter asked that the FDIC relax approval conditions for bank-sponsored applications. The FDIC</p>

	<p>declines to adopt this proposal, because the approval conditions are meant to address the specific position being sought at a particular IDI.”</p>
<p>The FDIC should clarify that the banks may wait to inquire into an applicant’s criminal history until after the conditional offer stage of the hiring process (Section 303.229)</p>	<p><u>Declined (Delay Criminal History Inquiry):</u> “Two commenters asked that the FDIC clarify that banks are allowed to delay inquiry into an applicant’s criminal history until after a job offer is extended. The FDIC notes that this approach is already stated as permissible in the SOP for FDIC-supervised banks. To the extent that the commenters request that the FDIC direct IDIs to follow this practice, the FDIC declines to make this change for several reasons. First, the FDIC does not have primary supervisory authority over IDIs that are subject to the supervisory authority of other Federal banking agencies (FBAs). Therefore, it is within the supervisory authority of the other FBAs to determine what is satisfactory to them in reviewing which policies and procedures their respective institutions adopt to ensure compliance with Section 19. Second, the FDIC’s authority under Section 19 focuses on the review needed to provide consent to remove the bar imposed by Section 19 and allow an individual to participate in the affairs of an IDI. It does not grant the FDIC rulemaking authority to impose conditions or requirements on an IDI other than to note that the IDI faces a criminal penalty for acting in violation of the statute.”</p>