



January 16, 2024

*Via Electronic Mail*

Federal Deposit Insurance Corporation  
Attention: Mr. James P. Sheesley, Assistant Executive Secretary  
550 17th Street NW,  
Washington, DC 20429  
RIN 3064-AF92

Re: Proposed Amendments to the FDIC's Section 19 Regulations

Ladies and Gentlemen:

The Bank Policy Institute supports the Federal Deposit Insurance Corporation's proposed amendments to the Section 19 regulations (12 C.F.R. part 303, subpart L, and part 308, subpart M). The proposed amendments would implement the Fair Hiring in Banking Act (FHBA), which amended section 19 of the Federal Deposit Insurance Act (12 U.S.C. 1829) and had the purpose of expanding opportunities for employment in the banking sector. The proposal would provide welcome clarity to job seekers and insured depository institutions seeking to attract qualified candidates.

## **I. Introduction**

The FHBA was intended to provide greater opportunities for individuals with minor criminal records to participate in the affairs of a bank as an employee or other institution-affiliated party. BPI strongly supports this objective. We supported the legislative amendments that more appropriately calibrated Section 19's requirements by exempting certain minor offenses and older offenses from the law's scope. Together with the FDIC's implementing regulations, these changes will enhance economic advancement opportunities for qualified job seekers with minor records by giving IDIs the flexibility they need to hire rehabilitated candidates. IDIs may continue to review candidates according to their own risk assessments but, with respect to the minor offenses identified in the statute, candidates would not be subject to a more extensive regulatory approval process.

BPI supports the current proposal to align the FDIC's rules with the statutory amendments and provide greater certainty. We agree with the FDIC's approach to revise its regulations consistent with the clear direction set by Congress in FHBA. We recognize that most of the changes are—appropriately—mandated by the statute and thus we do not address those required changes specifically, although we are supportive of them. While the statute was

effective immediately, updating the FDIC’s implementing regulations is an important step that will ultimately provide regulatory clarity and support the objectives of the FHBA.

As described further in this letter, we believe certain targeted, technical adjustments to the proposal would provide additional clarity and promote expanded utilization of the flexibility provided to IDIs in the FHBA.

## **II. Technical Recommendations on Proposed Rule**

### ***A. Interpretation of “offense committed” and “offense occurred”***

The FHBA excludes from the scope of covered offenses (i) “a misdemeanor criminal offense committed more than one year before the date on which an individual files a consent application, excluding any period of incarceration; and (ii) any offense if “it has been 7 years or more since the offense occurred.” Proposed section 303.222 would interpret both “offense committed” and “offense occurred” to mean “the last date of the underlying conduct.” The proposal asks if there are other, supportable interpretations.

This proposed interpretation would lead to greater operational uncertainty for IDIs. Background check reports that are commercially available or provided by the Federal Bureau of Investigation typically reflect the date of arrest, conviction or release from incarceration and will not necessarily include the date of the underlying conduct that led to the conviction. This means that banks attempting to comply may need to conduct detailed and time-consuming research and/or pull court records to determine whether someone is or is not eligible under the statute. Currently, Subpart L does not look to the date of underlying conduct but rather looks to the date of conviction or program entry, which are much more concrete, readily available data points. BPI supports the FDIC maintaining this interpretation in the final rule and providing greater certainty and administrability to the greatest extent possible under the FHBA. At a minimum, the final rule should clarify in section 303.220(b) that a “reasonable, documented” inquiry would include verifying the date of conviction or program entry occurred at least one year or seven years prior, as applicable.

### ***B. De minimis offenses***

The proposal asks if the FDIC should maintain its current approach to *de minimis* offenses. Currently, the FDIC considers *de minimis* offenses to be covered offenses for which an application is not required because the FDIC deems the application automatically granted. However, the FHBA provides that the FDIC may exempt *de minimis* offenses from section 19’s prohibitions—i.e., the statute states that the prohibition in paragraph (a) “shall not apply” to such *de minimis* offenses as the FDIC determines. Therefore, as established by FHBA, *de minimis* offenses are exempt from Section 19’s prohibition and should not be considered covered offenses.

BPI recommends that the FDIC revise section 303.227 to align with the framework established in FHBA. That is, the FDIC should exempt *de minimis* offenses from the scope of section 19’s prohibition and should not label these offenses as covered offenses. FDIC rules should treat exempt *de minimis* offenses the same way as exempt “designated lesser offenses.”

This treatment would be appropriate because the statute recognizes designated lesser offenses as a type of *de minimis* offense and nothing indicates they should be treated differently. In addition, there is no apparent utility in designating these exempt *de minimis* offenses as covered offenses. Streamlining the rule in this way will provide greater clarity and help to avoid unnecessary confusion among job seekers and IDIs.

### ***C. Process for Consent Applications***

The FHBA requires the FDIC to make all forms and instructions for consent applications available to the public, including on the FDIC’s website. The FDIC must also provide a sample cover letter, a comprehensive list of items that may accompany the application, and “clear guidance on evidence that may support a finding of rehabilitation.”

The proposal notes that the FDIC intends to comply with these requirements. We urge the FDIC to comply with these requirements as soon as possible and no later than the effective date of the final rule. In many, if not most, cases individuals apply to the FDIC directly on their own behalf. Therefore, it is essential that the process is as accessible, straightforward, and streamlined as possible. Providing clear and simple forms and instructions on the FDIC’s website will facilitate individuals’ ability to take advantage of the statutory amendments and promote the statutory purpose of expanding banking opportunities for qualified candidates.

Although the statute did not provide a deadline for the FDIC to comply with this provision, the required public forms, instructions, and guidance are essential to complete implementation of the law, to the same extent as revised rules are. Further, these forms, instructions, and guidance are necessary to support Congress’s directive and the clear legislative intent to increase opportunities and reduce barriers for qualified applicants. BPI would welcome the opportunity to discuss or provide feedback on the content of these forms, instructions and guidance in advance of publication on the FDIC’s website.

### ***D. Timeline for Processing Applications and Providing Copy of Applicant Criminal History Record***

In its final rule, the FDIC should commit to process applications within a specified period following the FDIC’s receipt of the applicant’s criminal history record from the FBI and should commit to provide the applicant a copy of the criminal history record within a specified time following FDIC’s receipt of the record.<sup>1</sup> As we have previously suggested, a specified response timeframe would encourage IDIs to make conditional offers of employment because they would have greater certainty that the conditional offer would not require them to keep positions vacant for an extended period of time. It may also encourage individuals to apply to bank jobs and to submit applications, since they would have a more certain timeframe for the review process.<sup>2</sup>

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<sup>1</sup> The FDIC should further commit to submit a request for the applicant’s criminal history record within 7 days of receiving a complete application.

<sup>2</sup> See Bank Policy Institute, Letter to FDIC regarding Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals (RIN 3064-AF19) (March 2, 2020), available at <https://bpi.com/wp-content/uploads/2020/03/BPI-Comment-Letter-on-Proposed-Section-19-Regulations-RIN-3064AF19.pdf>.

Commenters including BPI previously recommended that the FDIC commit to specified timeframe for processing Section 19 applications.<sup>3</sup> In response to those comments the FDIC said “application processing is dependent upon receipt of background investigation materials from other agencies, whose timeframes for action the FDIC does not control.”<sup>4</sup> To address this issue, the FDIC’s timeline for processing applications could run from the time the applicant’s criminal history record is received from the FBI. This would address the FDIC’s prior concerns about steps that are not within the FDIC’s control while providing greater certainty to applicants and IDIs on the timeframe for review.

With respect to providing an applicant a copy of their criminal history, the FHBA requires that the FDIC provide the criminal history record to the applicant for their review. Proposed section 303.229 restates the statutory language. To ensure adherence to this Congressional directive, the FDIC should establish a timeframe in which the record will be provided following the FDIC’s receipt of the information from the FBI. For example, we believe a five-day time period would be appropriate for providing the applicant a copy the criminal history record after the FDIC has received it from the FBI. In addition to supporting compliance with the statutory requirement, an established timeline would also provide much-needed predictability for applicants. This would further encourage individuals to apply to bank jobs and submit applications because they would have more clarity about key milestones in the review process.

### ***E. Reasonable Inquiry***

The proposal would revise section 303.220 to provide that an institution must make a “reasonable, *documented* inquiry” to verify an applicant’s eligibility.<sup>5</sup> In general, we support the FDIC’s statement in the adopting release to the 2020 rule that “the procedures that constitute a reasonable inquiry will vary from bank to bank, and the FDIC believes that this determination is best left to the business judgments of these institutions.”<sup>6</sup> We request that the FDIC reaffirm this position with respect to the revised rule and, in particular, that the FDIC clarify the addition of the term “documented” does not change the position that this is a determination left to the business judgment of IDIs.

Similar to our recommendation in response to the 2019 proposal, we recommend that the FDIC clarify the meaning of a “reasonable, documented” inquiry for purposes of considering whether an applicant meets the criteria of a *de minimis* offense. Specifically, the FDIC should confirm that a “reasonable, documented” inquiry does not require the IDI to review objective or official documentation (e.g., court records) if such information is not available. For example, there are dollar-based criteria in the *de minimis* exceptions for small dollar simple theft and “bad” or insufficient funds checks, but the information available to the bank may not include the exact dollar value of the goods or checks at issue. We recommend that the FDIC clarify that a

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<sup>3</sup> *Id.* at 5.

<sup>4</sup> 85 Fed. Reg. 51312, 51316.

<sup>5</sup> 88 Fed. Reg. 77906, 77907 (emphasis added).

<sup>6</sup> 85 Fed. Reg. at 51317.

“reasonable, documented” inquiry does not require objective or official documentation of each element of a *de minimis* offense.

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We appreciate the opportunity to comment on the proposal and would be pleased to discuss our comments with the FDIC staff if it would be helpful. If you have any questions, please do not hesitate to contact the undersigned by email at [tabitha.edgens@BPI.com](mailto:tabitha.edgens@BPI.com).

Sincerely,

/s/

Tabitha Edgens  
Senior Vice President and  
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*Bank Policy Institute*