

FEDERAL DEPOSIT INSURANCE CORPORATION

FAIR HIRING IN BANKING ACT

REPORT TO CONGRESS

On December 23, 2022, the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA) was signed into law. Section 5705 of the NDAA, known as the Fair Hiring in Banking Act (FHBA), amended section 19 of the Federal Deposit Insurance Act (12 U.S.C. 1829) (section 19), among other provisions, and became effective immediately.

Section 19 prohibits, without the prior written consent of the FDIC, a person convicted of any criminal offense involving dishonesty, breach of trust, or money laundering, or who has entered into a pretrial diversion or similar program in connection with a prosecution for such an offense (collectively, covered offenses), 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. Further, 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.

Among other provisions, the FHBA excluded or exempted categories of otherwise covered offenses from the scope of section 19. The FHBA also clarified several definitions in section 19 and provided application-processing procedures. On July 30, 2024, the Board of Directors of the FDIC (FDIC Board) approved a Final Rule that revised 12 C.F.R. part 303, subpart L, and part 308, subpart M, thereby updating the FDIC's regulations concerning section 19 to conform with the provisions of the FHBA. The Final Rule was published in the *Federal Register* on August 7, 2024, and became effective on October 1, 2024.

Section 5705(c) of the NDAA requires the FDIC to issue a report to Congress no later than the end of the 2-year period beginning on the date of enactment of the FHBA (that is, no later than December 22, 2024). The report must contain "any legislative or regulatory recommendations for expanding employment opportunities for those with a previous minor criminal offense." Section 5705(c) of the FHBA also requires the FDIC to review the rules issued to carry out the FHBA and the amendments made by it on: (1) the application of section 19; (2) the number of applications for consent applications under section 19; and (3) the rates of approval and denial for consent applications under section 19. The results of the FDIC's review are included in this report and must be made public. This report will be posted to [fdic.gov](https://www.fdic.gov).

Fair Hiring in Banking Act

The FHBA significantly revised section 19. Among the changes, the FHBA created several categories of exceptions or exemptions to the prohibition on participating in banking, including the following:

Certain Older Offenses

The FHBA excludes certain 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. If an individual has a covered offense and (1) it has been seven years or more since the offense occurred or (2) the individual was incarcerated with respect to the offense and it has been five years or more since the individual was released from incarceration, the Act excludes such an offense from the scope of section 19. That is, no consent application is required.¹ Moreover, if an individual (1) committed a covered offense when the individual was 21 years of age or younger and (2) if it has been more than 30 months since the sentencing for that offense occurred, the FHBA excludes the offense from the scope of section 19. These exceptions do not apply to the offenses described under 12 U.S.C. § 1829(a)(2).

Expunged, Sealed, or Dismissed Offenses

The FHBA excludes from the scope of section 19 offenses for which an order of expungement, sealing, or dismissal has been issued in regard to the conviction in connection with such offense and it is intended by the language in the order itself, or in the legislative provisions under which the order was issued, that the conviction shall be destroyed or sealed from the individual's State, Tribal, or Federal record even if exceptions allow the record to be considered for certain character and fitness evaluation purposes.

De minimis Offenses

The FHBA excludes “de minimis” offenses from the scope of section 19, and this category includes relatively minor offenses that are specified either by the FHBA or by the FDIC through regulations. In the FHBA, a subcategory of *de minimis* offenses is called “designated lesser offenses,” which offenses include the use of fake identification, shoplifting, trespass, fare evasion, driving with an expired license or tag (and such other low-risk offenses as the FDIC may designate), if one year or more has passed since the applicable conviction or program entry.

Criminal Offenses Involving Dishonesty

The FHBA excludes certain offenses from the definition of “criminal offenses involving dishonesty,” including (1) misdemeanor criminal offenses committed more than one year before the date on which an individual files an application, excluding any period of incarceration, and (2) “an offense involving the possession of controlled substances.”²

¹ Under the FHBA, a “consent application” “means an application filed with [the FDIC] by an individual (or by an insured depository institution or depository institution holding company on behalf of an individual) seeking the written consent of the [FDIC] under [12 U.S.C. 1829(a)(1)].” 12 U.S.C. § 1829(g)(1).

² 12 U.S.C. § 1829(g)(2)(C).

In addition to the changes noted above, the FHBA prescribes standards for the FDIC’s review of applications submitted under section 19 and requires the FDIC to “consult and coordinate” with the National Credit Union Administration (NCUA) “as needed to promote consistent implementation [of the FHBA] where appropriate.”³

Review of the FHBA and the FDIC’s Implementing Regulations on the Application of Section 19

Shortly following enactment of the FHBA, the FDIC began a process for revising its section 19 regulations to conform to the FHBA. On March 9, 2023, the FDIC issued Financial Institution Letter (FIL) 9-2023⁴ to announce to the banking industry the changes made to section 19 by the FHBA and to describe the actions the FDIC would take to implement the FHBA. The FDIC began to draft proposed amendments to its section 19 regulations, in consultation and coordination with the NCUA, the Board of Governors of the Federal Reserve System (FRB), and the Office of the Comptroller of the Currency (OCC), to promote consistent implementation of the FHBA where appropriate.

On October 24, 2023, the FDIC issued FIL-57-2023⁵ to announce publication of a Notice of Proposed Rulemaking (NPR) and to solicit public comments. The NPR was published in the *Federal Register* on November 14, 2023, and was open for public comments for 60 days.⁶ In the NPR, the FDIC requested comments on all aspects of its approach to section 19 and, notably, as to the following topics of interpretation:

- the date on which a criminal offense “occurred” or was “committed;”
- the date on which “sentencing occurred;”
- whether section 19 encompasses foreign convictions and pretrial diversions;
- the standard for expungements, sealings, and dismissals;
- “offenses involving controlled substances;” and
- *de minimis* offenses.

The FDIC received five comments from six different commenters, consisting of two individuals and four advocacy groups (two advocacy groups provided a joint comment). All of the comments generally supported the proposed rule. The comment received from one advocacy group did not offer specific changes to the proposal but urged the FDIC and other financial regulators to strengthen their enforcement practices. The other commenters suggested a variety of changes.

³ 12 U.S.C. § 1829(f)(9).

⁴ See FDIC, FIL-9-2023: *Fair Hiring in Banking Act Amends Section 19 of the Federal Deposit Insurance Act*, available at <https://www.fdic.gov/news/financial-institution-letters/2023/fil23009.html>.

⁵ FIL-57-2023: *Notice of Proposed Rulemaking to Revise FDIC Regulations Concerning Section 19 of the Federal Deposit Insurance Act* was issued but was designated as “inactive” and removed from [fdic.gov](https://www.fdic.gov) following issuance of a superseding FIL, FIL-49-2024, on July 30, 2024.

⁶ 88 Fed. Reg. 77,906, available at <https://www.govinfo.gov/content/pkg/FR-2023-11-14/pdf/2023-23853.pdf>.

At its meeting on July 30, 2024, and after consideration of the comments to the NPR received, the FDIC Board approved the Final Rule to revise 12 C.F.R. part 303, subpart L, and part 308, subpart M, thereby updating the FDIC’s regulations concerning section 19 to conform with the FHBA. On the same date, the FDIC issued FIL-29-2024 to announce the Board’s adoption of the rule and to highlight notable provisions.⁷ The Final Rule was published in the *Federal Register* on August 7, 2024, and became effective on October 1, 2024.⁸

The Final Rule incorporated the changes enacted by the FHBA and is consistent with the FHBA’s goal of reducing employment barriers and otherwise providing regulatory relief to individuals and insured depository institutions. Revisions to the Final Rule address, among other topics, the types of offenses covered by section 19 and the effect of the completion of sentencing or pretrial-diversion program requirements in the context of section 19. The Final Rule streamlines the FDIC’s section 19 application process and provides additional transparency as to the FDIC’s review of these applications. It also interprets the statutory prohibitions and exclusions under the FHBA and more closely aligns the FDIC’s section 19 regulations with those of other Federal financial regulators. Significant interpretations include the following topics:

Expunged, Sealed, or Dismissed Offenses

Prior to the Final Rule, the FDIC’s regulations contained interpretative language concerning offenses that had been expunged, sealed, or dismissed, but the FHBA codified the notion that certain expunged, sealed, or dismissed convictions are excluded from the scope of section 19. The Final Rule modestly broadened the statutory language concerning such offenses. The FHBA addresses expungements, sealings, or dismissals through court order; however, it is silent as to such actions by operation of law. The Final Rule therefore includes expungements, sealings, and dismissals by operation of law. This addition harmonized the FDIC’s regulations concerning expunged, sealed, and dismissed records with the statutory language and provided a more comprehensive framework as to such records.

Offense Involving the Possession of Controlled Substances

The FHBA excludes certain offenses from the definition of “criminal offenses involving dishonesty,” including, among other offenses, “an offense involving the possession of controlled substances.”⁹ Historically, the FDIC has required an application as to drug-related offenses—aside from simple-possession offenses.¹⁰ The rationale the FDIC had relied on had been that such non-simple-possession offenses (for example, trafficking and

⁷ See FDIC, FIL-49-2024: *Final Rule to Revise FDIC Regulations Concerning Section 19 of the Federal Deposit Insurance Act*, available at <https://www.fdic.gov/news/financial-institution-letters/2024/final-rule-revise-fdic-regulations-concerning-section-19>.

⁸ 89 Fed. Reg. 64,353, available at <https://www.govinfo.gov/content/pkg/FR-2024-08-07/pdf/2024-17327.pdf>.

⁹ 12 U.S.C. § 1829(g)(2)(C).

¹⁰ See 85 Fed. Reg. 51,312, 51,313 (Aug. 20, 2020) (FDIC Final Rule) (“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 *de minimis*.”)

manufacturing) inherently involved dishonesty, breach of trust, or money laundering. Due to the FHBA, however, the FDIC believes that Congress intended to exclude, *at least*, the offenses of simple possession and possession with intent to distribute from the “criminal offense involving dishonesty” category because of the statute’s use of the phrase “involving the possession of controlled substances.” Additionally, the FDIC believes that the agency should shift from the presumption that other drug-related offenses are necessarily subject to section 19 as crimes involving dishonesty, breach of trust, or money laundering. It is *possible* that the elements of a drug-related crime could implicate a criminal offense involving dishonesty or a breach of trust or money laundering under section 19 (and if so, an application would be required), but it is not *necessarily* so. Because the Final Rule implements the FHBA’s statutory language concerning “involving possession,” the Final Rule provides an opportunity for the FDIC to treat drug offenses the same as all other types of crimes—which do not automatically trigger the need for an application. Moving away from that presumption of coverage under section 19 also aligned the FDIC with the FRB’s treatment of drug-related offenses; the FRB does not presume that drug-related offenses are subject to section 19 and instead looks at the statutory elements of such crimes like any other form of criminal conduct.

Now that the FDIC’s Final Rule has become effective, the agency has begun the process of updating its industry-guidance literature and consent application forms and instructions. In addition, the FDIC is continuing to review section 19 orders and section 19 letters previously published on the FDIC’s Enforcement Decisions and Orders¹¹ webpage to determine whether, due to the FHBA, particular orders should be terminated (as to orders) and removed from the webpage (as to both orders and letters).

Review of the FHBA and the FDIC’s Implementing Regulations on the Number of Applications for Consent Applications and the Rates of Approval and Denial for Consent Applications

Before enactment of the FHBA, the FDIC routinely received and processed numerous consent applications each year. In the five years prior to enactment of the FHBA, the FDIC acted on 345 substantially complete applications, of which 276 (80 percent) were approved, and none were denied. Those that were not approved or denied were returned to or withdrawn by the applicant for various reasons, including that an application was not required, or an applicant chose to withdraw rather than proceed with having their application denied. Following the December 23, 2022, enactment of the FHBA, the FDIC determined that most of the applications that were in process as of that date were based on offenses that were no longer covered or were now considered *de minimis* under the amended section 19. Of the 12 substantially complete applications in process on or accepted after December 23, 2022, 10 were returned because no application was required, one was withdrawn because the FDIC’s regional office that received the application was prepared to recommend denial of the application, and one was approved.

¹¹ <https://orders.fdic.gov/s/>.

During the time following enactment of the FHBA, the FDIC has received multiple inquiries from potential applicants as to whether an application is required given the individuals' criminal offenses. For the vast majority of the inquiries, the FDIC determined and communicated to the inquiring individuals that their offenses did not require an application. It is noteworthy that many of those offenses would have required an application prior to the FHBA's amendments to section 19.

The FHBA has effectively eliminated the need to submit consent applications for numerous individuals with certain criminal offenses—particularly older or expunged convictions, misdemeanors, drug-possession offenses, and other lesser offenses. The FDIC expects that the number of applications it receives will continue to be substantially lower than prior to enactment of the FHBA and the corresponding revisions to the FDIC's implementing regulations.

Legislative and Regulatory Recommendations for Expanding Employment Opportunities for Those with a Previous Minor Criminal Offense

The FDIC has long recognized that section 19 placed significant restrictions on individuals with criminal records from becoming employed in the banking industry. It also recognized that many individuals with older and less serious crimes that were covered by section 19 were likely to be approved for consent if an application was submitted. For example, the FDIC's regulations before the enactment of the FHBA contained criteria for automatic consent for certain older and lesser crimes without the need for an application. The FHBA expanded further on themes that the FDIC had already established in practice.

The FDIC consulted with the NCUA when considering what legislative and regulatory recommendations to Congress may be appropriate for expanding employment opportunities. Given the significant reduction in covered offenses under section 19 due to the FHBA—and the associated, marked reduction in the number of consent applications filed with the FDIC—the FDIC does not recommend any further reduction in covered offenses under section 19. Nonetheless, the FDIC recommends establishing an automatic inflation-adjustment for the monetary threshold for bad-check offenses under 12 U.S.C. § 1829(c)(3)(C). The FDIC may also consider adjusting other monetary thresholds in its regulations concerning *de minimis* offenses. Periodic adjustment for inflation would ensure that the statute and the FDIC's implementing regulations continue to provide meaningful relief from barriers to employment opportunities.