

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Parts 303 and 308**

**RIN 3064-AF19**

**Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Final Rule.

**SUMMARY:** Section 19 of the Federal Deposit Insurance Act requires persons convicted of certain criminal offenses to obtain prior written consent before participating in the conduct of the affairs of any depository institution. The Federal Deposit Insurance Corporation (FDIC) is revising its existing regulations relating to Section 19 to revise the FDIC's procedures and standards relating to applications for the FDIC's written consent, and to incorporate and revise the FDIC's existing Statement of Policy for Section 19 of the Federal Deposit Insurance Act (SOP). Incorporating the SOP into the FDIC's regulations will make application of the SOP more transparent, increase certainty concerning the FDIC's application process, afford regulatory relief, and help both insured depository institutions and affected individuals to understand the impact of Section 19 and to potentially seek relief from it. The FDIC's existing SOP will be rescinded on the date this Final Rule (Rule) becomes effective.

**DATE:** This Rule will be effective [30 days after publication date].

**FOR FURTHER INFORMATION CONTACT:**

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## **SUPPLEMENTARY INFORMATION:**

### **I. Policy Objectives**

The policy objective of the Rule is to clarify how the FDIC interprets and applies Section 19 of the Federal Deposit Insurance Act (Section 19),<sup>1</sup> clarify the application process for insured depository institutions and individuals who seek relief from Section 19, and expand the scope of relief available for certain offenses. The FDIC SOP provides the public with guidance relating to Section 19 and the FDIC's application of this statute. The current SOP, with modifications over time, has been published and a resource for the public for over twenty years. However, the terms and procedures outlined in the SOP have not been adopted as formal regulations by the FDIC. To remove potential ambiguities about the FDIC's approach to Section 19 or the application process, the Rule incorporates much of the current SOP, while adopting certain changes suggested by commenters.

### **II. Background and Public Comments**

Section 19 prohibits, without the prior written consent of the FDIC, the participation in banking by any person who has been convicted of a crime of dishonesty or breach of trust or money laundering, or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution for such an offense. Further, this law forbids an insured depository institution (IDI) from permitting such a person to engage in any conduct or to continue any relationship prohibited by Section 19. Section 19 also imposes a ten-year ban for a

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<sup>1</sup> 12 U.S.C. 1829.

person convicted of certain crimes enumerated in Title 18 of the United States Code, which can be removed only upon a motion by the FDIC and approval by the sentencing court.

On December 16, 2019, the FDIC published a Notice of Proposed Rulemaking (Proposal) to incorporate the SOP into the FDIC's existing Procedure and Rules of Practice.<sup>2</sup> In the Proposal, the FDIC provided a history of the SOP from its issuance in December of 1998, through clarifications in 2007 and 2011, modification in 2012, and through its most-recent revision in August of 2018.<sup>3</sup> The FDIC proposed to incorporate the current provisions of the SOP into its rules and procedures in order to provide greater transparency into the FDIC's interpretation and application of Section 19, to provide greater certainty concerning the FDIC's application process, and to aid both IDIs and individuals who may be affected by Section 19 to understand its impact and potentially seek relief from its provisions. The FDIC proposed to rescind such sections of 12 C.F.R. 308, subpart M, that would be duplicative of the changes proposed for part 303, subpart L, and to revise the remaining sections to ensure conformity for any request for a hearing when an application under Section 19 has been denied.

The FDIC, in the Proposal, requested comments on all aspects of its approach to Section 19. The FDIC also requested comments, in particular, on the following topics:

- the *de minimis* criteria for offenses that represent low risk to the Deposit Insurance Fund;
- expansion of the *de minimis* category for use of fake identification;
- modification of the five-year post-conviction cooling-off period for certain offenses; and
- the application of Section 19 to expungements.

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<sup>2</sup> See 84 Fed. Reg. 68353.

<sup>3</sup> See 84 Fed. Reg. at 68353–54.

The comment period closed on March 16, 2020. The FDIC received multiple comments from nine different commenters, consisting of three policy institutes, a reentry employment provider, a depository institution trade group, two financial institutions, an advocacy group on behalf of 28 additional organizations, and an individual. All of the comments generally supported the Proposal. The comment received from the individual did not offer specific changes to the Proposal, but the other eight commenters suggested a variety of changes. The comments and the FDIC's responses are discussed below in Sections III and IV.

### **III. Description and Expected Effects of the Rule**

The Rule addresses, among other topics, who is covered by Section 19, the types of 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 Rule makes several significant changes to the SOP, partly in response to the public comments. These revisions include the following:

- *Expungements.* The Rule excludes all covered offenses that have been expunged or sealed by a court of competent jurisdiction or by operation of law.
- *De minimis offenses* (offenses for which a person will be deemed automatically approved and no application will be required). Increases the small-dollar theft threshold to \$1,000. Expands the *de minimis* exception to include the use of a fake or false identification by a person under the age of 21 to circumvent age based restrictions on purchases, activities, or entry (not just alcohol-related purposes). Allows for two covered *de minimis* offenses on a person's criminal record to still qualify for the *de minimis* exception. (Note, no offense committed against an IDI or insured credit union can qualify as "*de minimis*.") If an

individual has two covered offenses on their record, the Rule decreases the amount of time that must elapse, following the date of conviction or entry into a pre-trial diversion program, before the covered offenses may be deemed *de minimis*.<sup>4</sup> The Rule also eliminates this waiting period when there is only one covered, *de minimis* offense on a person’s record.

- Application procedures. Clarifies when and how an application must be filed, the application types available, and how the FDIC will evaluate an application. In addition, the Rule addresses denials of applications.

Specifically, the Rule does the following:

A. *Revised provisions of 12 CFR part 303, subpart L*

1. § 303.220 What is Section 19 of the FDI Act?

This section combines portions of the “scope” section in the existing 12 CFR § 303.220 and the introduction part of the SOP. Paragraph (a) reflects the scope provisions. Paragraph (b) sets out the application of Section 19 to insured depository institutions, including the conditional offers of employment that FDIC-supervised institutions may make. The substance of this paragraph comes from the SOP. Paragraph (c) also comes from the SOP and addresses the need for an application.

2. § 303.221 Who is covered by Section 19?

This section describes who is covered by Section 19 and comes mainly from the existing SOP. Paragraph (a) defines “institution-affiliated parties” and others who may fall within Section 19. Paragraph (b) defines the term “person” under Section 19 as an individual, not a legal entity. Paragraph (c) concerns individuals who file an application with the FDIC under

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<sup>4</sup> The FDIC notes that, during the *de minimis* waiting period, individuals retain the option of filing an application for consideration by the FDIC.

Section 19 and who also seek to participate in the affairs of a bank or savings and loan holding company, noting that such individuals may have to comply with any filing requirements of the Board of the Governors of the Federal Reserve System under 12 U.S.C. §§ 1829(d) and (e).

Paragraph (d) defines when “ownership” or “control” results in the application of Section 19 to an individual or individuals who may be deemed in control of, or be deemed to be an owner of, an IDI.

3. § 303.222 What offenses are covered under Section 19?

This section addresses covered criminal offenses under Section 19. It comes mainly from the SOP. Paragraph (a) notes that Section 19 applies to any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering, or who has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for any such offense. This paragraph also describes the restrictions that Section 19 places upon such individuals. Paragraph (b) requires that, to determine whether the criminal offense is one of dishonesty, breach of trust, or money laundering, the FDIC will look to the statutory elements of the criminal offense or to court decisions in the relevant jurisdiction.

Paragraph (c) requires an application for all drug offenses, except for simple possession, unless the criminal offense meets the criteria in § 303.227 for not filing an application. 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 *de minimis*.

4. § 303.223 What constitutes a conviction under Section 19?

This section comes mainly from the SOP, but clarifies the status of convictions reversed on appeal and expands and simplifies the exclusion for expungements. The current SOP notes that a conviction or program entry that has been completely expunged is not subject to Section 19 and does not require an application. For the expungement to be considered “complete” under the current SOP, the jurisdiction granting the expungement must not allow the conviction or program entry to be used for any subsequent purpose, including but not limited to an evaluation of a person’s fitness or character. This constraint has been a source of confusion for the industry and individual applicants, and the FDIC has twice undertaken to clarify this term in prior SOP revisions. The public comments to the NPR make it clear that the confusion remains.

Paragraph (a) states that there must have been a conviction of record for Section 19 to apply, and that Section 19 does not apply to arrests, pending cases not brought to trial (unless the person has a program entry as set out in section 303.224), or any conviction reversed on appeal unless the reversal was for the purpose of re-sentencing. This revised language is in response to one commenter’s request that the FDIC clarify its position on appellate decisions as they pertain to the scope of Section 19. The FDIC notes, however, that covered offenses that have been *pardoned*—and which are not otherwise excluded by the SOP—will still require an application.

Paragraph (b) clarifies that, absent a program entry, when an individual is *charged* with a covered offense but is subsequently *convicted* of an offense that is not a covered offense, that conviction is not subject to Section 19.

Paragraph (c) excludes covered offenses that have been expunged or sealed by a court of competent jurisdiction or by operation of law. 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.

Paragraph (d) excludes “youthful offender” judgments for minors from the scope of Section 19.

5. § 303.224 What constitutes a pretrial diversion or similar program under Section 19?

This section comes mainly from the SOP. Paragraph (a) defines what constitutes a pretrial diversion or similar program (a program entry), and excludes program entries that occurred prior to November 29, 1990.

Paragraph (b) clarifies that when a covered offense either is reduced by a program entry to an offense that would otherwise not be covered by Section 19 or is dismissed upon successful completion of a program entry, the offense remains a covered offense for purposes of Section 19. The covered offense will require an application unless it is *de minimis* as provided by section 303.227.

Paragraph (c) states that expungements or sealings of program entry records will be treated the same as expungements or sealings of convictions.

6. § 303.225 What are the types of applications that can be filed?



This section is a combination of the existing § 303.221, § 308.158, and the SOP.

Paragraph (a) establishes the institution-filing requirement (bank-sponsored applications).

Paragraph (b) establishes the procedure to apply when an IDI will not file an application for an individual (individual waiver applications).

7. § 303.226 When is an application to be filed?

This section states when an application is to be filed, excepting from its requirement those covered offenses which are considered *de minimis* under subpart L. An application will not be considered by the FDIC until all sentencing requirements associated with a conviction have been met or all requirements of the program entry have been completed.

8. § 303.227 When is an application not required for a covered conviction or program entry (*de minimis* offenses)?

This section comes mainly from the SOP but has been expanded. Under the current SOP, certain minor offenses are deemed to present low risk to insured institutions. Currently, an individual's covered offense may be considered *de minimis* only when there is one conviction or program entry, and the conviction or program entry occurred at least five years before the date on which an application would be required. For applicants whose underlying misconduct occurred when they were 21 years of age or younger, the waiting period is reduced to 30 months. Certain individuals may also be required to complete all sentencing or program requirements before qualifying for the *de minimis* exception.

Eight commenters supported the expansion of the *de minimis* exception to filing as it currently exists, and seven of the commenters provided specific proposals for the expansion, clarification, or modification, of this exception. Three commenters proposed that the FDIC reduce the waiting period to qualify under the *de minimis* framework. Three commenters also proposed that the FDIC increase the simple-theft threshold to \$1,000 to align with the “bad-

check” or insufficient-funds threshold under the *de minimis* framework. Moreover, three commenters proposed that the FDIC include additional minor crimes under the *de minimis* exception, regardless of the maximum punishment for those crimes.

Paragraph (a) establishes the general criteria for convictions or program entries to be considered *de minimis*, if the criteria are met. If the *de minimis* conditions are satisfied, the person is deemed automatically approved and no application will be required. 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 *de minimis* 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 *de minimis* offense, and the waiting period has been reduced to three years when the individual has two *de minimis* offenses (or 18 months if the actions that resulted in both convictions or program entries all occurred when the individual was 21 years of age or younger).

The FDIC continues to process a number of applications from individuals who are low risk, and these applications are generally approved. FDIC review of these applications revealed that many include multiple convictions or program entries for minor offenses, or convictions or program entries that occurred less than 5 years (or 30 months) ago. Because these applications are considered low risk and are generally approved, the FDIC is expanding the *de minimis* criteria to include individuals with up to two convictions or program entries, each of which offenses would, by themselves, qualify under the *de minimis* exception.

Paragraph (b) establishes certain other specific exceptions to the filing requirement, which exceptions, if met, will result in a potential application being deemed automatically approved. Partly in response to the comments, the FDIC has made substantive changes to

paragraphs (b)(1), (b)(3), and (b)(4). Paragraph (b)(1) shortens the 30-month waiting period under the general criteria to 18 months when all the elements of the offense(s) occurred when the person was age 21 or younger. Paragraph (b)(2) establishes the criteria for when certain convictions or program entries for bad or insufficient-funds checks will not require an application. Paragraph (b)(3) establishes the criteria for when certain small-dollar simple theft convictions or program entries of \$1,000 or less will not require an application. The small-dollar, simple theft *de minimis* criteria was added to the SOP by the FDIC Board in July 2018. The FDIC continues to process Section 19 applications for convictions or program entries involving small-dollar, simple theft. These covered offenses are relatively low-risk and generally result in approval of an application following a reasonable period of rehabilitation. The Rule increases the dollar limit to \$1,000—from the current \$500—based on some commenters’ suggestions to better align this threshold with the limit for “bad” or insufficient funds check(s), and to reduce the number of low-risk applications that have historically been approved. Excluded from this exception to filing are convictions or program entries for burglary, forgery, identity theft, and fraud. Paragraph (b)(4) establishes the criteria for when the creation or possession of a fake or false identification by a person under the age of 21, or the use of a fake or false identification by a person to circumvent age-based restrictions on purchases, activities, or entry will not require an application. This exception was expanded beyond the use of a fake or false identification to purchase alcohol or to enter a premises where alcohol is served. The FDIC believes that this provision can be expanded to provide additional regulatory relief without significantly increasing risk to the financial system.

Paragraph (c) requires that, for any case where the person is able to avail themselves of the *de minimis* exception to filing, she or he must disclose the conviction(s) or program entry(ies) to an IDI and must qualify for a fidelity bond to the same extent as others in a similar position.

Paragraph (d) states that any conviction or program entry for criminal offenses under Title 18 of the U.S. Code, as set out in 12 U.S.C. 1829(a)(2), cannot qualify under the *de minimis* exception to filing an application.

9. § 303.228 How to file an application.

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. IDIs should file with the FDIC's regional office where the institution's home office is located, and any individual waiver and application should be filed with the FDIC's regional office where the person lives.

10. § 303.229 How an application is evaluated.

This section comes from a combination of § 308.157 and the SOP. Paragraph (a) sets out the ultimate determination the FDIC will make as to the level of risk the applicant poses to an IDI and whether it will consent to allow the person to participate in an IDI's affairs. In evaluating the risk posed by the person's participation, the FDIC has established nine factors that it will consider, including other factors that might be relevant to a particular application.

Paragraph (b) states that the question of whether a person was guilty of the offense for which the person was convicted, or had a program entry for, is not an issue for part 303, subpart L or for part 308, subpart M. Paragraph (c) states that the FDIC will apply the factors and determination used in paragraph (a) when evaluating an application that is made to terminate the ten-year ban

under 12 U.S.C. 1829(a)(2). Paragraph (d) provides that a person must be bonded the same as others in that position, and the person must disclose the covered conviction or program entry to any IDI in which she or he intends to participate.

Paragraphs (e) and (f) pertain to bank-sponsored applications. Paragraph (e) provides that FDIC approval to work pertains to a specific job at a specific IDI. The IDI may be required to seek permission from the FDIC before there may be a significant change in a person's duties or responsibilities, and the FDIC regional director may request a new application. Paragraph (f) states that approval to work at a specific IDI is limited to that institution—or to a successor institution (for instance, as a result of the IDI's merger with or acquisition by another IDI)—and a new application is required to work at another IDI.

11. § 303.230 What will the FDIC do if the application is denied?

This section is a combination of current §§ 303.223, 308.157, and 308.159. Paragraph (a) provides that the FDIC will provide a written denial of an application, which will summarize or cite the relevant factors from § 303.229. Paragraph (b) provides that the applicant can file a written request for a hearing under part 308, subpart M within 60 days of the denial.

12. § 303.231 Waiting time for a subsequent application if an application is denied.

This section comes mainly from § 308.158 and was clarified so that an applicant will need to wait one year from the date of the denial or decision of the FDIC Board, or its designee.

*B. Revised Provisions of 12 CFR part 308, subpart M*

1. § 308.156 Scope.

This section has been revised to reflect its application to denials that are issued under 12 CFR part 303, subpart L.

2. § 308.157 Relevant considerations.

This section will be rescinded.

3. § 308.158 Filing papers and effective date.

This section will be rescinded.

4. § 308.159 Denial of application.

This section has been revised to reflect the outcome of the application process in part 303, subpart L and to clarify the procedure by which a hearing may be requested. It will be renumbered as § 308.157.

5. § 308.160 Hearings.

This section will remain as it currently exists but will be renumbered as § 308.158.

After renumbering, §§ 308.159 and 309.160 will be reserved.

*C. Expected Effects*

The changes adopted will provide immediate relief to IDIs, as well as to individuals who represent a low risk to the Deposit Insurance Fund and who would otherwise be required under Section 19 to file waiver applications, if they wish to be employed by an IDI. Moreover, these applications would very likely be approved under existing practices. Based on the FDIC's analysis of applications submitted between January 1, 2017, through April 30, 2020, the changes would not have altered the outcome of any applications that were controversial or ultimately denied.

Overall, the FDIC expects the Rule to have relatively small effects, in the aggregate, on the public and insured institutions. The FDIC currently insures 5,186 depository institutions, which could be affected by the Rule.<sup>5</sup> Additionally, as discussed previously, the Rule will apply to certain persons covered by the provisions of Section 19 who are or wish to become

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<sup>5</sup> FDIC Call Report Data, December 31, 2019.

employees, officers, directors or shareholders of an IDI. In the period from 2014 through 2019, the FDIC received 69 bank-sponsored Section 19 applications, an average of about 12 per year. Additionally, the FDIC received 654 individual Section 19 applications during the same period, an average of 109 per year.<sup>6</sup> Therefore, the FDIC estimates that the Rule would affect at least 12 FDIC-insured depository institutions, and 109 individuals per year. The FDIC acknowledges that these estimates do not fully capture the full effect of the rule; most notably, the estimates do not take into account any individuals or institutions who choose not to apply rather than go through the application process.

One commenter made this point, suggesting that the FDIC is likely underestimating the number of ex-offenders affected by the Rule. Specifically, this commenter suggested that the number of Section 19 applications received does not take into account the number of individuals or institutions who choose not to apply because of the complexity of the application process. The FDIC agrees that this is one reason the estimates chosen do not fully reflect the impact of the Rule.

As described previously, the Rule incorporates and revises the current content of the SOP into the FDIC's regulations. The FDIC believes the codification is unlikely to have substantive effects on most covered entities and individuals. The FDIC already considers individuals who have been convicted of a crime of dishonesty, breach of trust, or money laundering, who participate in the affairs of an IDI without the prior written consent of the FDIC, to be subject to Section 19, and will continue to do after the SOP becomes codified.

To the extent that the revised consideration of expungements, reduction in waiting periods, increase in the threshold for certain small-dollar simple-theft convictions, or other items

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<sup>6</sup> Application Tracking System.

provide relief to certain institutions or individuals, the FDIC believes that such effects are likely to be relatively small. As discussed previously, some of these changes are being adopted to establish better alignment with other regulatory limits or more-consistent treatment of individuals. Other revisions are intended to reduce regulatory burden on individuals and IDIs by decreasing the number of applications that would otherwise be required under Section 19. The FDIC believes that such changes more accurately reflect the risk of dishonesty and breach of trust posed by the potential employment of certain individuals to institutions. As noted earlier, the FDIC has received on average about 109 Section 19 applications per year since 2014, relative to a population of insured institutions of over 5,000, suggesting that the effects of the rule are likely to be relatively small.

In short, the Rule will benefit covered entities and individuals by further clarifying the FDIC's interpretation of Section 19 and the application process, expanding regulatory relief, and reducing the number of applications required under Section 19.

#### **IV. Alternatives Considered**

The FDIC considered the other proposals that were submitted by the commenters but believes that the final amendments represent the most appropriate option for covered entities and individuals.

##### *A. Application process*

Two commenters requested that the FDIC reduce the Section 19 application burden. One commenter provided this recommendation without specifying the proposed changes. The other commenter asked that the FDIC continually streamline and simplify the application process and not require court documentation from an applicant because the FDIC already has access to criminal "rap sheets." The FDIC notes that it has periodically revised the SOP over the past



several decades, and it anticipates that it will revise its Section 19 regulations, as needed, in the future. The FDIC revises its application instructions as warranted to improve clarity—such as by noting that bank-sponsored applications and individual-waiver applications are distinct application processes, rather than a two-step process—but a regulation is not the appropriate method to amend the application form. 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.

Two commenters made recommendations concerning the FDIC’s approval rate of Section 19 applications. The two commenters asked that the FDIC simplify the application process to encourage a higher number of applicants, and one commenter asked that the FDIC commit to significantly increasing its application approval-rate. The FDIC does clarify aspects of the application instructions, as noted above. The FDIC anticipates that the expansion of the *de minimis* 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.

One commenter asked that the FDIC relax approval conditions for bank-sponsored applications. The FDIC declines to adopt this proposal, because the approval conditions are meant to address the specific position being sought at a particular IDI.

One commenter proposed that the FDIC not require the repayment of fees or fines before the submission of an application. The FDIC declines to adopt this proposal in full.

Rehabilitation is a significant factor that is evaluated during the application process, and completion of all sentencing requirements is an integral part of rehabilitation. As such, the case must be considered final by the procedures of the applicable jurisdiction. The FDIC notes, however, that an individual is *not* required to have completed all sentencing requirements in order to qualify for the *de minimis* exceptions pertaining to convictions or program entries for (i) “bad” or insufficient funds checks, and (ii) the creation, possession, or use of a fake, false, or altered identification to circumvent age-based restrictions.

One commenter asked that the FDIC delegate more authority to process Section 19 applications to FDIC regional offices. 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 *de minimis* framework will result in more decision-making at the regional-office level, as regional office staff typically respond to inquiries as to whether the *de minimis* exception applies to particular offenses.

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.

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 *Your Complete Guide to Section 19*, 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 *de minimis* exception, as amended, provides sufficient flexibility.

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, [www.fdic.gov](http://www.fdic.gov), specifically the brochure *Your Complete Guide to Section 19*, available at <https://www.fdic.gov/regulations/applications/resources/brochure-section-19.pdf>, 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 (<https://orders.fdic.gov/s/searchform>), 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.

*B. Bank hiring-practices*

Four commenters suggested that the FDIC revise policies concerning bank hiring-practices. 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.

Two commenters asked that the FDIC clarify what constitutes a "reasonable inquiry" for a bank background check. The FDIC declines to adopt this proposal. 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.

*C. Coverage of Section 19*

Five commenters requested that the FDIC change its interpretation of the coverage of Section 19. One commenter asked that the SOP note that Federal law preempts state and local law concerning Section 19. The FDIC believes that it is inappropriate to include such a statement in this regulation but notes that Section 19 applies to all IDIs, as defined under Title 12 of the U.S. Code.

One commenter asked that the FDIC further clarify whether independent contractors and other individuals are considered institution-affiliated parties (IAPs), for Section 19 purposes. The FDIC believes that additional clarification is unnecessary because the FDIC's revised Section 19 regulations, 12 U.S.C. § 1813(u) and its related caselaw, as well as other statutory and regulatory provisions, provide ample clarification as to who qualifies as an IAP under Title 12 of the U.S. Code.

Two commenters asked that the FDIC recommend changes to Section 19 to Congress. This request is outside the scope of this rulemaking.

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 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 IDI. Congress would have to change Section 19 for the FDIC to implement

such a proposal. However, the FDIC notes that the expanded *de minimis* framework provides significant regulatory relief.

*D. Covered offenses*

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.

Two commenters proposed that the FDIC reduce the type of offenses covered by the 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 *de minimis*, which will exclude such crimes from requiring an application.

*E. De minimis exception*

Two commenters asked that the time actually served in jail component of the *de minimis* exception be amended to exclude instances where the applicant only served pretrial detention. The FDIC declines to adopt this proposal because pretrial detention is typically incorporated into the ultimate sentence as time served.

One commenter proposed that the maximum time served be increased to three years, and that other restrictions on the freedom of movement (such as probation), be excluded from being considered actual time served. The FDIC notes that the “time served” factor does not apply to individuals on probation or parole who may be restricted to a particular jurisdiction, or who must report occasionally to an individual or to a specified location. The FDIC further notes that the

“time served” factor does not apply to individuals who are restricted to a substance abuse treatment program facility for part or all of the day. The “time served” factor applies to individuals confined to a psychiatric treatment center in lieu of a jail, prison, or house of correction on mental-competency grounds, but not to individuals ordered to attend outpatient psychiatric treatment. The FDIC declines to further expand the time-served component, because the FDIC believes that this proposal is too expansive.

Two commenters asked that the FDIC expand the *de minimis* 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 *de minimis* 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.

One commenter asked that the FDIC exclude entirely from consideration all offenses that occurred before a certain, relatively young age. The FDIC believes that this request is too expansive and declines to adopt the proposal.

Three commenters recommended that the FDIC increase the actual jail-time-served factor. The FDIC declines to further expand the *de minimis* framework beyond the significant revisions outlined in Section III.

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 *de minimis* framework as proposed, because the FDIC considers the current threshold appropriate.

One commenter asked that the FDIC expand the maximum potential incarceration-period for a covered offense from one year to three years, under the *de minimis* framework. The FDIC

declines to further expand the *de minimis* exception beyond the significant revisions outlined in Section III and believes that the current threshold is appropriate.

*F. Status quo, or issuing the Rule as originally proposed*

The FDIC also considered the status quo alternative of retaining the existing Section 19 SOP and regulations, as well as issuing the Rule as originally proposed.<sup>7</sup> The FDIC, however, believes that the Rule further clarifies the FDIC's application of Section 19 and the application process for IDIs and individuals who seek relief from its provisions, while posing no substantive costs, relative to the status quo alternative. Additionally, the FDIC believes that the changes adopted more accurately reflect the risk of dishonesty, breach of trust, and money laundering posed by the potential employment of certain individuals to institutions. None of the commenters advocated for the status quo alternative. Moreover, the revisions made between the Proposal and the final Rule should result in significant regulatory relief for IDIs and individuals.

**V. Regulatory Analysis**

*The Paperwork Reduction Act*

In accordance with the requirements of the Paperwork Reduction Act (PRA),<sup>8</sup> the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The Rule includes clarification of reporting requirements in an existing FDIC information collection entitled *Application Pursuant to Section 19 of the Federal Deposit Insurance Act* (3064-0018) that should result in a decrease in the number of applications filed. However, the FDIC does not currently have access to data that would enable it to accurately estimate what the

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<sup>7</sup> 12 CFR part 303, subpart L and 12 CFR part 308, subpart M.

<sup>8</sup> 44 U.S.C. 3501 *et seq.*



actual decrease may be. As such, the FDIC does not believe that a change to the number of respondents or the PRA burden in its existing information collection is necessary at this time. The FDIC will continue to monitor the number of applications received going forward and will incorporate any changes in future submissions including the next information-collection renewal. Therefore, no information collection request will be submitted to the OMB for review.

#### *The Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a rule on small entities.<sup>9</sup> However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined “small entities” to include banking organizations with total assets of less than or equal to \$600 million that are independently owned and operated or owned by a holding company with less than or equal to \$600 million in total assets.<sup>10</sup> Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. As

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<sup>9</sup> 5 U.S.C. 601 *et seq.*

<sup>10</sup> The SBA defines a small banking organization as having \$600 million or less in assets, where an organization's “assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” *See* 13 CFR 121.201 (as amended by 84 FR 34261 (July 18, 2019), effective August 19, 2019). In its determination, the “SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.” *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity’s affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is “small” for the purposes of RFA.

discussed further below, the FDIC certifies that this Rule will not have a significant economic impact on a substantial number of FDIC-supervised small entities.

The FDIC insures 5,186 depository institutions, of which 3,815 are defined as small banking organizations according to the RFA.<sup>11</sup> In the period from 2014 through 2019, the FDIC received 33 bank-sponsored Section 19 applications from small, FDIC-insured institutions, an average of about 6 per year. Additionally, the FDIC received 654 Section 19 applications from individuals during the same period, an average of 109 per year.<sup>12</sup> To determine the maximum number of small, FDIC-supervised institutions who could be affected by the Rule, this analysis assumes that each applicant is seeking employment at a different bank; each bank is a small, FDIC-insured institution; and no FDIC-insured institutions or individuals are affected except those who have submitted Section 19 applications. Based on these assumptions, 115 (3.0 percent of) small, FDIC-insured institutions on average, annually, would be affected by the Rule.<sup>13</sup> However, in the FDIC's experience, Section 19 applications from individuals are compelled by the applicant's intent to seek employment at FDIC-insured institutions that are generally not small. Therefore, the FDIC believes that the number of small, FDIC-insured institutions affected by the Rule could be less than 115.

As described previously, the Rule incorporates and revises the current content of the SOP into the FDIC's regulations. The FDIC considers individuals who have been convicted of a crime of dishonesty, breach of trust, or money laundering, who participate in the affairs of an IDI without the prior written consent of the FDIC, to be subject to Section 19, and will continue to do so under the Rule. The Rule will, however, expand the scope of the *de minimis* exception and,

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<sup>11</sup> FDIC Call Report, December 31, 2019.

<sup>12</sup> Application Tracking System.

<sup>13</sup>  $(115 / 3,815) * 100 = 3.01$  percent.

therefore, expand the number of offenses that will not require an application under Section 19. Both of these changes will likely result in a reduction in Section 19 applications.

To the extent that the current content of the SOP conveys any ambiguity as to the FDIC's application of Section 19 or the application process, the Rule will benefit covered entities by further clarifying this topic and process. Based on the FDIC's estimate, mentioned earlier, that the Rule could affect about 3 percent of small FDIC-insured institutions per year, such effects are likely to be relatively small.

To the extent that the revised consideration of expungements, reduction in waiting periods, increases in certain small-dollar simple-theft convictions, or other items provide relief to certain small institutions or individuals, the FDIC believes that such effects are likely to be relatively small. As discussed previously, some of these changes are being adopted to establish better alignment with other regulatory limits or more-consistent treatment of individuals. Other revisions are intended to reduce regulatory burden on individuals and IDIs by decreasing the number of applications that would otherwise be required under Section 19. The FDIC believes that such changes more accurately reflect the risk of dishonesty and breach of trust posed by the potential employment of certain individuals to small institutions. Again, based on the FDIC's estimate, mentioned earlier, that the Rule could affect about 3 percent of small FDIC-insured institutions per year, such effects are likely to be relatively small.

Based on the information above, the FDIC certifies that the Rule will not have a significant economic impact on a substantial number of small entities.

*Plain Language*

Section 722 of the Gramm-Leach-Bliley Act<sup>14</sup> requires each FBA to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC has sought to present the Rule in a simple and straightforward manner. The FDIC did not receive any comments on the use of plain language.

*Riegle Community Development and Regulatory Improvement Act of 1994*

Under section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),<sup>15</sup> in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on IDIs, each FBA must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of the RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.<sup>16</sup>

The FDIC has determined that the final rule would not impose additional reporting, disclosure, or other requirements on IDIs; therefore, the requirements of the RCDRIA do not apply. Therefore, in conjunction with the RCDRIA, the Rule will be effective on [30 days after publication date].

*The Congressional Review Act*

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<sup>14</sup> 12 U.S.C. 4809.

<sup>15</sup> 12 U.S.C. 4802(a).

<sup>16</sup> 12 U.S.C. 4802.

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a “major” rule.<sup>17</sup> If a rule is deemed a “major rule” by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.<sup>18</sup>

The Congressional Review Act defines a “major rule” as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in: (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.<sup>19</sup>

The OMB has determined that the final rule is [not a major rule] for purposes of the Congressional Review Act, and the FDIC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

## **List of Subjects**

12 CFR Part 303

Administrative practice and procedure, Section 19 of the FDI Act (consent to service of persons convicted of certain criminal offenses).

12 CFR Part 308

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<sup>17</sup> 5 U.S.C. 801 *et seq.*

<sup>18</sup> 5 U.S.C. 801(a)(3).

<sup>19</sup> 5 U.S.C. 804(2).

Rules of practice and procedure, procedures and standards applicable to an application under Section 19.

### **Authority and Issuance**

For the reasons stated in the preamble and under the authority of 12 U.S.C. 1819 (Seventh and Tenth), the FDIC amends 12 CFR parts 303 and 308 to read as follows:

### **PART 303—FILING PROCEDURES**

1. The authority citation for Part 303 continues to read as follows:

**Authority:** 12 U.S.C. 378, 1464, 1813, 1815, 1817, 1818, 1819(a) (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p-1, 1831w, 1835a, 1843(l), 3104, 3105, 3108, 3207, 5414, 5415 and 15 U.S.C. 1601–1607.

2. Revise Part 303, Subpart L as follows:

### **Subpart L—Section 19 of the FDI Act (Consent to Service of Persons Convicted of, or Who Have Program Entries for, Certain Criminal Offenses)**

Sec.

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|---------|---|
| 303.220 | What is Section 19 of the FDI Act?              |
| 303.221 | Who is covered by Section 19?                   |
| 303.222 | What offenses are covered under Section 19?     |
| 303.223 | What constitutes a conviction under Section 19? |

- 303.224 What constitutes a pretrial diversion or similar program (program entry) under Section 19?
- 303.225 What are the types of applications that can be filed?
- 303.226 When must an application to be filed?
- 303.227 When is an application not required for a covered offense or program entry (*de minimis* offenses)?
- 303.228 How to file an application.
- 303.229 How an application is evaluated.
- 303.230 What will the FDIC do if the application is denied?
- 303.231 Waiting time for a subsequent application if an application is denied.

**Subpart L—Section 19 of the FDI Act (Consent to Service of Persons Convicted of, or Who Have Program Entries for, Certain Criminal Offenses)**

**§ 303.220 What is Section 19 of the FDI Act?**

(a) This subpart covers applications under Section 19 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1829. Under Section 19, any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering, or has agreed to enter into a pretrial diversion or similar program (program entry) in connection with a prosecution for such offense, may not become, or continue as, an institution-affiliated party (IAP) of an insured depository institution (IDI); own or control, directly or indirectly, any IDI; or otherwise participate, directly or indirectly, in the conduct of the affairs of any IDI without the prior written consent of the FDIC.

(b) In addition, the law bars an IDI from permitting such a person to engage in any conduct or to continue any relationship prohibited by Section 19. IDIs should therefore make a reasonable inquiry regarding an applicant's history to ensure that a person who has a conviction or program entry covered by the provisions of Section 19 is not hired or permitted to participate in its affairs without the written consent of the FDIC issued under this subpart. FDIC-supervised IDIs may extend a conditional offer of employment contingent on the completion of a background check satisfactory to the institution and to determine if the applicant is barred under Section 19, but the job applicant may not work for, be employed by, or otherwise participate in the affairs of the IDI until the IDI has determined that the applicant is not barred under Section 19.

(c) If there is a conviction or program entry covered by the bar of Section 19, an application under this subpart must be filed seeking the FDIC's consent to become, or to continue as, an IAP; to own or control, directly or indirectly, an IDI; or to otherwise participate, directly or indirectly, in the affairs of the IDI. The application must be filed, and consented to, prior to serving in any of the foregoing capacities unless such application is not required under the subsequent provisions of this subpart. 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 IDI 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.

### **§ 303.221 Who is covered by Section 19?**

(a) Section 19 covers IAPs, as defined by 12 U.S.C. 1813(u), and others who are participants in the conduct of the affairs of an IDI. Therefore, all employees of an IDI that fall



within the scope of Section 19, including 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 IAPs are covered depends upon their degree of influence or control over the management or affairs of an IDI. In the context of the FDIC's application of Section 19, coverage would apply to an IDI's holding company's directors and officers to the extent that they have the power to define and direct the management or affairs of an IDI. Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an IDI or its holding company will be covered if they participate in the affairs of the IDI or are in a position to influence or control the management or affairs of the insured institution. Typically, an independent contractor does not have a relationship with the IDI other than the activity for which the institution has contracted. An independent contractor who influences or controls the management or affairs of the IDI would be covered by Section 19.

(b) The term “person,” for purposes of Section 19, means an individual, and does not include a corporation, firm, or other business entity.

(c) Individuals who file an application with the FDIC under the provisions of Section 19 who also seek to participate in the affairs of a bank holding company or savings and loan holding company may have to comply with any filing requirements of the Board of the Governors of the Federal Reserve System under 12 U.S.C. 1829(d) and (e).

(d) Section 19 specifically prohibits a person subject to its provisions from owning or controlling an IDI. The terms “control” and “ownership” under Section 19 shall have the meaning given to the term “control” 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 IDI (or 10 percent of the voting shares if no

other person has more shares) or the ability to direct the management or policies of the institution. Under the same standards, a person will be deemed to “own” an IDI if that person owns 25 percent or more of the institution’s voting stock, or 10 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 control or ownership of shares above the foregoing limits.

### **§ 303.222 What offenses are covered under Section 19?**

(a) 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 includes offenses that 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 that 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.

(b) Whether a crime involves dishonesty, breach of trust, or money laundering will be determined from the statutory elements of the offense itself or from court determinations that the statutory provisions of the offense involve dishonesty, breach of trust, or money laundering.

(c) All convictions or program entries for offenses concerning the illegal manufacture, sale, distribution of, or trafficking in controlled substances shall require an application unless no application is required under this subpart. Convictions or program entries for criminal offenses involving the simple possession of a controlled substance are not covered under Section 19.

### **§ 303.223 What constitutes a conviction under Section 19?**

(a) *Convictions requiring an application.* There must be a conviction of record. Section 19 does not cover arrests or pending cases not brought to trial, unless the person has a program entry as set out in section 303.224. Section 19 does not cover acquittals or any conviction that has been reversed on appeal, unless the reversal was for the purpose of re-sentencing. A conviction with regard to which an appeal is pending requires an application. A conviction for which a pardon has been granted will require an application.

(b) *Convictions not requiring an application.* When an individual is charged with a covered offense and, in the absence of a program entry as set out in section 303.224, is subsequently convicted of an offense that is not a covered offense, the conviction is not subject to Section 19.

(c) *Expungements.* 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.

(d) *Youthful offenders.* An adjudication by a court against a person as a “youthful offender” under any youth-offender law applicable to minors as defined by state law, or any judgment as a “juvenile delinquent” by any court having jurisdiction over minors as defined by state law, does not require an application. Such an adjudication does not constitute a matter

covered under Section 19 and is not a conviction or program entry for determining the applicability of section 303.227.

**§ 303.224 What constitutes a pretrial diversion or similar program (program entry) under Section 19?**

(a) A program entry is characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution upon agreement, whether formal or informal, by the accused to treatment, rehabilitation, restitution, or other non-criminal or non-punitive alternatives. Whether the outcome of a case constitutes a program entry is determined by relevant Federal, state, or local law, and, if not so designated under applicable law, then the determination of whether a disposition is a program entry will be made by the FDIC on a case-by-case basis. Program entries prior to November 29, 1990, are not covered by Section 19.

(b) When a covered offense either is reduced by a program entry to an offense that would otherwise not be covered by Section 19 or is dismissed upon successful completion of a program entry, the covered offense remains a covered offense for purposes of Section 19. The covered offense will require an application unless it is *de minimis* as provided by section 303.227 of this subpart.

(c) Expungements or sealings of program entries will be treated the same as those for convictions.

**§ 303.225 What are the types of applications that can be filed?**

(a) *Institution filing requirement (bank-sponsored applications)*. Applications are required to be filed by the IDI, which intends for a person covered by the provisions of Section

19 to participate in its affairs. Bank-sponsored applications shall be filed with the appropriate FDIC Regional Office, as required by this subpart.

(b) *Waiver applications.* If an IDI does not file an application regarding an individual, the individual may file a request for a waiver of the institution filing requirement. Such a waiver application shall be filed with the appropriate FDIC Regional Office and shall set forth substantial good cause why the application should be granted.

#### **§ 303.226 When must an application to be filed?**

Except for situations in which no application is required under this subpart, an application must be filed when 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 when such person has a program entry regarding that offense. Before an application is considered by the FDIC, all of the sentencing requirements associated with a conviction, or conditions imposed by the program entry, including but not limited to, imprisonment, fines, condition of rehabilitation, and probation requirements, must be completed, and the case must be considered final by the procedures of the applicable jurisdiction. The FDIC's application forms as well as additional information concerning Section 19 can be accessed at the FDIC's regional offices or on the FDIC's website.

**§ 303.227 When is an application *not* required for a covered offense or program entry (*de minimis* offenses)?**

(a) *In General.* Approval is automatically granted and an application will not be required where all of the following *de minimis* criteria are met.

(1) The individual has been convicted of, or has program entries for, no more than two covered offenses, including those subject to paragraph (b); and for each covered offense, all of the sentencing requirements associated with the conviction, or conditions imposed by the program entry, have been completed (the sentence- or program-completion requirement does *not* apply under paragraphs (b)(2) and (b)(4) of this section 303.227);

(2) Each covered offense was punishable by imprisonment for a term of one year or less and/or a fine of \$2,500 or less, and the individual served three days or less of jail time for each covered offense. The FDIC considers jail time to include any significant restraint on an individual's freedom of movement which includes, as part of the restriction, confinement to a specific facility or building on a continuous basis where the person may leave temporarily only to perform specific functions or during specified times periods or both. Jail time includes confinement to a psychiatric treatment center in lieu of a jail, prison, or house of correction on mental-competency grounds. The definition is *not* intended to include any of the following: (i) persons on probation or parole who may be restricted to a particular jurisdiction, or who must report occasionally to an individual or to a specified location; (ii) persons who are restricted to a substance-abuse treatment program facility for part or all of the day; and (iii) persons who are ordered to attend outpatient psychiatric treatment;

(3) If there are two convictions or program entries for a covered offense, each conviction or program entry was entered at least three years prior to the date an application would otherwise be required, except as provided in paragraph (b)(1); and

(4) Each covered offense was not committed against an IDI or insured credit union.

(b) *Other types of offenses for which the de minimis exception applies and no application is required.*

(1) *Age of person at time of covered offense.* If there are two convictions or program entries for a covered offense, and the actions that resulted in both convictions or program entries all occurred when the individual was 21 years of age or younger, then the *de minimis* criteria in (a)(3) above shall be met if the convictions or program entries were entered at least 18 months prior to the date an application would otherwise be required.

(2) *Convictions or program entries for insufficient funds checks.* Convictions or program entries of record based on the writing of “bad” or insufficient funds check(s) shall be considered *de minimis* offenses under this provision if the following conditions apply:

(i) The aggregate total face value of all “bad” or insufficient funds check(s) cited across all the conviction(s) or program entry(ies) for “bad” or insufficient funds checks is \$1,000 or less;

(ii) No IDI or insured credit union was a payee on any of the “bad” or insufficient funds checks that were the basis of the conviction(s) or program entry(ies); and

(iii) The individual has no more than one other *de minimis* offense under this section 303.227.

(3) *Convictions or program entries for small-dollar, simple theft.* Convictions or program entries based on the simple theft of goods, services, or currency (or other monetary instrument) shall be considered *de minimis* offenses under this provision if the following conditions apply. Simple theft excludes burglary, forgery, robbery, identity theft, and fraud.

(i) The value of the currency, goods, or services taken is \$1,000 or less;

(ii) The theft was not committed against an IDI or insured credit union;

(iii) The individual has no more than one other *de minimis* offense under this section 303.227; and

(iv) If there are two *de minimis* offenses under this section 303.227, each conviction or program entry was entered at least three years prior to the date an application would otherwise be required; or at least 18 months prior to the date an application would otherwise be required if the actions that resulted in the conviction or program entry all occurred when the individual was 21 years of age or younger.

(4) *Convictions or program entries for the use of a fake, false, or altered identification.* A conviction or program entry for the creation or possession of a fake, false, or altered form of identification by a person under the age of 21, or the use of a fake, false, or altered form of identification by such a person to circumvent age-based restrictions on purchases, activities, or premises entry, shall be considered a *de minimis* offense under this provision if the following conditions apply.



(i) The individual has no more than one other *de minimis* offense under this section 303.227; and

(ii) If there are two *de minimis* offenses under this section 303.227, each conviction or program entry was entered at least three years prior to the date an application would otherwise be required; or at least 18 months prior to the date an application would otherwise be required if the actions that resulted in the conviction or program entry all occurred when the individual was 21 years of age or younger.

(c) *Fidelity bond coverage and disclosure to institutions.* Any person who meets the criteria under this section 303.227 shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction(s) or program entry(ies) to all IDIs in the affairs of which he or she intends to participate.

(d) *Non-qualifying convictions or program entries.* No conviction or program entry for a violation of the Title 18 sections set out in 12 U.S.C. 1829(a)(2) can qualify under any of the *de minimis* exceptions set out in this section.

### **§ 303.228 How to file an application.**

Forms and instructions should be obtained from the FDIC's website ([www.fdic.gov](http://www.fdic.gov)), and the application must be filed with the appropriate FDIC Regional Director. The application must be filed by an IDI on behalf of a person (bank-sponsored) unless the FDIC grants a waiver of that requirement (individual waiver). Individual waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown. A person may request an individual waiver and file an application on her or his own behalf within the same application.

The appropriate Regional Office for a bank-sponsored application is the office covering the state where the IDI's home office is located. The appropriate Regional Office for an individual filing for a waiver of the institution filing requirement is the office covering the state where the person resides. States covered by each FDIC Regional Office can be located on the FDIC's website.

**§ 303.229 How an application is evaluated.**

(a) The ultimate determinations in assessing an application are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an IDI, and whether the affiliation, ownership, control, or participation by the person in the conduct of the affairs of the institution may constitute a threat to the safety and soundness of the institution or the interests of its depositors or threaten to impair public confidence in the institution. In determining the degree of risk, the FDIC will consider:

(1) Whether the conviction or program entry is for a criminal offense involving dishonesty, breach of trust, or money laundering and the specific nature and circumstances of the offense;

(2) Whether the participation directly or indirectly by the person in any manner in the conduct of the affairs of the IDI constitutes a threat to the safety and soundness of the institution or the interests of its depositors or threatens to impair public confidence in the institution;

(3) Evidence of rehabilitation including the person's age at the time of the covered offense, the amount of time that has elapsed since the occurrence of the conviction or program entry, and the person's employment history and full legal history;

(4) The position to be held or the level of participation by the person at an IDI;

(5) The amount of influence the person will be able to exercise over the operation, management, or affairs of an IDI;

(6) The ability of management of the IDI to supervise and control the person's activities;

(7) The level of ownership or control the person will have at an insured depository institution;

(8) The applicability of the IDI's fidelity bond coverage to the person; and

(9) Any additional factors in the specific case that appear relevant to the application or the applicant including, but not limited to, the opinion or position of the primary Federal or state regulator.

(b) The question of whether a person, who was convicted of a crime or who agreed to a program entry, was guilty of that crime shall not be at issue in a proceeding under this subpart or under 12 CFR part 308, subpart M.

(c) The foregoing factors 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 under 12 U.S.C. 1829(a)(2) for certain Federal offenses.

(d) All approvals and orders will be subject to the condition that the person 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 also be conditioned upon that person disclosing the presence of the conviction(s) or program entry(ies) to all IDIs in the affairs of which he or she wishes to participate.

(e) When deemed appropriate, bank-sponsored applications are to allow the person to work in a specific job at a specific bank and may also be subject to the additional conditions, including that the prior consent of the FDIC will be required for any proposed significant changes in the person's duties or responsibilities. In the case of bank-sponsored applications, such proposed changes may, in the discretion of the Regional Director, require a new application.

(f) In situations in which an approval has been granted for a person to participate in the affairs of a particular IDI and the person subsequently seeks to participate at another IDI, another application must be submitted and approved by the FDIC prior to the person participating in the affairs of the other IDI.

#### **§ 303.230 What will the FDIC do if the application is denied?**

(a) The FDIC will inform the applicant in writing that the application has been denied and summarize or cite the relevant considerations specified in § 303.229 of this subpart.

(b) The denial will also notify the applicant that a written request for a hearing under 12 CFR part 308, subpart M may be filed with the Executive Secretary within 60 days after the denial. The request for a hearing must include the relief desired, the grounds supporting the request for relief, and any supporting evidence.

#### **§ 303.231 Waiting time for a subsequent application if an application is denied.**

An application under Section 19 may be made in writing at any time more than one year after the issuance of a decision denying an application under Section 19. If the original denial is subject to a request for a hearing, then the subsequent application may be filed at any time more

than one year after the decision of the Board of Directors, or its designee, denying the application. The prohibition against participating in the affairs of an IDI under Section 19 shall continue until the individual has been granted consent in writing to participate in the affairs of an IDI by the Board of Directors or its designee.

## **PART 308 RULES OF PRACTICE AND PROCEDURE**

1. The authority citation for Part 308 continues to read as follows:

5 U.S.C. 504, 554-557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831o, 1831p-1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15 U.S.C. 78(h) and (i), 78o(c)(4), 78o-4(c), 78o-5, 78q-1, 78s, 78u, 78u-2, 78u-3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Pub. L. 104-134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109-351, 120 Stat. 1966; Pub. L. 111-203, 124 Stat. 1376; Pub. L. 114-74, sec. 701, 129 Stat. 584.

2. Revise Part 308, Subpart M as follows:

### **Subpart M— Procedures Applicable to the Request for and Conduct of a Hearing after Denial of an Application under Section 19 of the FDI Act**

Sec.

- |         |                         |
|---------|-------------------------|
| 308.156 | Scope.                  |
| 308.157 | Denial of applications. |
| 308.158 | Hearings.               |
| 308.159 | [Reserved]              |
| 308.160 | [Reserved]              |

**Subpart M— Procedures Applicable to the Request for and Conduct of a Hearing after Denial of an Application under Section 19 of the FDI Act**

**§ 308.156 Scope.**

The rules and procedures set forth in this subpart shall apply to an application filed under Section 19 of the FDI Act, 12 U.S.C. 1829 (Section 19), and 12 CFR part 303, subpart L, by an insured depository institution (IDI) or an individual, which individual has been convicted of any criminal offense involving dishonesty, a breach of trust, or money laundering, or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution of such offense, to seek the prior written consent of the FDIC for the individual to become or continue as an institution-affiliated party (IAP) with respect to an IDI; to own or control directly or indirectly an IDI; or to participate directly or indirectly in any manner in the conduct of the affairs of an IDI; and shall apply only after such application has been denied under part 12 CFR part 303, subpart L.

**§ 308.157 Denial of applications.**

If an application is denied under 12 CFR part 303, subpart L, then the applicant may request a hearing under this subpart M. The applicant will have 60 days after the date of the denial to file a written request with the Executive Secretary. In the request, the applicant shall state the relief desired, the grounds supporting the request for relief, and provide any supporting evidence that the applicant believes is responsive to the grounds for the denial.

### § 308.158 Hearings.

(a) *Hearing dates.* The Executive Secretary shall order a hearing to be commenced within 60 days after receipt of a request for hearing on an application filed under § 308.157. Upon the request of the applicant or FDIC enforcement counsel, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Burden of proof.* The burden of going forward with a *prima facie* case shall be upon the FDIC. The ultimate burden of proof shall be upon the person proposing to become or continue as an IAP with respect to an IDI; to own or control directly or indirectly an IDI; or to participate directly or indirectly in any manner in the conduct of the affairs of an IDI.

(c) *Hearing procedure.* (1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§ 308.6 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held under this subpart.

(3) The applicant may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the FDIC enforcement staff may attend the hearing and participate as a party.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an

opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the applicant afforded the hearing.

(6) In the course of or in connection with any hearing under this paragraph, the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas *duces tecum*. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within 20 days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors or its designee. The Executive Secretary's certification shall close the record.

(d) *Written submissions in lieu of hearing.* The applicant or the IDI may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.



(e) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of a hearing. If a hearing is waived, the person shall remain barred under Section 19.

(f) *Decision by Board of Directors or its designee.* Within 60 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected person whether the person shall remain barred under Section 19. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the applicant.

**§308.159 [Reserved]**

**§308.160 [Reserved]**

Federal Deposit Insurance Corporation.

By order of the Board of Directors,

Dated at Washington, DC, on July X, 2020.

**[insert here],**

*Assistant Executive Secretary*