

§§ 303.208–303.219

12 CFR Ch. III (1–1–23 Edition)

this provision does not supersede the general prohibitions contained in § 337.6.

[67 FR 79247, Dec. 27, 2002, as amended at 78 FR 55470, Sept. 10, 2013]

§§ 303.208–303.219 [Reserved]

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

SOURCE: 85 FR 51319, Aug. 20, 2020, unless otherwise noted.

§ 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

Federal Deposit Insurance Corporation

§ 303.223

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 §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 §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

§ 303.224

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 § 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 § 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 appro-

12 CFR Ch. III (1–1–23 Edition)

priate 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 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) of this section; 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 (4) of this section);

(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) of this section; 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 paragraph (a)(3) of this section 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.

(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; and

(iv) If there are two *de minimis* offenses under this section, 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; and

§ 303.228

12 CFR Ch. III (1-1-23 Edition)

(ii) If there are two *de minimis* offenses under this section, 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 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*), 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.

Federal Deposit Insurance Corporation

§ 303.241

(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.

Subpart M—Other Filings

§ 303.240 General.

This subpart sets forth the filing procedures to be followed when seeking the FDIC's consent to engage in certain activities or accomplish other matters as specified in the individual sections contained herein. For those matters covered by this subpart that also have substantive FDIC regulations or related statements of policy, references to the relevant regulations or statements of policy are contained in the specific sections.

§ 303.241 Reduce or retire capital stock or capital debt instruments.

(a) *Scope*—(1) *Insured State nonmember banks*. The procedures contained in this section are to be followed by an insured State nonmember bank to seek the prior approval of the FDIC to reduce the amount or retire any part of its common or preferred stock, or to retire any part of its capital notes or debentures pursuant to section 18(i)(1) of the FDI Act (12 U.S.C. 1828(i)(1)).

(2) *Insured State savings associations*. The procedures contained in this section are to be followed by an insured State savings association to seek the prior approval of the FDIC to reduce the amount or retire any part of its common or preferred stock, or to retire