



# Fair Hiring in Banking: Adapting to the FDIC's Final Rule on Section 19

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December 2024

**Seyfarth Shaw LLP**

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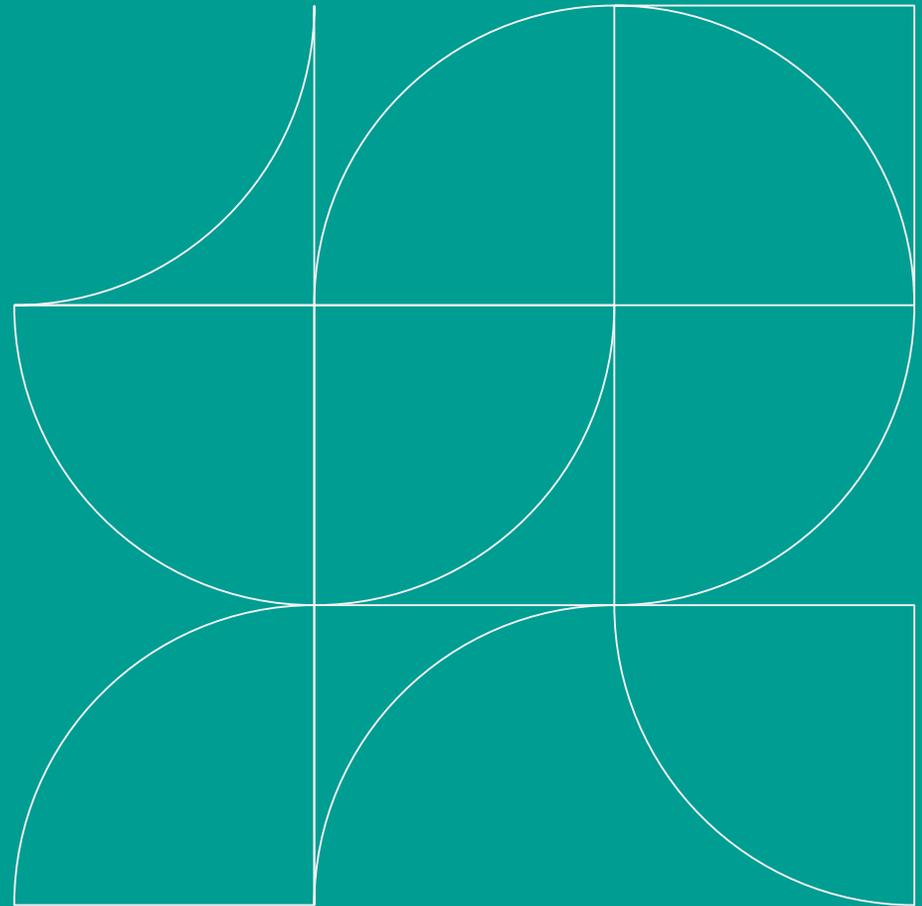


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# Agenda

1. Fair Hiring in Banking Act
2. 2024 Final Rule
3. Background Check Considerations
4. Takeaways

# The Fair Hiring in Banking Act and 2024 Final Rule



# Federal Deposit Insurance Act

- Section 19 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1829
- Statement of Policy for Section 19 of the FDIC
- 2020 Final Rule
- Fair Hiring in Banking Act
  - Amended Section 19
- Final Rule
  - Effective October 1, 2024



# The Crux of Section 19

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- Governs whether a person may be employed by a federally insured depository institution
- Unless the FDIC consents, prohibits employment of persons convicted of:
  - any criminal offense involving dishonesty or breach of trust or money laundering, or
  - any criminal offense concerning the illegal manufacture, sale or distribution of, or trafficking in, controlled substances
- Conviction includes an agreement to enter a pretrial diversion or similar program in connection with the prosecution for such an offense
- Financial institution may seek regulatory approval (i.e., a waiver) to employ such a person
- 10-year ban for certain crimes under Title 18

# Major Changes in 2020

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- Excluded all covered offenses that had been expunged or sealed by a court of competent jurisdiction or by operation of law
- *De minimis*
  - Increased small-dollar theft threshold to \$1,000 (up from \$500)
  - Expanded the exception to include use of a fake ID by a person under 21 to circumvent age-based restrictions on alcohol purchases
  - Allowed for two covered *de minimis* offenses
  - If two covered offenses on record, decreased the amount of time that must elapse before a covered offense may be deemed *de minimis*
  - Eliminated waiting period when there is only one covered *de minimis* offense

# Fair Hiring in Banking Act

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- Category of crimes for which a financial institution can outright reject a job applicant or terminate an employee has been significantly narrowed
- Provides guidance in determining whether an offense is one of “dishonesty”
  - Does not include misdemeanor offenses committed more than one year before filing of waiver application
  - Does not include offenses for possession of controlled substances (could fall under a different exclusion, however)
- Unless one of the federal offenses with a 10-year minimum prohibition period, no application required if:
  - more than 7 years since offense occurred; or
  - person was incarcerated and more than 5 years since the person was released; or
  - offenses committed before age 21 and more than 30 months since sentencing

## 2024 Final Rule to Align with Fair Hiring in Banking Act

- Requires the “reasonable” inquiry be documented
  - Left to business judgment of the institutions
- Incorporates definition of “criminal offense involving dishonesty”
- Clarifies one-year runs from date of offense, not conviction (multiple offenses runs from last date of the underlying offense)
  - May require some investigation!
- Includes a definition of “breach of trust”
- Two-pronged test for expunged, sealed or dismissed records

# 2024 Final Rule to Align with Fair Hiring in Banking Act

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- Expands *de minimis* from 2020 Final Rule
  - **Increased** the requirement that the offense be punishable by a term of one year or less (excluding periods of pre-trial detention and restrictions on location during probation and parole) to three years or less
  - For “bad check criteria,” **increased** the aggregate total face value of all insufficient funds checks across all convictions or program entries related to insufficient funds checks from \$1,000 or less to \$2,000 or less
  - **New exclusions**: the use of a fake identification, shoplifting, trespassing, fare evasion, driving with an expired license or tag, if one year or more has passed since the applicable conviction or program entry

## What Has Not Changed?

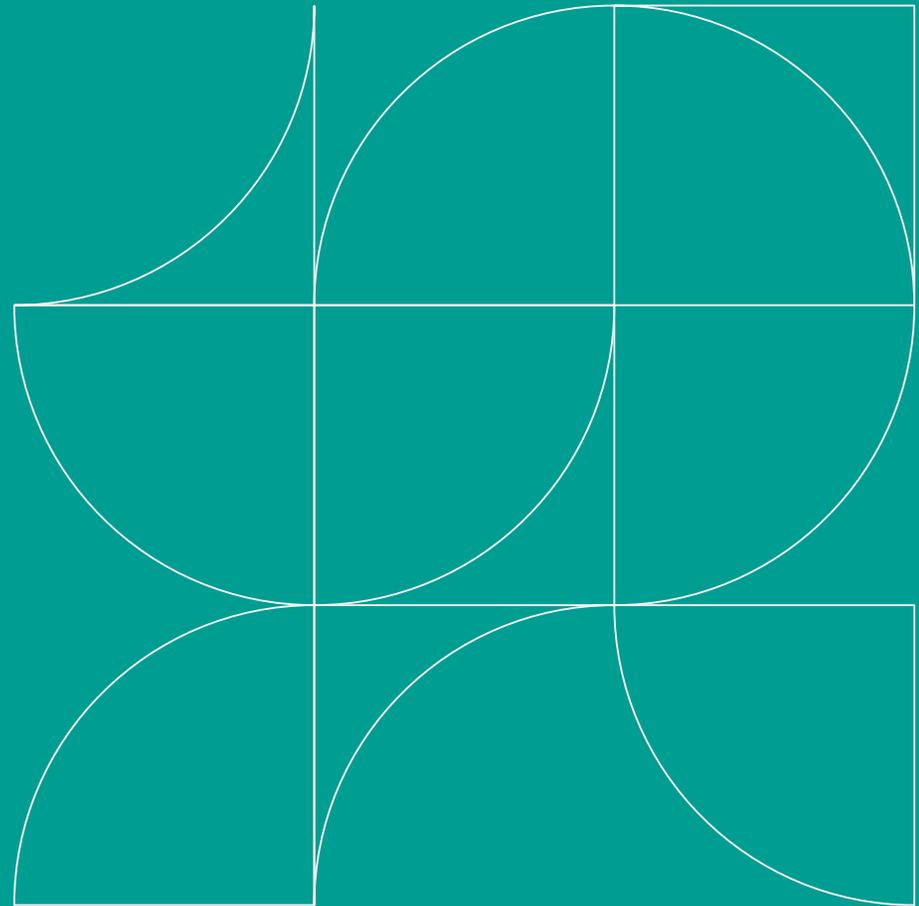
- Must be a conviction or a pretrial diversion or similar program
  - Does not cover:
    - arrests or pending cases (unless a program entry)
    - acquittals
    - convictions that have been reversed on appeal
  - Does cover convictions being appealed or pardoned convictions
- No application required for expunged, dismissed or sealed records or youthful offender adjudications
- Convictions or program entries for a violation of 12 U.S.C. 1829(a)(2) (certain federal offenses) can never qualify as *de minimis*

# Consider Fair Chance Ordinances

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- Unclear whether Section 19 fully preempts them
- New York City Fair Chance Act guidance has comprehensive discussion about Section 19 and other regulated employers
- New Los Angeles Co. Fair Chance Ordinance requires financial institutions to:
  - Post the law that requires background checks or prohibits employment of people with certain offenses in job postings
  - Follow individualized assessment and notice requirements
  - Post a summary of the law in the workplace
  - Allow candidates an opportunity to provide explanatory information virtually, in person or by phone

# Conducting a Background Check



## **What is an FDIC Institution *Required to Do?***

- Duty to perform a “reasonable inquiry” regarding an applicant’s history to avoid hiring or permitting participation by a person with a covered conviction
  - No definition of “reasonable inquiry”
  - At minimum, should establish a screening process that provides information covering convictions (or diversion program entries) pertaining to a job applicant
  - FDIC says this would include, for example, completion of a written employment application that requires a listing of all convictions and diversion program entries
- 2024 Final Rule now requires it be documented
  - Suggest maintaining copies of background and FBI reports

# Components of a Background Check

## Among suggested measures:

- FBI fingerprinting service
- Third-party background check
- Criminal background checks may serve as evidence of a reasonable inquiry

## Third-party background check

- Criminal history
  - County and national
  - Partner with background check provider to ensure a comprehensive search
    - California ICRAA exception
  - Consider background check provider reporting rules

## Applicant self-disclosure

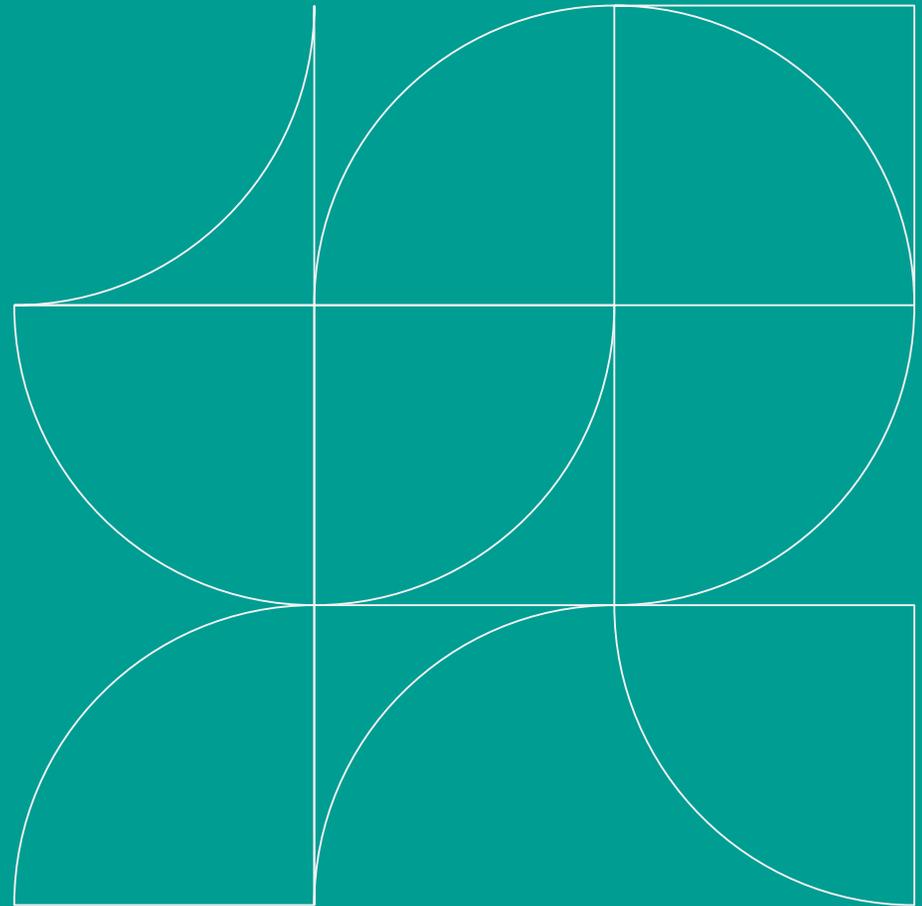
- Consider ban-the-box implications, if any

# The FCRA

- Employers utilizing consumer reports for employment purposes must:
  - Provide disclosures
  - Obtain consent
  - Follow pre-adverse and adverse action requirements
    - Required for fingerprint/DOJ reports?



# Final Thoughts



# Final Thoughts

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- Not all criminal convictions are “covered offenses”
  - If not a covered offense, no safe harbor from other laws if used as a basis to reject a job applicant or terminate an employee
- Not all employees are covered
  - Section 19 applies only to FDIC-insured institutions, their institution-affiliated parties, and those participating in the affairs of an insured depository institution
  - All employees of an insured depository institution fall within the scope of Section 19
  - “De facto employees” (e.g., contractors, consultants)
    - Individuals with influence or control over the management or affairs of the institution

# Final Thoughts

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- Review and revise your policies to ensure Section 19 compliance
- Review your FCRA disclosure and authorization forms
- Button up your pre-adverse and adverse action process
- Consider Title VII and Fair Chance ordinances/laws for crimes not covered by Section 19





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