

June 16, 2020

MEMORANDUM TO: Board of Directors

FROM: Doreen R. Eberley
Director
Division of Risk Management Supervision

SUBJECT: Notice of Proposed Rulemaking: Branch Application Procedures

Summary of Recommendation

Staff recommends that the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) approve and authorize publication in the *Federal Register* the attached Notice of Proposed Rulemaking: Branch Application Procedures (NPR). The NPR proposes to: (1) amend the FDIC's branch application filing procedures set forth in 12 CFR § 303.2, 12 CFR § 303.42, 12 CFR § 303.182, and 12 CFR § 303.184 by deleting the requirements related to the National Historic Preservation Act of 1966 (NHPA) and/or the National Environmental Policy Act of 1969 (NEPA), (2) amend the FDIC's International Banking procedure set forth in 12 CFR § 347.119 and (3) rescind two related Statements of Policy regarding the NHPA and the NEPA.

In connection with an ongoing and comprehensive review of the FDIC's existing regulations and guidance to identify rules or guidance that may be outdated, duplicative or inconsistent, and after a careful analysis of applicable law, staff has concluded that continued consideration of the NHPA and the NEPA in the review of: (1) applications for deposit insurance for *de novo* institutions; (2) applications for establishment of a domestic branch; and (3) applications for relocation of a domestic branch or main office (collectively, "Covered Applications") is not required under law and, therefore, consideration of these statutes during the processing of Covered Applications is unnecessary for insured state nonmember banks. The NPR would eliminate existing regulatory requirements that are unnecessary for insured state nonmember banks and insured branches of foreign banks as well as improve the efficiency of the Covered Applications process. Additionally, this action would place the FDIC in alignment with the other Federal banking agencies, removing a competitive disadvantage for insured state nonmember banks and insured branches of foreign banks that now exists relative to insured state member banks supervised by the Board of Governors of the Federal Reserve System (FRB) and national banks supervised by the Office of the Comptroller of the Currency (OCC).

WITH THE
CONCURRENCE OF: Nicholas J. Podsiadly
General Counsel

Supplementary Information

Background

Congress enacted the NHPA and the NEPA as discrete but related laws to limit the impact of Federal government initiatives on historic properties and the environment, respectively. Both statutes apply broadly across the Federal government but to a limited universe of Federal government actions. Congress sought to incorporate historic preservation and environmental considerations into the Federal government's work and also to augment and support state and local laws that address historic preservation and environmental policy. The FDIC historically has interpreted the NHPA and the NEPA as having limited application to deposit insurance and branch applications.

Sections 106 and 402 of the NHPA require Federal agencies to take into account the effects of their "undertakings" on historic properties.¹ Likewise, section 102(2)(C) of the NEPA requires that Federal agencies include, in every recommendation or report on major Federal actions significantly affecting the quality of the human environment, a detailed statement that addresses the environmental impact of the proposal.² Historically, the FDIC has interpreted the scope of the NHPA and the NEPA as limited to Covered Applications' potential impact on historic properties and the environment.

The FDIC has implemented its responsibilities under the NHPA and the NEPA with respect to Covered Applications by regulation and via three statements of policy. Subparagraphs (4) and (5) of the branch application filing procedures set forth in 12 CFR § 303.42(b) require: (1) "a statement on the impact of the proposal on the human environment, including, information on compliance with local zoning laws and regulations and the effect on traffic patterns..." and (2) "a statement as to whether or not the site is eligible for inclusion in the National Register of Historic Places, . . . including documentation of consultation with the State Historic Preservation Officer, as appropriate."³ The three statements of policy are: the *Statement of Policy Regarding the National Historic Preservation Act of 1966*;⁴ the *Statement of Policy Regarding the National Environmental Policy Act of 1969*;⁵ and the *Statement of Policy on Applications for Deposit Insurance*.⁶

¹ 54 U.S.C. § 306108. Section 402 (54 U.S.C. 307101) of the NHPA requires that federal undertakings outside of the United States take into account adverse effects on sites inscribed on the World Heritage List or on the foreign nation's equivalent of the National Register for the purpose of avoiding or mitigating adverse effects. Congress added this provision to the NHPA in 1980 to govern federal undertakings outside the United States.

² 42 U.S.C. § 4332(C).

³ 12 CFR § 303.42(b)(4) & (5). Similar requirements for moving a foreign branch are found in 12 CFR § 303.184(a)(2)(iii), (iv), and (d)(1)(iv). Additionally, 12 CFR § 303.182 includes notice requirements for the establishment, moving or closing a foreign branch of an insured state nonmember bank in accordance with section 402 of the NHPA.

⁴ 71 Fed. Reg. 42399 (July 26, 2006).

⁵ 63 Fed. Reg. 63475 (Nov. 13, 1998).

⁶ 63 Fed. Reg. 44756 (Nov. 20, 1998); amended 67 FR 79278 (Dec. 27, 2002). The FDIC expects to update this Statement of Policy at a later date.

Review of Regulations and Guidance

In an ongoing effort to streamline FDIC regulations and other supervisory materials issued to the public, and to ensure that such materials are timely, relevant, and effective, the FDIC initiated a comprehensive review of its statements of policy and related matters to identify those that could be rescinded. Additionally, as part of its 2017 decennial report to Congress required by the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA),⁷ the FDIC committed to review all published guidance in order to identify any guidance that should be revised or rescinded because such issuance is out-of-date or otherwise no longer relevant. In accordance with the EGRPRA, the FDIC regularly reviews its regulations to identify outdated or otherwise unnecessary regulatory requirements.

As noted above, the NHPA and the NEPA are parallel but discrete statutes. In determining whether these laws apply to a particular Federal agency action, courts have applied similar principles to both statutes. Section 106 of the NHPA applies only to a Federal “undertaking,” which, for purposes of the FDIC’s statutory responsibilities, means an activity “requiring a federal permit, license or approval.”⁸ Section 102(2)(C) of the NEPA applies only to a “major Federal action,” which includes actions with environmental effects that may be major and which are potentially subject to Federal control and responsibility. After reviewing the case law on what constitutes an “undertaking” under the NHPA or a “major Federal action” under the NEPA, staff does not believe that approval of a Covered Application constitutes a federal undertaking under section 106 or section 402 of the NHPA or a major federal action under section 102(2)(C) of the NEPA.

Section 18(d) of the Federal Deposit Insurance Act requires the FDIC’s consent in connection with: an insured state nonmember bank’s establishment of a domestic or foreign branch, an insured state nonmember bank’s relocation of its main office or a domestic branch, and a foreign bank’s relocation of an insured branch.⁹ Section 18(d) does not confer upon the FDIC the statutory authority to oversee the construction or acquisition of bank premises, but it governs the circumstances under which the FDIC may authorize a state nonmember bank to engage in core banking functions from the location of such premises. Therefore, the FDIC’s approval of a Covered Application does not discretely authorize or prohibit any building construction or demolition – or any other activity that could affect historic properties or the environment.

The FDIC is currently the only Federal banking agency that requires consideration of the NHPA and the NEPA in connection with branch applications. The FRB’s and the OCC’s regulatory requirements with respect to branch applications do not incorporate review of the NHPA and the NEPA requirements. After carefully reviewing the FDIC’s procedures for Covered Applications, staff has concluded that consideration of the NHPA and the NEPA is not required by law and is an unnecessary regulatory requirement for insured state nonmember banks.

⁷ 12 U.S.C. § 3311.

⁸ The full statutory definition of “undertaking” is “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including: (1) those carried out by or on behalf of the federal agency; (2) those carried out with federal financial assistance; (3) those requiring a federal permit, license or approval; and (4) those subject to state or local regulation administered pursuant to a delegation or approval by a federal agency.” 54 USC § 300320.

⁹ 12 U.S.C. §1828(d)(1) & (2).

Federal Register Notice

For the reasons discussed above, the proposed *Federal Register* notice would:

1. remove “NEPA” and “NHPA” as defined terms in 12 CFR 303.2(w) and (x);
2. amend the branch application filing procedures set forth in 12 CFR § 303.42(b) by deleting the requirements related to the NHPA and NEPA set forth in subparagraphs (4) and (5);
3. amend the foreign branch application filing procedures applicable to state nonmember banks set forth in 12 CFR §303.182 by removing the requirements to provide a statement in accordance with NHPA set forth in subparagraphs (a) and (b)(2)(i); and by removing NHPA compliance as a basis for withholding general consent to establish or relocate a foreign branch under 12 CFR 347.119(b);
4. amend the filing procedures for moving an insured branch of a foreign bank set forth in 12 CFR 303.184 by deleting the requirements related to the NHPA and the NEPA set forth in paragraphs (a)(2)(iii), (a)(2)(iv) and (d)(1)(iv);
5. rescind the *Statement of Policy Regarding the National Historic Preservation Act of 1966*; and
6. rescind the *Statement of Policy on National Environmental Policy Act Procedures Relating to Filings Made with the FDIC*.

The proposed amendments to 12 CFR § 303 and 12 CFR § 347 together with the proposed rescission of the two Statements of Policy regarding the NHPA and the NEPA, would eliminate requirements that are unnecessary for insured state nonmember banks and insured branches of foreign banks as well as improve the efficiency of the Covered Application review process. Additionally, these actions would place the FDIC in alignment with the other Federal banking agencies and remove a competitive disadvantage insured state nonmember banks and insured branches of foreign banks now face relative to insured state member banks supervised by the FRB and national banks supervised by the OCC. Furthermore, insured state nonmember banks would remain subject to any applicable state and local historic preservation and environmental laws.

Recommendation

Staff recommends that the Board approve the attached Resolution to authorize publication of the attached Notice in the *Federal Register* for public comment.

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Attachments