I. INTRODUCTION

Applications for deposit insurance for de novo institutions and for the establishment or relocation of a domestic branch or a main office (collectively, covered applications) are considered “undertakings” for National Historic Preservation Act (NHPA) purposes.

Section 106 of the NHPA requires the FDIC to consider, prior to acting on a covered application, the effect of the undertaking on a “historic property,” which the NHPA defines as any historic district, site, building, structure, or object that is included on or eligible for inclusion in, the National Register of Historic Places (National Register). The Advisory Council on Historic Preservation (Advisory Council) has issued regulations that implement the NHPA. These regulations (36 CFR Part 800) can be found on the Advisory Council’s website (Advisory Council on Historic Preservation Regulations Link) under the heading, “Working with Section 106.”

For covered applications, the FDIC is responsible under Advisory Council regulations for making a “reasonable and good faith” effort to identify whether or not the proposal involves a historic property or district and, if it does, what effect the proposal will have on the historic property or district. The Advisory Council regulations set out several factors to be considered in making the effort both reasonable in terms of intensity and scale, and carried out in good faith through its development and execution. The Advisory Council’s guidance on meeting the “reasonable and good faith” effort is available on the Advisory Council website.
Advisory Council on Historic Preservation Guidance Link

The filing should include a statement detailing whether any property connected with a covered application is eligible for inclusion in the National Register, as well as documentation of the applicant’s consultation with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), as appropriate. In addition, the FDIC Statement of Policy Regarding the National Historic Preservation Act of 1966 (SOP-NHPA) provides that filings that may affect a historic property should include information relevant to the historic property such as:

- Locational details, such as appropriate maps and photographs;
- Description of the historical use of the historic property;
- Previous ownership, to the extent known;
- Plans for destruction or alteration of all or any part of the historic property;
- Plans for isolation from or alteration of the surrounding environment;
- Plans for the introduction of visual, audible, or atmospheric elements;
- Details regarding any restrictions or conditions affecting the long-term preservation of the property's historic significance;
- An analysis of alternatives for activities that may otherwise result in an adverse effect on the historic property;
- Information received from the SHPO/THPO, as applicable; and
- Such other details as appropriate for the proper evaluation of the proposal.

II. INITIAL CONTACT WITH STATE/TRIBAL HISTORIC PRESERVATION OFFICER AND OTHER INTERESTED PARTIES

While the ultimate responsibility for verifying whether a property has historical or tribal implications belongs to the FDIC, applicants typically initiate consultation with the SHPO/THPO and other interested parties (such as organizations representing Native Hawaiian preservation interests) prior to filing a covered application to determine whether the proposed undertaking may have a potential effect on a historic property. These consultations are particularly important if there is a question as to whether the proposed undertaking involves a historic property or district, or whether the proposed undertaking may have an adverse effect on a known historic property or district.
Because each SHPO/THPO may have different requirements for information to conduct its consultation, the consultation process should be initiated as early as possible. The FDIC’s SOP-NHPA encourages the applicant to initiate the consultation process with the appropriate SHPO/THPO to identify historic properties within the area of potential effects. However, the FDIC remains legally responsible for all findings and determinations.

Consultations with Indian tribes or THPOs and other organizations representing Native American interests are considered separate from consultations with the SHPO because they are separate organizations. A reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious or cultural significance to historic properties in the area of potential effects is appropriate. Such good faith efforts can include contacts with the appropriate state and local authorities. The Advisory Council’s handbook on consultation with Indian tribes during the review process is also available on the Advisory Council’s website: Advisory Council's Handbook Link.

The FDIC may consider information submitted by other interested parties. See “Other Consulting Parties” below.

III. PROCESSING APPLICATIONS REQUIRING SECTION 106 REVIEW

Upon receipt of a covered application, the Case Manager is to review the materials submitted to determine whether the proposed property is listed on the National Register, exhibits characteristics of a historic property that would deem it eligible for inclusion on the National Register, or is located in an area that might be deemed a historic district or area. In most cases, the applicant submits evidence regarding its consultation with the SHPO/THPO as to whether the covered application will have an adverse impact on a historic property or district. In cases in which SHPO/THPO consultation has not been submitted with the covered application, the FDIC will initiate consultation or during the application review request that the applicant perform this consultation. The FDIC may include a non-standard condition that approval of the covered application is contingent on obtaining a SHPO/THPO consultation before consummation. However, reliance on one or more conditions is only appropriate when the FDIC has a reasonable basis to believe the undertaking does not involve a historic property or district. Further, while a SHPO/THPO consultation is a significant consideration, determinations regarding the impact of an undertaking on a historic property or district statutorily remains with the FDIC.

When an applicant fails to fully consider whether the property is eligible for inclusion on the National Register or is located in a historic district, the Case Manager should contact the applicant as soon as practical to ensure that no alteration of the property has occurred or will occur prior to consultation with the SHPO/THPO. If the property has been altered or a determination has been made that there is a potential adverse effect on a historic property, the application should be removed from expedited processing (if otherwise eligible for expedited processing) following established procedures. If the applicant has begun construction or alteration of the property, the Case Manager, after notifying the Assistant Regional Director, should instruct the applicant to immediately cease construction or further alteration to limit any additional adverse effect. Because of the changes to or demolition of the property in question, SHPOs/THPOs may determine that it is not possible to issue a determination, but will require full participation throughout the consultation process pursuant to the Section 106 process.

The covered application should generally be acted on only after a determination has been made regarding whether the undertaking has or will have an adverse effect on a historic property or district, and the analysis and consultation process pursuant to Section 106 is complete. Construction or alteration may only begin or resume upon approval of the covered application and completion of the Section 106 process.
If alteration or anticipatory demolition has occurred, consideration must be given to the appropriate supervisory response. Refer to Alteration Prior to SHPO/THPO Consultation below.

**Historic Property Determination**

The FDIC considers information submitted by the applicant, SHPOs/THPOs, and other (consulting) parties, as well as other information developed during the review, in determining whether a property is historic. Considerations may include, for instance, location-related details, such as maps and photographs, a description of the historical use of the property, previous ownership, to the extent known, and other relevant considerations. If a property is determined to be historic, the FDIC must determine whether the undertaking proposed in the covered application will have an adverse effect on the historic property. If the proposal may affect a historic property, the applicant should provide the FDIC with information relevant to the historic property. This information includes, but is not limited to:

- Plans for destruction or alteration of all or any part of the historic property;
- Plans for isolation from or alteration of the surrounding environment;
- Plans for the introduction of visual, audible, or atmospheric elements;
- Details regarding any restrictions or conditions affecting the long-term preservation of the property’s historic significance;
- An analysis of alternatives that may otherwise result in an adverse effect on the historic property;
- Information received from the SHPO/THPO and other parties, as applicable; and
- Such other details as appropriate for the proper evaluation of the proposal.

Case Managers should review any information submitted or developed during the review and make an assessment of compliance with the NHPA and the Advisory Council’s regulations prior to approving an application. The National Park Service’s website provides a searchable database for properties that have been listed on the National Register, as well as a list of historic districts.

If the property is not currently on the National Register, but is eligible to be included on the National Register, the property must be evaluated as a historic property. Properties that require increased scrutiny include, but are not limited to:

- Buildings that are in excess of 50 years old;
- Properties that are included within historic districts or areas;
- Properties that are located in close proximity to other historic properties or districts;
- Properties that are located on or near tribal lands; and
- Properties whose former use is significant to a historic element of a location’s history.

If consultation with the SHPO/THPO or other parties has been initiated, whether by the FDIC or the applicant, and the FDIC’s review does not indicate a potential concern, the Case Manager may, following consultation with Regional Office (RO) Legal and, if appropriate, the Washington Office (WO) Division of Risk Management Supervision (RMS) and Legal, forward a recommendation to the signing official to approve the covered application conditioned on completion and satisfaction of the consultation process with all relevant parties prior to the property being altered and the undertaking consummated. The approval should also be conditioned on submission of appropriate documentation that the consultation process with all relevant parties has been fully satisfied, that all necessary actions or changes have been fully satisfied, and that the applicant must obtain the FDIC’s non-objection prior to altering the property in any manner. Such conditions must explicitly require resolution of any issues or concerns prior to any activity being initiated that will impact the property.
There are situations when consultation with the SHPO/THPO may not be necessary. Examples include covered applications involving properties that:

- Are located in recently constructed supermarkets or shopping centers and the applicant had no ownership interest prior to or during construction;
- Are newly constructed and the applicant had no ownership interest prior to or during construction;
- Are newly constructed properties whose immediate prior usage was that of a financial institution and no ground disturbing activities will take place;
- Involve messenger services where no new physical location is necessary; or
- Involve temporary or seasonal branches that do not involve permanent structures that will alter the location or surrounding areas.

The applicant typically provides appropriate documentation for the FDIC to confirm that consultation with the SHPO/THPO is not required in these situations. Information that may be needed to make this determination should be discussed with the Case Manager.

Other Consulting Parties

The FDIC, in its sole discretion, may solicit participation from parties other than the applicant and appropriate SHPO/THPO at any time while the covered application is pending. Invitation as a consulting party should only be extended after consultation with RO management and Legal, and, as appropriate, the WO (RMS and Legal). Other consulting parties could include, but are not limited to, local historical societies, government offices, and industrial development authorities.

Alteration Prior to SHPO/THPO Determination

If the applicant, or an entity acting on behalf of the applicant, demolishes or initiates construction or alteration on, or renovation to, the proposed property prior to the SHPO/THPO rendering an assessment of the property’s historic significance, the SHPO/THPO may notify the applicant or the FDIC that it has terminated its consultation on the basis that it cannot appropriately assess the property or the impact of the undertaking. In such a case, the FDIC must make an independent determination as to whether the property is or is eligible to be included on the National Register and, if so, whether the undertaking will adversely affect a historic property. In addition, the FDIC must determine whether the applicant intentionally altered the property to avoid the requirements of the NHPA. If the FDIC anticipates approval of the covered application, the basis for the FDIC’s findings must be fully documented and provided to the Advisory Council. The Advisory Council is then allowed at least 30 days to comment on the FDIC’s determination before the covered application may proceed. To ensure compliance with the technical provisions of the Advisory Council’s regulations, the Case Manager should consult with RO management, RO Legal, and the WO, as appropriate, prior to submitting any correspondence regarding the FDIC’s proposed determination to the Advisory Council.

Further, the Case Manager should develop an appropriate supervisory response to the premature alteration for review by RO management and Legal, as well as WO staff (RMS and Legal), as appropriate. Generally, the appropriate supervisory options include: 1) issuance of a supervisory letter, 2) assessment of civil money penalties, or 3) enforcement action.

Impact on Determinations

Because alteration or anticipatory demolition reflects negatively on management, such circumstances should be considered when evaluating the statutory factors and/or regulatory
requirements relevant to the filing. Further, because alteration or anticipatory demolition violates the law, the circumstances should be considered when assigning CAMELS ratings to the institution, particularly when considering the rating assigned to the management component.

**Adverse Effect on a Historic Property**

The Case Manager should consult with RO Legal and the Risk Management and Application Section in WO, as appropriate, as soon as it becomes apparent that the covered application will have an adverse effect on a historic property. Upon such a determination, the RO and WO, as appropriate, should consult with the SHPO/THPO, the Advisory Council, and other consulting parties to seek ways to avoid, minimize, or mitigate the adverse effect. If the parties mutually agree to measures that will avoid, minimize, or mitigate the adverse effect, the RO should execute a Memorandum of Agreement (MOA) with the applicant, the SHPO/THPO, and other interested parties to memorialize the requirements and/or restrictions to be satisfied in resolving the adverse effects. The provisions to be included should require the relevant parties\(^1\), generally the applicant, to certify to the FDIC that all requirements, restrictions, and other provisions have been satisfied, and also require that sufficient documentation (independent, if appropriate) is submitted to the FDIC to support the certifications. In no case should any provision require the FDIC to determine satisfaction of the requirements and restrictions absent certifications and appropriate documentation.

The Advisory Council has required the following clause to be included in MOAs to ensure and document FDIC consultation with Indian tribes:

> Whereas, the FDIC, after making a reasonable and good faith effort, has not identified any federally recognized Indian tribes that may have attached religious or cultural significance to the Property in accordance with 36 C.F.R. § 800.2(c)(2)(ii), or identified any evidence to suggest that there are any such Indian tribes that should be invited to be a consulting party pursuant to 36 C.F.R. § 800.3(f)(2).

Each MOA is individually prepared based on the circumstances of the particular application. Case Managers should work closely with RO Legal to draft the appropriate provisions. The MOA should be drafted in accordance with the Secretary of the Interior’s Standards for Architectural and Engineering Documentation, 48 FR 44716 (Sept. 29, 1983); for updates see also The Standards and Guidelines Website. A copy of the draft MOA must be provided to the Advisory Council for review, and the Advisory Council should be invited to join the MOA. The Advisory Council has 15 days to respond to this request, and the MOA cannot be signed until the earlier of the expiration of the 15-day review period or a response from Advisory Council is received. A copy of the signed MOA must be provided to the Advisory Council, the SHPO, the institution, any consulting parties, and to WO Legal. A copy of the signed MOA and any other mitigation documentation must also be provided to the National Park Service for inclusion in the Heritage Documentation Programs collection at the Library of Congress.

**Washington Office Consultation**

Regional Directors or authorized designees have delegated authority to make adverse effect determinations with regard to the NHPA and to enter into MOAs. WO RMS and Legal should be consulted, as appropriate, to ensure that the FDIC adheres to the NHPA and its implementing regulations.

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\(^1\) Relevant parties may include the SHPO/THPO, state authority, applicant, or third party representing the applicant.
IV. DELEGATED AUTHORITY CONSIDERATIONS

NHPA requirements must be favorably resolved for the RO to act under delegated authority on an application for deposit insurance or for the establishment or relocation of domestic branches and main offices. As previously stated, Regional Directors or authorized sub-delegates have delegated authority to make adverse effect determinations with regard to the NHPA and to enter into MOAs. However, Regional Directors should consult with WO RMS and Legal on all MOAs before the documents are provided to the Advisory Council for comment and final execution.

V. REFERENCES

Section 303.42(b)(5) of the FDIC Rules and Regulations

National Historic Preservation Act of 1966

Statement of Policy Regarding the National Historic Preservation Act of 1966


Secretary of the Interior’s Standards for Architectural and Engineering Documentation, 48 FR 44716 (Sept. 29, 1983).

Advisory Council on Historic Preservation website