

September 28, 2020

MEMORANDUM TO: Board of Directors

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

SUBJECT: **Final Rule: Branch Application Procedures**

Summary of Recommendation

Staff recommends that the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) approve and authorize for publication in the *Federal Register* the attached Final Rule: *Branch Application Procedures*. If approved, the rule would finalize, without any changes, the proposed actions in the Notice of Proposed Rulemaking (NPR) issued on July 10, 2020. Specifically, the final rule: (1) amends 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) amends the FDIC's International Banking procedure set forth in 12 CFR § 347.119 and (3) rescinds 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and comprehensive review of the FDIC's existing regulations and guidance to identify rules or guidance that may be outdated, duplicative or inconsistent, the staff reviewed the FDIC's rules and policy statements related to the NHPA and the NEPA. After a careful review, including analysis of applicable law, staff recommends that the Board, through the final rule, adopt as final the position 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 and insured branches of foreign banks. The final rule would eliminate existing regulatory requirements that are unnecessary for insured state

CONCUR:

Nicholas J. Podsiadly
General Counsel

nonmember banks and insured branches of foreign banks and 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).

Supplementary Information

Background

The NHPA and the NEPA were enacted by Congress as discrete but related laws to limit the impact of Federal Government initiatives on historic properties and the environment, respectively. These statutes apply to a limited universe of Federal Government actions. The NHPA and the NEPA seek to incorporate historic preservation and environmental considerations into the Federal Government's work and also to enhance and support state and local laws that address historic preservation and environmental policy. Historically, the FDIC has interpreted the NHPA and NEPA as having application limited 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 Similarly, 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 the NHPA and the NEPA with respect to Covered Applications by regulation and via three statements of policy. The FDIC's regulations generally require applicants to provide statements regarding their compliance with NEPA and NHPA in connection with main office relocation applications by state nonmember banks,³ domestic and foreign branch establishment and relocation applications by state nonmember banks,⁴ and insured branch relocation applications by foreign banks.⁵ The three statements of policy are: the *Statement of Policy Regarding the National Historic Preservation Act of 1966*;⁶ the *Statement of*

¹ 54 U.S.C. § 306108.

² 42 U.S.C. § 4332(C).

³ 12 CFR 303.40 and 303.42(b)(4) and (5).

⁴ 12 CFR 303.40, 303.42(b)(4) and (5), and 303.182. 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.

⁵ 12 CFR 303.184.

⁶ 71 Fed. Reg. 42399 (July 26, 2006).

*Policy Regarding the National Environmental Policy Act of 1969;*⁷ and the *Statement of Policy on Applications for Deposit Insurance.*⁸

Review of Regulations and Guidance

As part of the FDIC’s comprehensive review of its statements of policy and related matters in an effort to streamline supervisory materials issued to the public, FDIC staff reviewed the requirements for branch applications. Additionally, as part of its 2017 decennial report to Congress required by the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA),⁹ 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.

Courts generally determine whether the NHPA and the NEPA apply to a particular Federal agency action by applying similar principles to both statutes, because the two statutes are parallel but discrete. Section 106 of the NHPA applies only to a Federal “undertaking,” which means an activity “requiring a federal permit, license or approval.”¹⁰ 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. As noted in the preamble to the NPR, in reviewing the case law on what constitutes an “undertaking” under NHPA or a “major Federal action” under the NEPA, the FDIC 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.¹¹ 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.

⁷ 63 Fed. Reg. 63475 (Nov. 13, 1998).

⁸ 63 Fed. Reg. 44756 (Nov. 20, 1998); amended 67 FR 79278 (Dec. 27, 2002). The FDIC expects to comprehensively update this Statement of Policy at a later date. Applications for deposit insurance would not need to provide the statements regarding NHPA and NEPA because this Statement of Policy references the other two Statements of Policy that are being rescinded.

⁹ 12 U.S.C. § 3311. In accordance with the EGRPRA, the FDIC regularly reviews its regulations to identify outdated or otherwise unnecessary regulatory requirements.

¹⁰ 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.

¹¹ 12 U.S.C. §1828(d)(1) & (2).

Currently, the FDIC is the only Federal banking agency that requires consideration of the NHPA and NEPA in connection with branch applications. The regulatory requirements under the Federal Reserve Board and the OCC do not incorporate review of the NHPA and the NEPA with respect to branch applications.¹² After carefully reviewing the FDIC's procedures for Covered Applications, the FDIC has concluded that consideration of the NHPA and NEPA is not required by law and is an unnecessary regulatory requirement for insured State nonmember banks.

Proposed Rule; Rescission of Policy Statements

On July 10, 2020, the FDIC published a NPR to amend its application requirements for the establishment and relocation of branches and offices so that such applications no longer require statements regarding the compliance of such proposal with the NHPA and the NEPA. For the reasons discussed above, the proposed *Federal Register* notice sought to:

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*.

Comments

The FDIC issued the NPR with a 30-day comment period. The FDIC received only one comment on the NPR from a FDIC-supervised community bank. The commenter supported the proposal by noting that rescinding the filing requirement would make the application process more efficient, align with timing requirements, and remove a time-consuming and onerous requirement.

Final Rule

The final rule would adopt without change, the amendments listed above. The final rule would amend Parts 303 and 347 to remove references to compliance statements regarding the NHPA and NEPA, as well as rescind the *Statement of Policy Regarding the National Historic Preservation Act of 1966* and the *Statement of Policy Regarding the National Environmental Policy Act of 1969*. The amendments to 12 CFR parts 303 and 347, together with the rescission

¹² 84 FR 51711 (Sept. 30, 2019).

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 and national banks. Furthermore, insured state nonmember banks and insured branches of foreign banks would remain subject to any applicable state and local historic preservation and environmental laws.

Recommendation

Staff recommends that the Board approve the final rule and authorize publication of the its publication in the *Federal Register* with an effective date 30 days from publication.

RMS Contact: Patricia A. Colohan, Associate Director, (202) 898-7283

Legal Contact: Navid Choudhury, Counsel, (202) 898-6526

Attachments