



Preserving America's Heritage

December 22, 2005

Mr. Robert E. Feldman  
Executive Secretary  
Attention: Comments/Legal ESS  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, DC 20429

Dear Mr. Feldman:

This letter is in response to your agency's Federal Register notice, dated October 18, 2005, in which FDIC proposes to revise the agency's Statement of Policy on the National Historic Preservation Act (NHPA). We thank you for the opportunity to provide comments and apologize for not meeting the December 19<sup>th</sup> deadline. However, we thought it important to transmit these comments since they directly involve our regulations, "Protection of Historic Properties" (36 CFR Part 800), which implements Section 106 of the NHPA.

In its present format, the Advisory Council on Historic Preservation (ACHP) cannot endorse the proposal included in the Federal Register notice since it does not comport with our regulations. Accordingly, we request that FDIC delay revising its Statement of Policy pending further consultation with the ACHP, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes, and a review of the public comments received in response to the Federal Register notice.

As you may know, the ACHP consulted with FDIC for over four years regarding development of a Nationwide Programmatic Agreement (PA) that would improve the administration of the Section 106 review process for *Covered Applications*. These discussions were not concluded because the FDIC, ACHP, and the NCSHPO did not reach agreement regarding the steps that should be taken to incorporate revisions to the ACHP's regulations issued in 1999. Based upon our records, our last correspondence regarding the FDIC's Nationwide PA was a letter dated November 14, 2001, from Michael J. Zamorski, Acting Director for the Division of Supervision. In response to this letter, we advised your staff via e-mail that further outreach and consultation would be required to move forward with this program initiative.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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Following our review of the proposed revised Statement of Policy, we would like to submit the following comments for your consideration.

- The process set forth in the proposed Statement of Policy does not adhere to the steps outlined in 36 CFR Sections 800.3 through 800.7. Instead, proposals are included that modify the process in a manner that may compromise FDIC's ability to demonstrate that it followed the steps and involved all stakeholders consistent with 36 CFR Part 800. In order to modify the process in such a manner requires approval of the ACHP through one of the alternatives set forth in 36 CFR Part 800.14.
- An example of how the Section 106 review process is modified in the proposed Statement of Policy is the coordination of the initial step in the review process as set forth in Section 800.3. This step requires FDIC to specify if Section 106 is being coordinated with other applicable reviews, identify consulting parties, and develop a plan to involve the public. Since, as far as we know, the FDIC has not issued a delegation of authority letter to SHPOs and Tribal Historic Preservation Officers (THPOs) authorizing applicants to act on behalf of the FDIC to initiate the Section 106 process, FDIC is responsible for carrying out these steps. While FDIC submitted a draft of a delegation of authority letter to us on November 14, 2001, the ACHP expressed concerns that the letter failed to include language regarding the need for applicants to avoid invoking Section 110(k) of the NHPA. A revised delegation letter was never resubmitted to the ACHP or the SHPOs and THPOs based upon our investigations.

The terminology included in the proposed Statement of Policy, (i.e. *SHPO/THPO consent*, *SHPO/THPO clearance*), are inconsistent with 36 CFR Part 800. The agency is required to consult with the SHPO/THPO, not seek their clearance in carrying out the steps in the Section 106 review process. Furthermore, use of such terms gives the wrongful impression that all that is needed for any to comply with Section 106 is for the SHPO/THPO to endorse the project.

- The provisions in the draft Statement of Policy require applicants to request information from the SHPO or THPO when determine whether or not a property is include or eligible for inclusion in the National Register. The regulations at 36 CFR 800.4(b) list additional steps that the agency must take, including research, sample field investigations, and field surveys to identify historic properties. By simplifying this provision in the proposed Statement of Policy, it conveys to applicants that the SHPO/THPO are the sole source of all information and that no efforts other than checking existing records are required.
- The proposed Statement of Policy does not specify that FDIC or applicants will consult with Indian tribes that may attach religious and cultural

significance to sites located off of tribal lands. Accordingly, the policy mistakenly appears to apply only on tribal lands.

- As presented in the proposed Statement of Policy, FDIC has identified categories of undertakings that may not be subject to Section 106 review. We assume that it is FDIC's intent to *exempt* undertakings to streamline the review process. However, such exemptions can only be achieved when an agency pursues a program alternative with the ACHP under 36 Section CFR 800.14), (i.e. Nationwide PA or a basic exemption), that specifies undertakings have limited potential to affect historic properties.
- The background documentation that FDIC has requested the applicant to provide does not provide for the analysis of alternatives for activities that may otherwise result in an *Adverse Effect* on historic properties. The absence of this information has the potential to delay consultation as the ACHP or SHPO request additional information in support of the preferred alternative.
- An obvious oversight in the proposed Statement of Policy is a much needed warning and clarification of how Section 110(k) of the NHPA applies to actions of the applicant that either have initiated or are planning to initiate a Section 106 review. As the ACHP has noted in previous recent correspondence to FDIC, there have been several incidents of anticipatory demolition involving historic properties for proposed new branches subject to FDIC's approval. Therefore, any policy issued by the agency should address this statutory requirement as well as Section 106 in order to provide applicants with the necessary guidance to avoid actions that may require FDIC to invoke this provision.

In closing, the ACHP would welcome the opportunity to discuss with FDIC the issuance of a Statement of Policy that comports with the ACHP's regulations and reflects the views of stakeholders. We appreciate FDIC's desire to be proactive and develop internal procedures to improve the Section 106 review process. As stated above, further collaboration is needed to achieve this goal.

Sincerely,



for

Don L. Klima

Director

Office of Federal Agency Programs