DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 81

[Docket No. FR–4947–F–02]

RIN 2501–AD09

Release in the Public Use Database of Certain Mortgage Data and Annual Housing Activities Report (AHAR) Information of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac)

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends HUD's regulations to permit the release to the public of certain data and information that have been, and will be, submitted to HUD by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the government sponsored enterprises, or GSEs). These amendments allow for the release of GSE mortgage data that fall into three categories, as identified in HUD's proposed rule. The first category involves HUD's public release of GSE mortgage data that the Secretary, by regulation or order, reclassifies from proprietary to non-proprietary status. Following the Secretary's determination to reclassify such data as non-proprietary, HUD will release the GSE mortgage data to the public both prospectively and for all preceding years' public use databases. The second category involves HUD's public release of certain GSE aggregated data derived from proprietary loan-level mortgage data that the Secretary determines are not proprietary when presented in aggregated form. Following the Secretary's determination that such aggregations of GSE data are not proprietary, HUD will release the data to the public both prospectively and for all preceding years. The third category involves the release of certain GSE mortgage data that are at least five years old that the Secretary determines, by regulation or order, to re-classify from proprietary to non-proprietary status because of the passage of time. This final rule provides that such data may, as determined by the Secretary on a case-by-case basis, lose proprietary status once the data have aged a minimum of five years, with the time interval for particular data elements to be determined by the Secretary. The final rule also amends HUD's regulations at 24 CFR 81.75 to incorporate the procedures the Secretary will use to make determinations under each of the above categories and makes certain technical and editorial changes to 24 CFR 81.74 and 81.75.

This final rule follows publication of a January 10, 2005, proposed rule and takes into consideration the public comments received in response to the proposed rule.

DATES: *Effective Date:* December 12, 2005.

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SUPPLEMENTARY INFORMATION:

I. Background

The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (FHEFSSA), Pub. L. 102–550, approved October 28, 1992, requires HUD to establish and monitor the performance of Fannie Mae and Freddie Mac in meeting annual goals for purchases of mortgages on housing for low- and moderate-income families, housing located in central cities, rural areas, and other underserved areas, and special affordable housing (*i.e.*, housing meeting the needs of and affordable to low-income families in low-income areas and very low-income families).

Fannie Mae submits mortgage data and AHAR information to HUD under sections 309(m) and (n), respectively, of the Fannie Mae Charter Act (12 U.S.C. 1723a(m) and (n)). Freddie Mac makes these submissions to HUD under sections 307(e) and (f), respectively, of the Freddie Mac Act (12 U.S.C. 1456(e) and (f)).[1]

Section 1323 of FHEFSSA requires HUD to make available to the public data submitted to HUD by the GSEs relating to the GSEs' mortgage purchases. HUD makes much of this data available to the public via its GSE public use database, compendia, and other means. However, the law prohibits the Secretary from disclosing mortgage data that he or she determines to be proprietary.[2] Specifically, section 1326 of FHEFSSA states that the Secretary may, by regulation or order, ''provide that certain information shall be treated as proprietary information and not subject to disclosure under section 1323 of [title 12 of the United States Code], section 309(n)(3) of the [Fannie Mae Charter Act], or section 307(f)(3) of the [Freddie Mac Act].'' [3]

This prohibition on the disclosure of proprietary information is repeated in section 1323(b)(1) of FHEFSSA, which states, in part, that ''* * * the Secretary may not make available to the public data that the Secretary determines pursuant to section 1326 are proprietary information.'' Thus, the Secretary is authorized by section 1326 of FHEFSSA to make determinations, by regulation or order, that certain GSE mortgage data are proprietary, except as expressly prohibited by section 1323(b)(2) of FHEFSSA.[4]

Under HUD's regulations at 24 CFR 81.75, the Secretary issues a temporary order, final order, or regulation to withhold mortgage data or AHAR information from the public use database and from public disclosure and

[1] HUD defines the term ''mortgage data'' at 24 CFR 81.2 to mean ''data obtained by the Secretary from the GSEs under subsection 309(m) of the Fannie Mae Charter Act and subsection 307(e) of the Freddie Mac Charter Act.''

[2] HUD's regulations at 24 CFR 81.2 define the term ''proprietary information'' to mean ''all mortgage data and all AHAR information that the GSEs submit to the Secretary in the AHARs that contain trade secrets or privileged or confidential, commercial, or financial information that, if released, would be likely to cause substantial competitive harm.''

[3] In addition to FHEFSSA's prohibition on the disclosure of GSE proprietary information, HUD's regulations at 24 CFR 81.72(c)(1) prohibit the release of certain types of mortgage data and AHAR information, including mortgage data and AHAR information that would ''constitute a clearly unwarranted invasion of personal privacy if such data or information were released to the public'' (citing 24 CFR 81.72(b)(3)) or that are ''required to be withheld or * * * [that are] not appropriate for public disclosure under other applicable laws and regulations, including the Trade Secrets Act * * * and Executive Order 12600'' (citing 24 CFR 81.72(b)(4)).

[4] The exception set forth in paragraph (2) of section 1323(b) of FHEFSSA states that the Secretary may not restrict access to GSE single-family mortgage data submitted to the Secretary under section 309(m)(1)(A) of the Fannie Mae Charter Act or section 307(e)(1)(A) of the Freddie Mac Act relating to ''the income, census tract location, race, and gender of mortgagors under such mortgages.''

may, by regulation or order, issue a list providing that certain mortgage data and AHAR information shall be treated as proprietary information. HUD first issued such a list by order in 1995,[5] modified it by order in 1996[6] and again in 2004.[7] In these orders, the list took the form of tables that indicated the organization and contents of the public use databases that were subsequently issued by HUD covering the GSEs' annual purchases since 1993.

As noted, on October 4, 2004, HUD published in the **Federal Register** a notice of final order reclassifying as non-proprietary certain loan-level mortgage data elements contained in the GSEs' annual loan-level data files that will be submitted by the GSEs to HUD pursuant to their charter acts (the 2004 Final Order). The Department's determinations with respect to the proprietary status of the mortgage data elements were discussed in the 2004 Final Order. The resulting revised structure of the public use database was summarized in the revised tables attached to the 2004 Final Order as an appendix. The 2004 Final Order indicated that the Department would, beginning in 2005, release the reclassified data elements through the Department's public use database covering the GSEs' 2004 mortgage purchases and in all future public use databases.[8]

On January 10, 2005, HUD published in the **Federal Register** a proposed rule (70 FR 1774) in which it proposed to release to the public certain mortgage data and aggregated data that have been, and will be, submitted to HUD by Fannie Mae and Freddie Mac (the 2005 Proposed Rule). Following are the categories of data that HUD proposed to release to the public. The reader should note that these are the same categories that HUD described in the 2005 Proposed Rule. However, for the sake of clarity, HUD is now describing each of these three categories separately, rather than combining into one category the prospective and prior years' release of reclassified mortgage data and aggregated data.

• *Prospective and prior years' release of reclassified data.* Following a Secretarial determination to modify the list of proprietary determinations by reclassifying certain GSE mortgage data as non-proprietary, the Secretary would release to the public the reclassified, non-proprietary mortgage data both prospectively and for all years preceding the effective date of HUD's determination, unless otherwise provided by the Secretary. This GSE mortgage data would be released to the public via HUD's GSE public use database. (See 24 CFR 81.75(b)(2).)

• *Prospective and prior years' release of non-proprietary aggregations of data.* Following a Secretarial determination that certain aggregated data derived from proprietary loan-level mortgage data are not proprietary when presented in aggregated form, HUD proposed to release to the public the non-proprietary aggregations of data both prospectively and for all years preceding the effective date of the Secretary's determination, unless otherwise provided by the Secretary. These aggregations of data would be released to the public in the form of a compendium, or by other means. (See 24 CFR 81.75(c).)

• *Release of non-proprietary aged data.* Following a Secretarial determination to reclassify as non-proprietary certain GSE mortgage data included on the list of proprietary determinations that are at least five years old, HUD proposed to release to the public the reclassified aged data. Specifically, HUD proposed that data classified as proprietary that have aged a minimum of five years could be subject to reclassification as non-proprietary data for release to the public because of the passage of time. HUD noted that the time interval for particular data elements would be determined by the Secretary on a case-by-case basis. (See 24 CFR 81.75(b)(3).) HUD sought public comment, in particular, on whether five years represented a reasonable minimum period after which mortgage data might lose their proprietary character and, as a result, warrant a reconsideration of proprietary status under HUD's regulations. Public comment also was solicited on whether a longer or shorter period should be adopted in the final rule, and the point at which the period should begin to run.

II. Discussion of Public Comments

A. Overview of Comments

HUD received four public comments in connection with the 2005 Proposed Rule. Comments were received from the National Association of Home Builders (NAHB), America's Community Bankers (ACB), Fannie Mae, and Freddie Mac.

NAHB expressed support for the 2005 Proposed Rule, stating that the rule appropriately balanced the need to protect the privacy of borrowers, lenders, and the proprietary needs of the GSEs, with Congress' intent to increase the transparency and public accountability of the GSEs by providing the public with as much data as possible regarding the GSEs' mortgage purchases. NAHB maintained that the 2005 Proposed Rule contained valid safeguards and measures to protect the privacy of consumers and the GSEs' business platforms.

ACB expressed support for increased transparency and disclosure of GSE data to help the public measure the GSEs' performance against their mission responsibilities and against the private market. However, ACB also indicated that HUD's proposed reclassification and release of additional data might subject the GSEs and, as a result, the GSEs' sellers/servicers, to financial and competitive harm.

The GSEs objected to several aspects of the 2005 Proposed Rule claiming that the rule, if implemented, could result in an infringement on the GSEs' property rights in their proprietary data with resulting significant competitive harm. The GSEs also expressed concerns that the rule would result in the release of data that could violate consumers' privacy.

Following is a more in-depth discussion of the public comments, and HUD's determinations in response to the comments.

B. Discussion of Public Comments

Comment: Proposed regulatory procedures fail to provide GSEs with due process. Both GSEs asserted that HUD's proposed procedures for reclassifying data are inadequate and fail to provide the GSEs with due process so that they can protect important property rights in their proprietary data. They maintained that the proposed adoption of the procedures in 24 CFR 81.74(f)(1) and (2) for reclassifications of mortgage data are inappropriate when HUD, rather than a GSE, is initiating the proprietary determination process.

Fannie Mae also disputed HUD's assertion in the 2005 Proposed Rule that the proposed adoption of the procedures in § 81.74(f) for use in connection with reclassifications of data under § 81.75 ''represents a codification of existing practice * * *.'' Fannie Mae contended that, in the past, whenever HUD has initiated a reclassification of data, it has provided the GSEs with significantly more opportunities to analyze, consider, and respond in writing to HUD's

[5] See Appendix F to HUD's 1995 final housing goals rule, which set forth an order identifying the list of data elements that HUD had determined under section 1326 of FHEFSSA to be proprietary and those data elements that it had determined to be non-proprietary, at 60 FR 62001–5.

[6] See HUD's final order published on October 17, 1996 (61 FR 54322).

[7] See HUD's final order published on October 4, 2004 (69 FR 59476).

[8] Id. at 69 FR 59482.

proposals than that afforded by § 81.74(f).

Fannie Mae urged HUD to include in the final rule a number of procedural protections, including the following: (1) HUD would be required, prior to making a determination, to notify the GSEs in writing of the actual data elements and/or aggregated data that are under consideration for release to the public; (2) HUD's written notice would contain the basis for the reclassification of the data elements and an assessment of the factors contained in § 81.74(b); (3) HUD would provide the GSEs with a minimum of 30 days in which to submit written comments; (4) after reviewing the GSEs' written comments, HUD would provide each GSE with an opportunity to meet to discuss the effect of the proposed public release; (5) after the meeting, HUD may request additional information or make a determination; and (6) if HUD decides to make the data elements or aggregated data non-proprietary, it will provide notice to the GSEs of its determination and state that the Secretary will not release the data for 10 working days.

HUD Determination. HUD has considered the GSEs' comments and is persuaded by some of these comments and, as a result, has made several changes to § 81.75 at this final rule stage. However, HUD is not persuaded by other GSE comments and, as a result, has not incorporated these suggested changes in this final rule. A discussion of each of HUD's determinations follows.

In response to the GSEs' expressed concerns that the procedures in existing § 81.74(f)(1) and (2) are inappropriate when HUD, rather than a GSE, initiates the proprietary determination process, HUD has determined that it would be simpler and more straightforward to incorporate the applicable procedures into § 81.75. These are the procedures the Secretary will use whenever he or she proposes to issue an order authorizing the release of reclassified mortgage data or AHAR information, or aggregations of data derived from proprietary loan-level mortgage data. As a result of this change, HUD has eliminated its proposed cross-references in § 81.75(b)(1) and (c) to the regulatory procedures in § 81.74(f)(1) and (f)(2), and has instead established the applicable procedures in a new § 81.75(d).

A review of § 81.75(d) reveals that it largely incorporates the procedures that currently exist in § 81.74(f)(1) and (f)(2). However, HUD has made changes to some of those procedures as a result of its consideration of the GSEs' comments on the proposed rule.

Specifically, HUD has adopted in § 81.75(d)(1) Fannie Mae's recommendation to notify the GSEs in writing of the actual data element(s), AHAR information, and/or aggregated data that are under consideration for release to the public.

HUD has not, however, adopted Fannie Mae's suggestion that the written notice include the basis for HUD's proposed reclassification of the data elements since any reclassification that HUD undertakes must be based upon the Secretary's consideration of all of the regulatory factors in § 81.74(b).

In addition, HUD has not adopted Fannie Mae's suggestion that the written notice include HUD's assessment of the data proposed to be reclassified under each of the regulatory factors in § 81.74(b). HUD does not prepare this assessment until it has completed any fact-finding that it considers to be necessary in connection with a proposed reclassification of mortgage data. (For example, HUD would want to have the benefit of the GSEs' perspectives and input with respect to any proposed release of its mortgage data or AHAR information before HUD develops its assessment of the relevant mortgage data elements or AHAR information under the regulatory factors in § 81.74(b).)

HUD also has determined not to adopt Fannie Mae's recommendation that the rule provide the GSEs with a minimum of 30 days in which to submit written comments. HUD believes that a 30-day minimum period may not be an appropriate period of time, in every instance, for the submission of written comments in connection with a proposed reclassification of mortgage data or AHAR information. As a result, HUD believes that it is appropriate for it to retain the discretion to determine, on a case-by-case basis, what constitutes a reasonable period of time by which the GSEs must submit their written comments.

HUD's current regulations at 24 CFR 81.74(f)(1) state that the Secretary, in considering a GSE's proprietary request, ''shall provide the GSE with an opportunity for a meeting with HUD to discuss the matter for the purpose of gaining additional information concerning the request.'' Because HUD is providing the GSEs in § 81.75(d)(1) with the opportunity to submit written comments in connection with any proposed release of GSE mortgage data, AHAR information or aggregated data, HUD does not believe that it is necessary to require, in each instance, that HUD also offer to hold a meeting with the GSEs before making its determination. While such a meeting may be necessary when a GSE initiates the request for proprietary determination so that the Secretary can gain ''additional information concerning the request,'' HUD believes that it may not always be necessary where the Secretary has initiated a proposed release of mortgage data, AHAR information, or aggregated data.

Accordingly, § 81.75(d)(1) provides that the ''Secretary *may* also provide each GSE with an opportunity for a meeting with HUD to discuss the proposed release of mortgage data, AHAR information or aggregated data.'' (Emphasis added.) HUD believes that this discretionary authority to hold a meeting strikes a necessary and careful balance between HUD's obligation to provide the GSEs with an opportunity to object to any proposed release of their mortgage data, AHAR information, or aggregated data (in this final rule, by the submission of written comments), while also streamlining the administrative process sufficiently that non-proprietary mortgage data, AHAR information, or aggregated data can be made available to the public in an efficient manner. To the extent that the Secretary determines that it would be helpful, before making a determination, to meet with the GSEs individually to discuss the proposed release of mortgage data, AHAR information, or aggregated data, he or she will arrange to do so.

Section 81.75(d)(2) of this final rule provides that the Secretary shall make a determination regarding the proposed release of the GSEs' mortgage data, AHAR information, or aggregated data based on a consideration of the data or information under the standards set forth in § 81.74(b) and the GSEs' written and oral objections, if any, to the proposed release of the mortgage data, AHAR information, or aggregated data. This language is consistent with the current requirements in §§ 81.74(b) and 81.74(f)(2), except that HUD has now added a requirement that the Secretary must consider, in making his or her determination, the GSEs' written comments objecting to the proposed release of the mortgage data, AHAR information, or aggregated data. If the Secretary, or his or her designee, has also met with the GSEs about the proposed release of mortgage data, AHAR information, or aggregated data, the Secretary also is required by § 81.75(d)(2) to consider the GSEs' oral objections, if any.

New § 81.75(d)(3) states that the Secretary shall provide notice in writing to each GSE of the Secretary's determination and the reasons under § 81.74(b) for his or her determination. In addition, consistent with HUD's

existing regulations at § 81.74(f)(2)(ii) and Fannie Mae's own request, new § 81.75(d)(3) states that whenever the Secretary determines that GSE mortgage data, AHAR information, or aggregated data may be released, the written notice must also provide that the Secretary will not release the mortgage data, AHAR information, or aggregated data to the public for 10 working days.

New § 81.75(d)(4) states that the Secretary shall, no earlier than the end of the 10 working day period, publish an order in the **Federal Register** notifying the public of the Secretary's determination to release the reclassified mortgage data or AHAR information and/or to release certain non-proprietary aggregations of data derived from proprietary loan-level mortgage data. The order will also modify the list of proprietary determinations to reflect the Secretary's reclassification of the mortgage data or AHAR information. This procedure is consistent with existing § 81.75, which states that the Secretary ''may modify the list [of HUD proprietary determinations] by regulation or order.'' Section 81.75(d)(4) also states that the Secretary shall omit from the published order any information that would reveal proprietary information. This language is consistent with existing § 81.74(e)(1)(ii), which requires that the Secretary exclude from public disclosure any portion of an order or regulation that would reveal proprietary information.

HUD believes that the changes described above will go far in clarifying the procedures the Secretary will use in considering reclassifications of GSE mortgage data and AHAR information and the release of certain aggregated data derived from proprietary loan-level mortgage data. While these procedures largely incorporate existing requirements established by HUD in § 81.74(f)(1) and (2), they also reflect changes that HUD believes to be appropriate in light of its dual statutory obligations to ensure that proprietary mortgage data or AHAR information are not released to the public, while also providing the public with the GSEs' non-proprietary mortgage data or AHAR information. As discussed above, these changes were made by HUD either in response to the GSEs' comments, or as an outgrowth of HUD's consideration of the GSEs' comments.

Comment: Rule fails to provide third parties with due process. Fannie Mae noted that HUD, in promulgating this rule, must balance the public's desire for data against important objectives of protecting property rights and consumer privacy. Fannie Mae asserted that even though HUD's regulations require the Secretary to protect the confidentiality of information the release of which would ''constitute a clearly unwarranted invasion of personal privacy,'' they do not provide guidance on how HUD would represent the interests of third parties whose privacy might be affected by the determination. (See 24 CFR 81.72(b)(3).) In particular, Fannie Mae expressed concern that the Secretary's release of historical data for the years 1993–2003 in connection with the mortgage data elements that were reclassified as non-proprietary in the 2004 Final Order (''1993–2003 Historical Data'') could allow the creation of borrower profiles with personally identifiable information that could be used irresponsibly by predatory lenders.

Fannie Mae and Freddie Mac both asserted that the procedures in the 2005 Proposed Rule were defective because they do not require HUD to provide notice to, and consider written comments from, ''all affected parties'' before the Secretary makes a reclassification determination.

Freddie Mac asked HUD to consider whether the process for reclassifying information should generally be done by a rulemaking or, in the alternative, to identify the circumstances under which a rulemaking may be more appropriate for reclassifying information than through an order. ACB expressed similar views, urging HUD to proceed by public rulemaking whenever a pending determination could impact the availability of loan-level information about specific lenders' business, either directly or through cross-reference to any available third-party data. ACB, Fannie Mae, and Freddie Mac each asked HUD to give all affected parties the right to comment on whether a rulemaking would be more appropriate in light of the public interest in the proposed disclosures.

HUD Determination. HUD has considered the public comments and determined that no additional protections are required in this final rule to protect the privacy rights of third parties. As Fannie Mae has correctly noted, HUD's existing regulations already require the Secretary to ensure that data or information submitted by, or relating to, the GSEs that would constitute a ''clearly unwarranted invasion of personal privacy'' are not disclosed to the public. (See 24 CFR 81.71(e) and 81.72(b)(3).) HUD already has regulatory standards in place at 24 CFR 81.74(b) that enable the Secretary to protect the privacy rights of third parties. (See, for example,§ 81.74(b)(4), which requires the Secretary to consider ''[t]he extent to which the mortgage data or AHAR information is publicly available including whether the data or information is available from other entities, from local government offices or records, including deeds, recorded mortgages, and similar documents, or from publicly available databases.'') HUD believes that these existing standards are sufficient to permit the Secretary to guide its proprietary determinations and ensure that the privacy rights of third parties are not violated.

For this same reason, HUD does not agree that the procedures described in the 2005 Proposed Rule are ''defective'' because they do not require HUD to provide notice to, and consider written comments from, ''all affected parties'' before the Secretary makes a reclassification determination.

HUD also does not believe it is necessary or appropriate to restrict the circumstances under which HUD may undertake a reclassification determination by order rather than regulation. HUD is authorized by section 1326 of FHEFSSA to make proprietary determinations ''by regulation or order,'' and HUD's existing regulations at 24 CFR 81.75 also authorize the Secretary to modify a prior proprietary determination by regulation or order. In light of HUD's statutory obligation under FHEFSSA to ensure that the GSEs' non-proprietary mortgage data and AHAR information are made available to the public, and the regulatory standards that already exist to protect the interests of third parties, HUD does not believe that the public interest would be served by curtailing its authority to undertake a reclassification determination by order.

Comment: Rule should be amended to include additional regulatory factors. Fannie Mae urged HUD to amend its regulations to include a consideration of the following two factors in connection with proprietary determinations: (1) The extent to which data released by HUD can be used singularly, or in conjunction with other information in the public domain, to ascertain confidential, private, or personal information about consumers, the GSEs' business partners, real estate assets, and/or residents of properties financed by mortgages purchased by the GSEs; and (2) the extent to which data may assist in the planning and perpetration of terrorist acts, fraud, and/or other malicious acts against real estate properties, individuals, business entities, or communities.

With regard to its second proposed factor, Fannie Mae cited a Department of Homeland Security warning about

terrorist groups that might target ''apartment buildings, hotels and other soft or lightly secured targets in the United States.''[9] Fannie Mae contended that incorporating these factors into HUD's regulations will help to ensure that any changes to proprietary treatment of loan-level or aggregated data involve a consideration of the interests of all parties, as well as other security interests that were not significant concerns at the time the original public use database regulations were developed.

HUD Determination. After considering Fannie Mae's recommendation, HUD has decided not to amend its regulations to add these two additional regulatory factors. With regard to Fannie Mae's first recommendation, HUD believes that its existing regulations at § 81.74(b) already require the Secretary to consider the extent to which mortgage data or AHAR information are publicly available, including whether the data or information are available from other entities, from local government offices or records, or from publicly available databases (*e.g.*, through the Home Mortgage Disclosure Act (HMDA) database or other public and/or private vendors). (See § 81.74(b)(4).)

HUD considers Fannie Mae's second recommendation to be unnecessary since anyone seeking information on properties from the HUD public use database would not be able to obtain information at the same level of detail that is already available in the public domain. For example, property street addresses are not available in the HUD public use database.

In light of the Secretary's clear statutory duty under FHEFSSA to release to the public GSE mortgage data and AHAR information that are not proprietary, and the comprehensive nature of the Secretary's current assessment under HUD's regulations at § 81.74(b), HUD does not believe that the addition of these two new regulatory factors is necessary or warranted.

Comment. Five-year aging period. Fannie Mae and Freddie Mac both objected strongly to the proposed five-year time period after which mortgage data might lose their proprietary character and, as a result, warrant a reconsideration of proprietary status under HUD's regulations. Fannie Mae maintained that aged data continue to provide it with value, and that certain aged data are more valuable to competitors after several years than at the time of origination. Fannie Mae expressed particular concern about the five-year time period in connection with its multifamily business where loans typically have maturities ranging from nine to ten years.

Freddie Mac affirmed that five years is a short period of time when considering long-term obligations like mortgages, and asserted that the release of five-year-old proprietary data still presents privacy concerns to consumers and potentially could still cause harm to Freddie Mac and its customers.

In particular, Freddie Mac disputed HUD's assertion in the 2005 Proposed Rule that significant portions of the GSE mortgage data that it had previously determined to be proprietary are now ''available publicly through private vendors.'' Freddie Mac maintained that its data are different from other data that can be purchased from a data broker over the Internet because ''borrowers provided this information to a mortgage lender under penalty of federal law'' and, as a result, may be subject to civil liability or criminal penalties for intentional or negligent misrepresentation of application information.

Freddie Mac also asserted that the Federal government's decision to enact the Gramm-Leach-Bliley Act (15 U.S.C. 6801, *et seq.*, enacted November 12, 1999) to regulate the use and disclosure of information provided to financial institutions, while choosing not to regulate other types of entities that may collect some of the same information, recognizes that financial institution information is ''significantly more sensitive'' than information available through other public sources.

Both GSEs asserted that HUD's 2005 Proposed Rule establishes a ''presumption'' that data lose their proprietary character after only five years, and each vigorously disputed the validity of such a presumption. Freddie Mac urged HUD to abolish such a ''presumption'' and to review all six of the regulatory factors in 24 CFR 81.74(b) before deciding whether to proceed with a reclassification of proprietary information.

Freddie Mac also asserted that other proprietary data collected by the government have no ''time-release provisions'' or have much lengthier ''time release provisions.'' Freddie Mac stated that HMDA has no ''time-release provision'' or ''presumption,'' and that the U.S. Census of Population and Housing does not publicly release individual-level data for 72 years. In addition, Freddie Mac noted that, under the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3), the ''time release'' or ''default presumption'' under which information can become public after a submitter has requested confidentiality is 10 years.

However, NAHB commented that the ''five year aging requirement'' in proposed § 81.75(b)(3) establishes a satisfactory method of respecting the privacy expectations associated with relevant mortgage data elements, and noted specifically that five years is ''a significant amount of time.''

HUD Determination. HUD has decided to retain the minimum five-year aging period for reclassifications of mortgage data because of the passage of time, but has decided to make three clarifying changes to its regulations in response to the public comments it received.

HUD believes that the five-year period is a reasonable minimum period of time after which mortgage data might lose their proprietary character and, as a result, warrant a reconsideration of proprietary status under HUD's regulations. However, as stated in the 2005 Proposed Rule, the five-year period is a minimum aging requirement that applies to reclassifications based on the age of the mortgage data. The Secretary will determine the actual time intervals for reconsideration of the proprietary status of particular mortgage data elements on a case-by-case basis.[10] (See HUD's discussion of this issue at 70 FR 1775 of the 2005 Proposed Rule.)

This case-by-case assessment of particular mortgage data elements contradicts the GSEs' contentions that the five-year minimum period establishes a ''presumption'' that data lose their proprietary character after only five years. Nevertheless, HUD has decided to clarify this point by revising the first sentence of § 81.75(b)(3) to state, ''[t]he Secretary may determine, *through case-by-case consideration of individual data elements under paragraph (b)(1) of this section,* that certain mortgage data previously determined to be proprietary may lose their proprietary status if they are at least five years old * * *'' (Emphasis added.)

With regard to Freddie Mac's assertion that HUD should abolish the five-year ''presumption'' and review all

[9] Citing remarks by former Secretary Tom Ridge, former Attorney General John Ashcroft, and Director Robert Mueller, U.S. Department of Homeland Security, Office of the Press Secretary, February 7, 2003.

[10] As discussed in Section I of this preamble, any such HUD reconsideration would be subject to the limitations of 24 CFR 81.72(c)(1), which prohibits the Secretary from publicly disclosing certain types of mortgage data and AHAR information, including mortgage data and AHAR information, the release of which would constitute a clearly unwarranted invasion of personal privacy, that are required to be withheld, or that the Secretary determines are not appropriate for public disclosure under other applicable laws and regulations.

six of the regulatory factors in 24 CFR 81.74(b) before deciding whether to proceed with a reclassification of proprietary information, HUD reiterates that this is precisely what HUD intends to do. HUD attempted to make this point when it stated in the 2005 Proposed Rule that the ''Secretary would make his or her determination [regarding the re-classification of aged data] *based upon a consideration of the regulatory factors in § 81.74(b).*'' (Emphasis added.) (See 70 FR 1777.) In this final rule, HUD has made two changes to further clarify this point.

First, HUD has included a sentence in § 81.75(b)(3) which states, ''[t]he Secretary will evaluate the age of the data *as one of the relevant factors that may be considered* under 24 CFR 81.74(b)(6).'' (Emphasis added.)

Second, HUD has amended the regulatory factors that the Secretary considers when determining the proprietary status of mortgage data under § 81.74(b)(6) to specifically include a reference to the age of the mortgage data. This second amendment is intended to further clarify that the Secretary's consideration of the age of mortgage data under § 81.75(b)(3) is just one of the regulatory factors that must be evaluated.

While Freddie Mac may contend that its data are qualitatively superior to mortgage data that can be purchased from a data broker over the Internet because ''borrowers provided this information to a mortgage lender under penalty of federal law,'' this reasoning would presumably support treating all GSE mortgage data as proprietary and preclude HUD from releasing any such data to the public. Such an outcome would be clearly untenable and inconsistent with HUD's statutory obligation under FHEFSSA to disclose the GSEs' non-proprietary mortgage data to the public.

With regard to Freddie Mac's assertion that the Gramm-Leach-Bliley Act constitutes implicit federal recognition that financial institution information is ''significantly more sensitive'' than information available through other public sources, HUD notes that Congress has enacted a very specific statutory regime in section 1323 of FHEFSSA that requires the Secretary to disclose to the public the GSEs' non-proprietary mortgage data. Since the GSEs derive their mortgage data from the financial institutions/mortgage sellers from whom they purchase the mortgages, the enactment of section 1323 of FHEFSSA reflects the clear intent of Congress to ensure and regulate the public disclosure of non-proprietary financial institution information provided by mortgage sellers to the GSEs.

With regard to Freddie Mac's comment that other proprietary data collected by the government have no ''time-release provisions,'' or have much lengthier ''time release provisions,'' HUD is uncertain as to the meaning that Freddie Mac is imputing to the term ''time-release provision.'' If Freddie Mac means that GSE mortgage data previously determined by HUD to be proprietary will be reclassified as non-proprietary automatically after five years under § 81.75(b)(3), then this interpretation is mistaken and neither the 2005 Proposed Rule nor this final rule contain a ''time release provision.'' While HUD's consideration of the regulatory factors in § 81.74(b) could potentially result in the release of certain GSE mortgage data after five years, the Secretary may well determine that other mortgage data should be kept confidential for 10, 20, or even 50 years.

Moreover, regardless of HUD's determination under § 81.75(b)(3) with respect to any particular mortgage data element, HUD will not implement its determination until it has completed an analysis of the mortgage data under the six regulatory factors in § 81.74(b) and fully complied with the due process procedures described in this final rule. HUD believes that its re-evaluation of GSE proprietary mortgage data to ensure that these data continue to qualify as proprietary is fully consistent with the Secretary's affirmative duty and obligation under section 1323 of FHEFSSA to ''make available to the public * * *'' the data submitted by [the GSEs under their charter acts],'' except for mortgage data that are proprietary.

HUD reiterates, as it previously noted in the 2005 Proposed Rule, that the addition of § 81.75(b)(3) to govern the release of certain mortgage data that have aged a minimum of five years does not limit HUD's current ability under § 81.75 to seek, at any time, to reclassify GSE mortgage data from proprietary to non-proprietary status. This is because § 81.75(b)(3), as added by this final rule, deals only with the reclassification and release of aged GSE mortgage data. This provision is independent of, and does not remove or limit, HUD's existing authority under § 81.75 (§ 81.75(b)(1) of this final rule) to modify a prior proprietary determination by reclassifying GSE mortgage data as non-proprietary. (See HUD's prior discussion of this matter in the 2005 Proposed Rule at 70 FR 1774, 1778.)

(For a discussion of how HUD's release of GSE mortgage data under § 81.75(b)(3) compares with the release of GSE mortgage data under HUD's regulations implementing Exemption 4 of FOIA at 24 CFR 15.108(b)(1), see the 2005 Proposed Rule at 70 FR 1777.)

Comment. Release of historical data constitutes retroactive rulemaking. Fannie Mae claimed that the proposed rule constitutes a ''retroactive rulemaking'' with respect to each of the three circumstances in which it would allow for the public release of the GSEs' historical data that has previously been determined by HUD to be proprietary. Fannie Mae described these three categories as: (1) The release of GSE data that have already been determined to be proprietary, upon HUD's determination that the data field in question will no longer be afforded proprietary status; (2) proprietary data that are at least five years old; and (3) aggregated data derived from historical proprietary loan-level data that would be released upon HUD's determination that the data is not proprietary in aggregated form.

Fannie Mae stated further that, absent explicit authorization by Congress, no government agency has statutory authority to issue regulations that have a ''retroactive effect'' and that Congress did not grant HUD explicit authority to promulgate such rules when it enacted FHEFSSA. In addition, Fannie Mae claimed that the courts, in determining whether a measure has retroactive effect, consider ''whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'' (Citing *Georgetown Hospital v. DirectTV, Inc.* v. *Federal Communications Commission*, 110 F.3d 816, 825–826 (D.C. Cir. 1997).) Fannie Mae maintained that, based upon a consideration of these factors, the 2005 Proposed Rule would, when implemented, have a retroactive effect because the GSEs submit their proprietary data to HUD with the ''reasonable expectation that the data will remain proprietary indefinitely,'' and that HUD's release of this data will place the GSEs at a competitive disadvantage in the market and impair their property rights in their historical mortgage data.

HUD Determination. HUD has considered Fannie Mae's comments and, for the reasons discussed below, disagrees that the current rulemaking has a ''retroactive effect.''

Initially, HUD notes that the GSEs, as federally chartered corporations, submit their mortgage data to HUD because of a statutory obligation imposed upon them by their charter acts. (See section 309(m) of the Fannie Mae Charter Act, 12 U.S.C. 1723a(m), and section 307(e)

of the Freddie Mac Act, 12 U.S.C. 1456(e).) HUD, as the GSEs' housing mission regulator, has a statutory obligation under section 1323 of FHEFSSA to release the GSEs' non-proprietary mortgage data and AHAR information to the public. The legislative history of FHEFSSA expressly provides that ''* * * every effort should be made to provide public disclosure of the information required to be collected and/or reported to the regulator [HUD] consistent with the exemption for proprietary data.'' [11] The GSEs have been aware of these parallel statutory obligations as they have continued to submit their mortgage data to HUD over the years.

Moreover, since 1995 when HUD first promulgated regulations establishing requirements governing the GSEs (60 FR 61888, December 1, 1995), HUD's public use database regulations at 24 CFR 81.75 have expressly stated that ''[t]he Secretary may modify the list [of HUD proprietary determinations] by regulation or order.'' HUD has also stated, in each of the proprietary determination orders that it has issued since 1995, that the order will remain effective until such time as it is determined necessary or appropriate to withdraw or modify it.

In light of the above express statutory and regulatory framework, and the notice provided to the GSEs in each of HUD's prior orders that the proprietary determinations could be withdrawn or modified ''as * * *'' determined necessary or appropriate,'' HUD cannot agree with Fannie Mae that the GSEs have submitted their mortgage data to HUD with a ''reasonable expectation'' that the data previously determined by HUD to be proprietary will remain proprietary indefinitely.

There is no question that the GSEs have a legitimate property right in mortgage data that qualify, in fact, as proprietary information, and that HUD is statutorily required by section 1326 of FHEFSSA to ensure that such data are not released to the public. However, the GSEs do not have a permanent and incontrovertible property right in mortgage data simply because HUD, at a prior point in time, made a determination that such data are proprietary.

As previously noted, the GSEs submit their mortgage data to HUD because they are statutorily obligated to do so and they, in turn, have received numerous benefits as a result of their federally chartered status as GSEs. The GSEs have also been on notice—by virtue of HUD's statutory obligations in section 1323 of FHEFSSA, HUD's regulatory authority in 24 CFR 81.75 to amend prior proprietary determinations, and the conditional nature of HUD's prior orders—that HUD's proprietary determinations are conditional in nature and may be modified and superseded.

The GSEs are entitled to due process before HUD can modify any prior proprietary determination, and this final rule ensures that the GSEs are provided with both notice and an opportunity to comment on any proposed reclassification of mortgage data or AHAR information. In addition, the GSEs have the right to receive HUD's written analysis of any proposed reclassification of mortgage data element(s) or AHAR information under the regulatory factors in 24 CFR 81.74(b), and to seek judicial recourse during a ten-working-day period before HUD will release the mortgage data or AHAR information to the public. (See the discussion of procedural safeguards governing the release of GSE historical mortgage data later in this preamble.) HUD believes that these procedural safeguards provide a reasoned and balanced approach that will enable it to carry out its twin statutory responsibilities of making ''* * * every effort * * * to provide public disclosure of the information required to be collected and/or reported to [HUD] consistent with the exemption for proprietary data.'' [12]

Comment: GSE historical data continue to be legally protected from disclosure; Discussion of applicable procedures. Fannie Mae objected to HUD's statement in the proposed rule that it intended to release historical ''GSE mortgage data that HUD has determined to be non-proprietary for the years 1993 through 2003, including GSE mortgage data that HUD has determined in the 2004 Final Order to be non-proprietary.'' (See 70 FR 1777.) In addition to Fannie Mae's assertion that HUD's release of this historical data constitutes ''retroactive rulemaking'' (see HUD's determination in response to this comment, above), Fannie Mae raised a number of other arguments in support of why it believes HUD's release of this historical data would be unlawful.

Initially, Fannie Mae asserted that FHEFSSA, HUD's regulations, FOIA, and the Trade Secrets Act, 18 U.S.C. 1905, all compel HUD to continue to protect data subject to an order determining such data to be proprietary.

More specifically, Fannie Mae noted that section 1323(b)(1) of FHEFSSA prohibits the Secretary from releasing to the public data that the Secretary has determined to be proprietary. Since all of the historical data that HUD advised, in the 2005 Proposed Rule, would be released following the effective date of this final rule has already been determined by the Secretary to be proprietary, Fannie Mae asserted that HUD's release of this historical data would violate FHEFSSA.

Fannie Mae also maintained that HUD's release of this historical data would violate HUD's regulations. The GSE noted that 24 CFR 81.74(b) requires HUD to apply six factors when making a determination of whether to accord proprietary treatment to mortgage data or AHAR information, ''*[e]xcept as provided in paragraph [81.74](c)* * * *.'' (Emphasis added.) Fannie Mae asserted that the exception carved out in § 81.74(c) means that the Secretary must grant a request for proprietary treatment where ''the request for proprietary treatment pertains to mortgage data or AHAR information that has been deemed proprietary by the Secretary under a temporary order, final order, or regulation in effect * * *.'' Fannie Mae claimed that since all of the historical data that HUD stated it would release following the effective date of this final rule are subject to an effective final order finding the data to be proprietary, the Secretary does not have the authority to apply the new provisions of § 81.75(b) and (c) to this historical data as the proposed rule appears to contemplate.

Fannie Mae also claimed that FOIA and HUD's implementing regulations protect from disclosure data that HUD has determined to be proprietary. Fannie Mae asserted that matters ''specifically exempted from disclosure by statute'' may not be released where the statute: ''(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.'' Fannie Mae maintained that FHEFSSA satisfies both prongs of this FOIA test since it protects historical data that have been designated proprietary by HUD, and since FHEFSSA also prohibits the Secretary from releasing proprietary data.

Fannie Mae also asserted that the historical mortgage data that HUD would release are protected by the Trade Secrets Act, which prohibits the unauthorized disclosure of a wide range of information by Federal officials, including confidential commercial or

[11] See S. Rep. No. 102–282, 102nd Cong., 2d Sess. 40 (1992).

[12] See S. Rep. No. 102–282, 102nd Cong., 2d Sess. 40 (1992).

financial information, statistical information, and information that would disclose the amount or source of income, profits, or losses. Fannie Mae stated that the Trade Secrets Act restricts ''formal agency action'' and applies even to actions approved by an agency head. Fannie Mae maintained that application of the procedures in the 2005 Proposed Rule, as currently drafted, and HUD's release of its historical mortgage data, could constitute a violation of the Trade Secrets Act because the data to be released ''are of the type'' covered by the Trade Secrets Act and have already been deemed proprietary under HUD's statutory mandate and effective regulations.

Fannie Mae further stated that HUD failed to include in the 2005 Proposed Rule a ''reconsideration'' of the factors in 24 CFR 81.74(b) that HUD is required to consider before it can determine that the 1993–2003 historical data are no longer proprietary. For this reason, Fannie Mae asserted that HUD has no authority to release this historical data to the public after the effective date of this final rule.

HUD Determination. After a thorough consideration of each of Fannie Mae's comments, HUD has concluded that it has the legal authority to release the GSEs' historical mortgage data in accordance with the procedures set forth in this final rule. HUD's reasoning, and its response to each of Fannie Mae's comments, is set out below.

With regard to Fannie Mae's comment that section 1323(b)(1) of FHEFSSA prohibits the Secretary from releasing to the public data that the Secretary has determined to be proprietary, HUD notes that section 1326 of FHEFSSA broadly confers on the Secretary the authority to determine, through either regulation or order, ''that certain information shall be treated as proprietary information and not subject to disclosure under section 1323.'' Inherent in this authority is the Secretary's authority to reconsider and modify a prior determination that information is proprietary. This inherent authority is expressed in HUD's existing regulations at 24 CFR 81.75, which authorize HUD to make a determination that mortgage data or AHAR information are proprietary under FHEFSSA and to issue a list providing that certain information shall be treated as proprietary information, but also expressly authorizing the Secretary to ''modify the list by regulation or order.'' Consequently, FHEFSSA does not act as a statutory bar to prohibit HUD's release of GSE mortgage data that HUD has properly reclassified as non-proprietary, but only prohibits HUD's release of the GSEs' proprietary data.

As noted, Fannie Mae also asserts that HUD's release of the 1993–2003 historical data pertaining to the mortgage data elements that were granted proprietary status under HUD's 1996 final order (the 1996 Final Order) would violate 24 CFR 81.74(c). This HUD regulatory provision states that ''[w]here the request for proprietary treatment pertains to mortgage data or AHAR information that has been deemed proprietary by the Secretary under a temporary order, final order, or regulation in effect, the Secretary *shall grant the request* with respect to any mortgage data or AHAR information which comes within the order or regulation.'' (Emphasis added.) Fannie Mae maintains that since all of the historical data are subject to an effective final order finding the data to be proprietary, the Secretary does not have the authority to apply the new provisions of § 81.75(b) and (c) to this historical data as the proposed rule appears to contemplate.

HUD does not agree with Fannie Mae's interpretation of 24 CFR 81.74(c). This provision essentially means that the Secretary must honor any GSE request for proprietary treatment with respect to mortgage data or AHAR information that have been determined by the Secretary to be proprietary under an order or regulation ''in effect.'' HUD's 1996 Final Order granted proprietary status to the mortgage data elements that HUD subsequently reclassified as non-proprietary in its 2004 Final Order. However, the 2004 Final Order was limited, by its terms, to the prospective release of these mortgage data elements. HUD intends, following the publication of this final rule, to initiate proceedings under § 81.75(b)(2) to reclassify as non-proprietary some or all of these mortgage data elements in prior years' public use databases. These proceedings will be conducted in accordance with § 81.75(d), which includes a requirement that the Secretary analyze each data element that is proposed to be reclassified under the regulatory factors in 81.74(b), and provide notice in writing to each GSE of his determination under these factors. In the event that the Secretary determines that some or all of these data elements no longer qualify as proprietary information, an order will be issued withdrawing and modifying the 1996 Final Order, as expressly authorized by that Order. In such case, the 1996 Final Order would no longer be ''in effect'' with respect to the reclassified data elements and § 81.74(c) would not act as a regulatory bar on the Secretary's authority to release some or all of the GSEs' reclassified, non-proprietary historical mortgage data.

HUD also does not agree with Fannie Mae that its historical mortgage data that are reclassified as non-proprietary are protected from disclosure by FOIA. For the reasons already discussed above, HUD does not believe that mortgage data elements that the Secretary has determined, by official agency action, to reclassify as non-proprietary will nevertheless retain into perpetuity their prior proprietary designation. Not only does such an interpretation contradict the clear legislative history to FHEFSSA, quoted earlier, which strongly supports HUD's release to the public of the GSEs' non-proprietary data, but it also contradicts a reasonable interpretation of HUD's prior public use database orders.

Moreover, HUD does not agree with Fannie Mae that its release of the GSEs' historical mortgage data in accordance with the procedures described in this final rule would violate the Trade Secrets Act. The Trade Secrets Act provides, in part, that:

> Whoever, being an officer or employee of the United States or of any department or agency thereof * * * publishes, divulges, discloses, or makes known *in any manner or to any extent not authorized by law* any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association * * * shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment. (Emphasis added.)

HUD notes initially that its regulations at 24 CFR 81.2 define the term ''[p]roprietary information'' to mean ''all mortgage data and all AHAR information that the GSEs submit to the Secretary in the AHARs that contain *trade secrets* or privileged or confidential, commercial, or financial information that, if released, would be likely to cause substantial competitive harm.'' (Emphasis added.) Thus, when the Secretary conducts a regulatory analysis to determine whether GSE mortgage data or AHAR information are proprietary based on the criteria in 24 CFR 81.74(b), he or she considers whether the data or information qualify as a trade secret, the release of which would be likely to cause substantial

competitive harm. The Secretary will not reclassify as non-proprietary mortgage data or AHAR information that the Secretary determines qualify as a trade secret and which, if released, would be likely to cause substantial competitive harm because, by definition, such a trade secret qualifies under HUD's regulations as ''proprietary information.''

Consequently, when the Secretary makes a determination, based on the standards in § 81.74(b) and the requirements of §§ 81.75(b)(2) and 81.75(d), that particular GSE mortgage data elements do not qualify as proprietary information and, thus, may be released to the public, his or her subsequent disclosure of that information is not actionable under the Trade Secrets Act because it is fully ''authorized by law.''

III. Other Changes in This Final Rule

HUD has also, at its own initiative, made three technical clarifications to §§ 81.75(b)(1), (b)(2), and 81.75(c) at this final rule stage.

HUD's existing regulations at § 81.75 state that, following a determination by the Secretary that mortgage data or AHAR information are proprietary under FHEFSSA, the Secretary shall issue a temporary order, final order, or regulation withholding the mortgage data or AHAR information from the public-use database and from public disclosure by HUD. This provision goes on to state that the Secretary may, from time to time, by regulation or order, issue a list providing that certain information shall be treated as proprietary information. The regulation states that the Secretary ''may modify the list by regulation or order.'' In this final rule, HUD has clarified what is already implicit in the existing regulation, *i.e.*, that any modification of the list by regulation or order follows the Secretary's determination to modify, by regulation or order, a prior proprietary determination.

Accordingly, HUD is providing in § 81.75(b)(1) of this final rule that the Secretary may, based on a consideration of the factors in § 81.74(b), ''modify a previous determination that mortgage data or AHAR information are proprietary information (and may also make conforming changes to the list designating certain mortgage data or AHAR information as proprietary information) by regulation or by order * * *'' HUD does not intend by this clarification to expand the scope of its proposals in the 2005 Proposed Rule so that AHAR information also is subject to the provisions of §§ 81.75(b)(2) (release of prior years' data), 81.75(b)(3) (release of aged data), and 81.75(c) (release of aggregated data). HUD's 2005 Proposed Rule contemplated that these regulatory provisions would apply only to GSE mortgage data, and this same scope of coverage is retained in this final rule. While AHAR information is subject to modification of proprietary status under § 81.75(b)(1), either by regulation or by order following the procedures in § 81.75(d), this is consistent with HUD's existing authority under 81.75, and does not expand upon that authority.

HUD has also made a technical correction in § 81.75 of this final rule to reinstate a word that was omitted in the 2005 Proposed Rule. Currently, § 81.75 states that, following a determination by the Secretary that mortgage data or AHAR information is ''proprietary information,'' the Secretary shall issue an order or regulation withholding the data or information from public disclosure. Thereafter, this section states that the Secretary may issue a list providing that certain information shall be treated as ''proprietary information.'' In the 2005 Proposed Rule, the word ''information'' was omitted in both of these regulatory references. Since the term ''proprietary information'' is a defined term in § 81.2, HUD has reinstated this term in 81.75(a), with conforming changes throughout this section.

In the 2005 Proposed Rule, HUD indicated in § 81.75(b)(2) that, following a Secretarial determination to reclassify certain GSE mortgage data as non-proprietary, the Secretary would release the reclassified, non-proprietary mortgage data to the public both prospectively and for all years preceding the effective date of HUD's determination, unless otherwise provided by the Secretary. Similarly, in § 81.75(c) of the 2005 Proposed Rule, HUD stated that after the Secretary determined that certain aggregated data derived from proprietary loan-level mortgage data are not proprietary, the aggregated data would be released to the public both prospectively and for all years preceding the effective date of the Secretary's determination.

In this final rule, HUD has removed the phrase, ''preceding the effective date of the Secretary's determination'' from both §§ 81.75(b)(2) and 81.75(c). Instead, HUD provides in § 81.75(b)(2) of this final rule that reclassified, non-proprietary mortgage data will be released to the public ''both prospectively *and for all prior years' public use databases*, unless otherwise provided by the Secretary.'' (Emphasis added.) In addition, HUD states in § 81.75(c) that non-proprietary aggregations of data derived from proprietary loan-level mortgage data will be released to the public ''both prospectively *and for all prior years*, unless otherwise provided by the Secretary.'' (Emphasis added.)

HUD believes that these corrections are necessary to clarify that HUD's non-proprietary determinations are ''effective'' both with respect to prior years'' data that it has previously classified as proprietary, as well as to future years' data. HUD believes that the reference in the proposed rule to the ''effective date'' of the Secretary's determination could potentially confuse this point and, accordingly, HUD has made the clarifying changes described herein. These changes are fully consistent with HUD's substantive proposals in the proposed rule to permit the release of prior years' data following a Secretarial determination that the GSE mortgage data or AHAR information are not proprietary.

IV. Findings and Certifications

Executive Order 12866. The Office of Management and Budget (OMB) reviewed this final rule under Executive Order 12866, *Regulatory Planning and Review*, which the President issued on September 30, 1993. OMB determined that this rule is a ''significant regulatory action'' as defined in section 3(f) of the order (although not economically significant, as provided in section 3(f)(1) of the order). Any changes made to the final rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500.

Paperwork Reduction Act. HUD's collection of information on the GSEs' activities has been reviewed and authorized by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), as implemented by OMB in regulations at 5 CFR part 1320. The OMB control number is 2502–0514.

Environmental Impact. This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from environmental review under the

National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Regulatory Flexibility Act. The undersigned, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule would not have a significant economic impact on a substantial number of small entities. This final regulation is applicable only to the GSEs, which are not small entities for purposes of the Regulatory Flexibility Act, and, thus, does not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism. Executive Order 13132 (''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act. Title II of the Unfunded Mandates Reform Act of 1995 (12 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and the private sector. This final rule would not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

List of Subjects in 24 CFR Part 81

Accounting, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Securities.

■ Accordingly, 24 CFR part 81 is amended as follows:

PART 81—THE SECRETARY OF HUD'S REGULATION OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION (FANNIE MAE) AND THE FEDERAL HOME LOAN MORTGAGE CORPORATION (FREDDIE MAC)

■ 1. The authority citation for 24 CFR part 81 continues to read as follows:

Authority: 12 U.S.C. 1451 et seq., 1716–1723h, and 4501–4641; 42 U.S.C. 3535(d) and 3601–3619.

■ 2. Section 81.74 is amended by revising paragraph (b)(6) to read as follows:

§ 81.74 Secretarial determination on GSE request.

* * * * *

(b) * * *

(6) Such additional facts and legal and other authorities as the Secretary may consider appropriate, including the age of the mortgage data (see 24 CFR 81.75(b)(3)), or the extent to which particular mortgage data or AHAR information, when considered together with other information, could reveal proprietary information.

* * * * *

■ 3. Section 81.75 is revised to read as follows:

§ 81.75 Proprietary information withheld by order or regulation.

(a) *Secretarial determination of proprietary classification.* Following a determination by the Secretary that mortgage data or AHAR information are proprietary information under FHEFSSA, the Secretary shall expeditiously issue a temporary order, final order, or regulation withholding the mortgage data or AHAR information from the public-use database and from public disclosure by HUD in accordance with 12 U.S.C. 4546. The Secretary may, from time to time, by regulation or order, issue a list providing that certain mortgage data or AHAR information shall be treated as proprietary information.

(b) *Modification of proprietary classification.* (1) *General.* The Secretary may, based upon a consideration of the factors in § 81.74(b), modify a previous determination that mortgage data or AHAR information are proprietary information (and may also make conforming changes to the list designating certain mortgage data or AHAR information as proprietary information) by regulation, or by order using the procedures described in paragraph (d) of this section, as applicable.

(2) *Release of data following a modification of proprietary classification.* Following the Secretary's determination under paragraph (b)(1) of this section to modify a previous proprietary determination by reclassifying certain mortgage data as non-proprietary, the Secretary shall release the reclassified, non-proprietary mortgage data to the public both prospectively and for all prior years' public use databases, unless otherwise provided by the Secretary.

(3) *Release of aged data.* The Secretary may determine, through case-by-case consideration of individual data elements under paragraph (b)(1) of this section, that certain mortgage data previously determined to be proprietary may lose their proprietary status if they are at least five years old (as measured from the end of the calendar year to which the mortgage data pertain). The Secretary will evaluate the age of the data as one of the relevant factors that may be considered under 24 CFR 81.74(b)(6). If the Secretary determines that such aged mortgage data have lost their proprietary status, these data shall be released publicly.

(c) *Release of aggregated data derived from proprietary loan-level data.* The Secretary may, based upon a consideration of the factors in § 81.74(b) and using the procedures in paragraph (d) of this section, determine that certain aggregated data derived from proprietary loan-level mortgage data are not proprietary. If the Secretary makes such a determination, then the aggregated data shall be released to the public both prospectively and for all prior years, unless otherwise provided by the Secretary.

(d) *Procedures.* The following procedures apply to the Secretary's issuance of an order in connection with a determination under paragraph (b)(1) or (c) of this section:

(1) The Secretary shall provide each GSE with written notice of the mortgage data, AHAR information or aggregated data proposed to be released, and an opportunity to submit written comments. The Secretary may also provide each GSE with an opportunity for a meeting with HUD to discuss the proposed release of mortgage data, AHAR information, or aggregated data;

(2) The Secretary shall make a determination regarding the proposed release of the GSE mortgage data, AHAR information, or aggregated data based upon a consideration of the data or information under the standards set forth in 24 CFR 81.74(b) and the GSEs' written and oral objections, if any, to the proposed release of such mortgage data, AHAR information, or aggregated data;

(3) The Secretary shall provide notice in writing to each GSE of the Secretary's determination and the reasons under § 81.74(b) for his or her determination. If the Secretary determines that the mortgage data, AHAR information, or aggregated data may be released, the notice will also provide that the Secretary shall not release the mortgage data, AHAR information, or aggregated data to the public for 10 working days;

(4) The Secretary shall, no earlier than the end of the ten-working-day period referred to in paragraph (d)(3) of this section, publish an order in the **Federal Register** notifying the public of the Secretary's determination to release the mortgage data or AHAR information that has been reclassified as non-proprietary

and/or to release certain non-proprietary aggregations of data derived from proprietary loan-level mortgage data. The order will also modify the list described in paragraph (a) of this section to reflect the Secretary's reclassification of the mortgage data or AHAR information. The Secretary shall omit from the published order any information that would reveal proprietary information.

Dated: October 17, 2005.

Brian D. Montgomery,

Assistant Secretary for Housing-Federal Housing Commissioner.

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