Department of Justice and federal financial regulatory institutions.

The Fair Housing Act and its implementing regulations, which were promulgated in 1989, apply to the GSEs and include a detailed prohibition against discrimination in the purchasing of loans and set forth the business necessity defense to a disparate impact claim involving the purchasing of loans.[53] Thus, when taken together, the Fair Housing Act regulations and case law, the Civil Rights Act of 1991, and the Interagency Policy Statement provide sufficient guidance concerning the application of the statutorily required assessment of disparate results.

The GSEs' assertions concerning the regulatory burden of compliance with the requirements outlined in § 81.43 of the proposed rule have been given careful consideration. Accordingly, HUD has substantially modified this section of the rule, which, as revised, now largely tracks the statutory language of sections 1381 and 1382 of FHEFSSA. These sections of the statute require the GSEs to include, in their AHAR to the Secretary and Congress, assessments of disparate results of various types of policies and practices. The GSEs are directed specifically to ''assess underwriting standards, business practices, repurchase requirements, pricing, fees, and procedures * * * that may yield disparate results based on the race of the borrower'' in their annual reports.[54]

The disparate results assessment is a statutorily-mandated part of the AHAR under FHEFSSA. This final rule implements that statutory mandate by requiring that the GSEs assess whether their business practices are discriminatory on the bases of race, color, religion, sex, handicap, familial status, age or national origin, since all of these are prohibited bases listed in section 1325(1) of FHEFSSA and the Secretary is charged with prohibiting the GSEs from discriminating in any manner based on all of these prohibited factors. The Secretary is authorized to implement the statute's disparate results assessment requirement in this manner. Sections 1381(p) and 1382(s) of FHEFSSA authorize the Secretary to require the GSEs to submit any other information in their AHARs that the Secretary considers appropriate. However, the Secretary recognizes that data may not be currently available to assess whether certain practices are discriminatory on the bases of handicap, familial status and religion.

This rule does not impose a requirement upon the GSEs to ask lenders to report information regarding the religion or handicap of potential borrowers. Nor is it intended, for purposes of this section, that the GSEs ask lenders to report any information other than that which the lenders currently report, or any information which lenders may not inquire about under ECOA or the Fair Housing Act. ECOA regulations generally prohibit creditors from inquiring about an applicant's race, color, religion, or national origin. The Fair Housing Act also generally prohibits inquiries regarding an applicant's race, color, national origin, religion, sex, familial status or handicap. However, ECOA regulations do allow a creditor to collect information regarding an applicant's race, national origin, sex, marital status, and age for monitoring purposes. Additionally, HMDA regulations require lenders to collect information on race or national origin and sex of an applicant or borrower.

These revisions address the GSE's concerns regarding undue regulatory burden. The streamlining of the reporting requirements included in § 81.43 of this final rule reduces the GSEs' compliance burden and requires fewer submissions to HUD. The AHARs under subpart E already require the GSEs to assess the impact of their own decisions with a conscious goal of ensuring that they do not violate the law, and to include, as the statute requires, ''revisions thereto to promote affordable housing and fair lending.''

In developing this final rule, HUD has recognized that regulatory provisions intended as guidance may sometimes become prescriptive and can lead unnecessarily to micromanagement. The GSEs themselves should be afforded the opportunity to use their capabilities to develop a functional assessment method that ensures the fulfillment of the precise statutory directive. The regular assessment by the GSEs of policies and practices to determine whether they may be yielding disparate results, and the evaluation of that assessment by HUD, will carry out FHEFSSA's mandate to prohibit discrimination in any manner.

Additionally, section 1325(6) of FHEFSSA requires review by the Secretary of the GSEs' underwriting and appraisal guidelines to ensure that they are consistent with the Fair Housing Act and that section. The language in § 81.43(b) mirrors the language of the statute.

Data Submission

Freddie Mac raised a series of concerns about the proposed rule's implementation of sections 1325(2) and (3) of FHEFSSA, authorizing the Secretary to require submission of information to assist the Secretary to determine whether a lender with which the enterprise does business has failed to comply with the Fair Housing Act and ECOA. Freddie Mac objected to being required to respond to requests from any agency other than the Secretary, pointing out that § 81.44(b) of the proposed rule suggested that other Federal agencies might make direct requests to the GSEs.

Freddie Mac objected to the rule's suggestion that information could be requested by the Secretary pertaining to the mortgage sales of lenders operating in the ''same or similar areas'' as a lender about whom a request for data had been made. Freddie Mac objected on cost and resources grounds, and requested that the rule be limited to requiring only the provision of data pertaining to lenders (a) against whom a complaint has been filed; (b) where other evidence supports an investigation; and (c) where the data in Freddie Mac's possession is not otherwise publicly available.

Freddie Mac also objected to HUD's characterization, in the proposed rule, of materials to be sought from it as ''information.'' Freddie Mac argued that ''data'' meant facts that were a matter of direct observation, while ''information'' included ''knowledge gained through communication, research, instruction, etc.'' Insisting on the distinction, Freddie Mac objected to the creation of ''an unfettered right of the Secretary to require the enterprises to conduct sophisticated statistical analyses that * * * might be helpful to complete an investigation * * *.'' Fannie Mae asked that the rule be revised to state that GSEs are required to provide only data: (a) owned by the GSE; (b) in response to requests by the Secretary; (c) in connection with an ongoing investigation by the Secretary (rather than other organizations); (d) pertaining only to a particular lender pursuant to specific allegations of discrimination; and (e) that has not already been supplied and is not readily obtainable from other sources.

Other housing industry commenters also requested that investigative data sought by HUD be limited to active investigations already in progress, because requiring the GSEs to produce an analysis of each of their lenders could poison the business relationship between GSEs and their customers, and

[53] 24 CFR 100.125.

[54] Sections 1381(p) and 1382(s) of FHEFSSA.