Industry commenters generally opposed the ''fair lending plan'' suggestion on which HUD sought comment and posed questions. Other commenters asserted that the GSEs should be required to prepare a fair lending plan. In the interest of reducing regulatory burden, HUD has not included a fair lending plan as a requirement in the final rule.

Subpart D—New Program Approval

In General

Section 1322(a) of FHEFSSA charges the Secretary with ''requir[ing] each [GSE] to obtain the approval of the Secretary for any new program of the [GSE] before implementing the program.''

The provisions of the proposed rule which sought to implement this authority met with strong objections from the GSEs and others. In light of the comments, which are detailed below, these provisions have been significantly revised to assure that: (1) the program review process is *not* unnecessarily burdensome; (2) ambiguity in the definition of terms cannot conceivably lead to required HUD approval of undertakings other than those reasonably recognizable as ''new programs''; and (3) constructive innovations by the GSEs, involving variations on existing programs, will be neither delayed nor derailed by HUD review processes. The revision of subpart D consists, in large measure, of conforming its language in key areas with the provisions of the statute with only the addition of necessary housekeeping provisions.

In light of the significant changes in the provisions on new program approval included in this final rule, this preamble summarizes the positions of the GSEs and other commenters in less detail than would be necessary were the proposed rule to have been adopted with only minor alteration. However, all of the comments on the proposal have been thoroughly reviewed by HUD. In general, the comments argued that: (1) HUD did not have statutory authority to promulgate the new program approval provisions of the proposed rule; and (2) these provisions would result in inappropriate micromanagement of the GSEs by HUD, which would inhibit the GSEs' flexibility and ability to adopt new products quickly. The Secretary is confident that: (1) HUD does have the statutory authority to establish new program approval procedures as described in the proposed rule; and (2) these procedures would not have inevitably led to micromanagement. Nonetheless, substantial changes were made to this section to address the concern of the GSEs and other commenters with the proposed procedures. The changes should not be interpreted as reflecting concurrence with the bulk of the comments but rather as an effort toward streamlining the final rule.

The Comments

Both entities read the proposal's definitions of ''new program'' and ''significantly different programs'' as effectively requiring that the Secretary's approval be sought for ''product variations, pilots, and demonstrations'' within existing GSE programs. Based on this expansive interpretation, the GSEs argued that the proposal would exceed the Secretary's authority.[61] Each GSE recommended that the Secretary withdraw the entire subpart,[62] or, in the alternative, simply track the statutory language, without embellishment.

Fannie Mae claimed that these provisions were: (1) arbitrary and capricious, and failed to consider relevant ''business necessities''; (2) an impermissible attempt by the Secretary to ''micro-manage'' the GSEs; (3) inconsistent with expressed congressional intent; (4) not contemplated by FHEFSSA, and unauthorized under the Secretary's general regulatory authority; and (5) inconsistent with the ''general principles'' set out by HUD as governing its own approach to rulemaking in this instance. Fannie Mae also argued that, during its 20 years of experience with HUD's existing program approval process, no evidence exists that a detailed regulation similar to that proposed was necessary.

Freddie Mac's comments were nearly identical. Freddie Mac concluded that the definitions contained in the proposed rule would lead to an enormous expansion of GSE activities subject to Secretarial review. Freddie Mac's comments suggested that: (1) The only threshold for submission of matters for new program review should be whether they are ''significantly different'' from prior programs; (2) only section 305 of the Freddie Mac Charter may serve as a basis for denying a new program approval request; (3) the term ''program'' should be defined to refer only to ''any broad and general plan or course of action for the purchasing, servicing, selling, lending on the security of, or otherwise dealing in conventional mortgages;'' (4) any reference to ''pilot or demonstration program''—the only part of the proposed definition that does not appear in the statute—be stricken; and (5) no attempt should be made to define when a program is ''significantly different,'' relying, instead, on the GSEs' to submit ''truly significant new initiatives'' for prior approval.

Some industry commenters, including the ABA, that joined the GSEs in questioning the scope of subpart D clearly believed that a more carefully tailored version of the approval provisions would be useful. These commenters believed it important that HUD ensure that ''the GSEs' activities are restricted to those activities they were chartered to do—purchase and securitize mortgages.''

Commenters, whether supportive of the GSE position or concerned about restricting the GSEs to Charter Act purposes, consistently argued that flexibility and the ability to move quickly to adopt new products were essential elements of the GSEs' contribution to affordable housing. A few commenters suggested that the Secretary allow the GSEs greater latitude to begin implementation of new programs, but to review the new activity ''as it is being introduced, to determine if it should be curtailed or modified.''

The Secretary's Response

Section 1322—new program approval—is an essential responsibility of HUD and the Federal Government to ensure that the GSEs remain faithful to their statutory purposes and serve the public interest. Accordingly, while significant revisions have been made, the final rule does not diminish the importance of this function. The GSEs argued that no regulation was required to carry out this function. The Secretary believes the final rule properly recognizes this statutory duty and establishes a mechanism for carrying out the responsibility assigned.

The Final Rule

The rule has been streamlined considerably to address the GSEs' apprehension about micromanagement to which the proposed rule apparently

[61] Comments from NAR took a different view: ''We are not contesting the Department's authority to conduct such program approval, since we believe the statute is very clear on this point.'' Nevertheless, NAR believed the proposed rule's new program review authority was ''too broad and ambiguous'' and recommended that the ''parameters for identifying new programs need to be clarified.''

[62] Although many other commenters also were critical of features of the New Program Approvals subpart, only a few joined the GSEs in recommending the subpart's total withdrawal. The MBA, NAMB, and the California Association of Realtors did recommend withdrawal of the subpart. MBA recommended, alternatively, elimination of the New Program Approvals provisions or limiting them to the precise terms of FHEFSSA, which, MBA declared, ''are self-implementing.''