

housing groups, State and local governmental entities, academicians, and other persons and entities, so that, for example, these entities may monitor the efforts of the GSEs toward meeting their Charter Act purposes.

#### "Balancing" Test

The preamble to the proposed rule stated that, in making as much data as possible available, the Secretary would engage in "balancing the proprietary concerns of the GSEs." Freddie Mac commented, however, that Congress did not intend the Secretary to balance the public interest to determine whether information was proprietary; rather Congress encouraged the Secretary to "be creative in finding ways to release certain types of information—without revealing proprietary information."

Neither the preamble nor the final rule incorporates a balancing test for determining whether information is proprietary. While the legislative history of FHEFSSA does discuss "balanc[ing] the sometimes competing interests of the enterprises against the public's interest in access to information," it also provides that HUD should "whenever possible develop disclosure and access methods that take into account any proprietary concerns, while continuing public access to information."<sup>69</sup> Therefore, the Secretary has determined that the public interest in knowing about the GSEs' activities must be addressed through the careful and considered design of a public-use database that makes maximum appropriate data and information available to the public in creative ways—including aggregating—while protecting proprietary information.

#### Definition of "Proprietary Information"

Section 1326 of FHEFSSA authorizes the Secretary to provide, by regulation or order, that certain information shall be treated as "proprietary information" and not subject to disclosure to the public either (1) in the public-use database established pursuant to section 1323 (which consists of mortgage data submitted by the GSEs under section 309(m) of the Fannie Mae Charter Act and section 307(e) of the Freddie Mac Act); or (2) through public dissemination of the AHARs of the GSEs (which the GSEs submit to the Secretary and Congress pursuant to sections 309(n)(3) of the Fannie Mae Charter Act and 307(f)(3) of the Freddie Mac Act). Section 81.2 of the proposed rule defined the term "proprietary information" as "all categories of information and data submitted to the

Secretary by a GSE that contain trade secrets or privileged or confidential, commercial or financial information that, if released, would cause the GSE substantial competitive harm."

Consistent with the statutory language of section 1326 of FHEFSSA and in light of the comments by the GSEs, the final rule clarifies that the designation "proprietary information" for purposes of this rule applies only to mortgage data (that the GSEs submit to the Secretary under sections 309(m) of the Fannie Mae Charter Act and 307(e) of the Freddie Mac Act), and AHAR information (that the GSEs submit to the Secretary under sections 309(n) of the Fannie Mae Charter Act and 307(f) of the Freddie Mac Act), since other types of information are not candidates for inclusion in the public-use data base. However, as discussed more fully below, where a GSE seeks to protect from disclosure confidential business information that is not mortgage data that the GSE submits to the Secretary under section 309(m) of the Fannie Mae Charter Act or section 307(e) of the Freddie Mac Act, and is not information that the GSE submits to the Secretary in the AHARs under section 309(n) of the Fannie Mae Charter Act or section 307(f) of the Freddie Mac Act, the GSE may seek protection of such confidential business information under HUD regulations at 24 CFR Part 15. This final rule clarifies and supplements Part 15 with respect to GSE information. FHEFSSA's specific designation of data and information as "proprietary information" is designed to distinguish that mortgage data and AHAR information that is to be included in the public-use database and disseminated to the public and data that may be withheld. It is not to be confused with the function that the designation of information as "confidential business information" serves under Part 15. (That term distinguishes business information, as defined in 24 CFR 15.54, which a submitter may seek to have withheld from public disclosure under the Freedom of Information Act (FOIA)<sup>70</sup> from other information.)

The issue of the scope of mortgage data that should be treated as "proprietary" and withheld from public disclosure drew only limited comment. Only ten of the 163 public comments treated the issue in any level of detail.

Both GSEs commented extensively on this subpart of the rule, recommending protections against the release of certain identified data elements the GSEs considered proprietary. Six of the other ten commenters (including MBA and

NAHB) supported the GSEs' position favoring strong controls on release of proprietary information. In contrast, the American Civil Liberties Union Foundation (ACLU), in comments filed on behalf of ACLU, the NAACP Legal Defense and Educational Fund, Inc., the Puerto Rican Legal Defense and Education Fund, and the National Council of La Raza, favored strict limitations on treating information provided by the GSEs under FHEFSSA as proprietary.

#### The Prospect of Competitive Harm

While Freddie Mac indicated that the definition of proprietary information in the proposed rule was "generally consistent" with definitions of the term in similar contexts, Freddie Mac proposed several additions to the scope of the definition. Freddie Mac, citing FHEFSSA's legislative history, contended that it was the intention of Congress that the Secretary withhold data if it "would be likely to cause the GSE substantial competitive or financial harm, or substantial harm to the GSE's ability to fulfill its statutory purposes." In suggesting that the term "financial harm" be added, Freddie Mac criticized the use of the term "competitive harm" by itself as too narrow. In suggesting that the ability to fulfill statutory purposes be added, Freddie Mac argued that because the GSEs have "express public purposes," it is not merely competitive harm that must be averted, but also the possibility that disclosure of data could "frustrate the GSEs' ability to fulfill their statutory purposes, by decreasing the liquidity of the secondary mortgage market and [thus] decreasing market stability."

Fannie Mae pointed out that it had asked for proprietary protection for only 23 of 80 database elements. Fannie Mae, in supplementary comments dated July 24, 1995, urged the adoption of the revisions to the definition of "proprietary information" indicated in Freddie Mac's comments.

The final rule adopts the GSEs' comment that the definition include a "likely to cause competitive harm" standard. HUD finds this formulation to be consistent with the body of case law interpreting Exemption 4 of FOIA,<sup>71</sup> which focuses on likely competitive harm,<sup>72</sup> as well as related regulations of other Federal financial regulators governing the confidentiality of business information.<sup>73</sup>

<sup>71</sup> 5 U.S.C. 552(b)(4); 24 CFR 15.21(a)(4).

<sup>72</sup> See *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

<sup>73</sup> See, e.g., 40 CFR 2.208(e)(1); 19 CFR 201.6(a).

<sup>69</sup> S. Rep. at 44.

<sup>70</sup> 5 U.S.C. 552.