

Exemption 4 of FOIA authorizes the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Accordingly, the exemption covers material that is substantively very similar to the information protected as proprietary under FHEFSSA. Because the case law interpreting the FOIA exemption is well-developed and FHEFSSA does not define the term "proprietary," HUD has chosen to formulate a definition that largely tracks interpretations of the FOIA exemption, so that interpretation of the term as it applies to mortgage data and AHAR information under FHEFSSA may draw upon the body of FOIA law.

It is not necessary to add a specific reference to "financial" harm to the definition of "proprietary information." The exclusion of this term from the definition keeps the definition more consistent with FOIA provisions respecting confidential business information and related law. Section 81.74(b)(1) of the rule provides that the Secretary will consider information on adverse financial consequences that would result from disclosure, in determining what information is proprietary. In general, "financial" harm will also involve "competitive" harm. Even where the disclosure of information would not harm one GSE relative to the other, the disclosure may nonetheless cause competitive harm, because the GSEs also compete with other private-sector firms, as well as individuals seeking an advantage with respect to the GSEs. The definition, as modified, will protect against financial harm by protecting the GSEs against substantial competitive harm.

It is not necessary to expand the definition to refer specifically to the GSE's ability to fulfill statutory purposes. Again, exclusion of this terminology avoids inconsistency with FOIA and similar definitions. The final rule allows the GSEs to advance arguments, for the Secretary's consideration, regarding any effect that disclosure would have on the GSEs' ability to fulfill statutory purposes.

Plain Meaning

In its original comments—prior to its July 24, 1995, letter endorsing much of Freddie Mac's approach to the definition of "proprietary"—Fannie Mae's comments on the definition of "proprietary information" focused on an assertion that the term "proprietary" has a settled "plain" meaning which should be incorporated into the rule, i.e., the entire range of business information that a GSE holds closely as an owner of private property. Fannie Mae supported

its claim based on the definition in *Webster's* dictionary.

Supreme Court precedent, however, reveals that the established approach under case law is more complicated. The mere fact that a statutory term is defined in a dictionary does not establish the term's plain meaning or deny the agency charged with administration of the statute the authority to provide a reasonable interpretation.⁷⁴

The term "proprietary" has several alternative dictionary definitions, depending on the dictionary consulted. Aside from the fact that the designation as "proprietary information" for purposes of FHEFSSA only applies to mortgage data and AHAR information, HUD's definition, as revised in this final rule, is similar to the definition Congress has ascribed to the term in other legislation, including statutes enacted just days before FHEFSSA's October 28, 1992, enactment date.⁷⁵ In addition, HUD's definition is generally consistent with the definitions of other Federal administrative agencies.⁷⁶

The definition that Fannie Mae advanced is not legally supported and is too broad. If any information obtained and held by a person by virtue of being an owner of property qualifies as proprietary, all such information submitted to HUD would have to be withheld from disclosure. Such a definition would effectively undermine the Secretary's ability to release nonproprietary information; it would allow the GSEs to force proprietary treatment of any information by merely labeling it as such. Such a definition would also improperly apply the specific designation "proprietary information" under FHEFSSA to materials other than mortgage data and AHAR information.

Other Comments on Definition

Freddie Mac also asked that § 81.73 be augmented to provide that HUD take into account the extent to which particular information, when taken together with other information, could reveal proprietary information. This final rule has been modified to specify that this is one of the additional facts that the Secretary will consider.⁷⁷

⁷⁴ See, e.g., *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418–19 (1992).

⁷⁵ See, e.g., 42 U.S.C. 13293 (Energy Policy Act of 1992, enacted Oct. 24, 1992); 10 U.S.C. 2506(e)(3) (Defense Conversion Reinvestment and Transition Assistance Act of 1992, enacted Oct. 23, 1992); 15 U.S.C. 5104(a) (Steel and Aluminum Energy Conservation and Technology Competitiveness Act of 1988).

⁷⁶ See, e.g., 48 CFR 1805.202(d); 10 CFR 51.16(a); 10 CFR 1504.204(a).

⁷⁷ See § 81.74(b)(6).

Public-use Database

Consistent with section 1323(a) of FHEFSSA, this final rule establishes a public-use database of mortgage data concerning the characteristics of individual mortgage purchases of the GSEs, including census tract, location, race, and gender of mortgagors.

In accordance with FHEFSSA, this final rule provides that the Secretary may not, by regulation or order, make available to the public information that the Secretary determines is proprietary information. The Secretary, however, may not restrict access to the income, census tract location, race, and gender data of single-family properties. When the Secretary grants a GSE's request for proprietary treatment of mortgage data, the Secretary will issue an order or promulgate a regulation providing that the mortgage data is proprietary and shall not be included in the public-use database.

In addition to mortgage data, the Secretary will make publicly available in the public-use database information in the GSEs' AHARs, which are submitted to the Secretary and Congress, and comprise a detailed picture of the GSEs' activities. Proprietary information in the AHARs may be withheld from the public if the GSE requests, and the Secretary agrees with, designation of the information as proprietary information, pursuant to a regulation or order.

On June 7, 1994, the Secretary published a Temporary Order⁷⁸ protecting GSE data and information deemed to be proprietary, pending public comment and further review. Published simultaneously with this final rule and adopted by the Secretary through this rule, is an Appendix 7 containing an Order entitled "GSE Mortgage Data and AHAR Information: Proprietary Information/Public-use Data" which Appendix F of this final rule contains the most current listing of data and information deemed proprietary by the Secretary and supersedes the Temporary Order. The Secretary may revise this list by regulation or order.

The public-use database also will not include information the release of which would invade personal privacy,⁷⁹

⁷⁸ 59 FR 29514.

⁷⁹ A bank commented that it was concerned about "right to privacy issues" regarding communication between HUD and the GSEs: "We hope that rights of individual borrowers are not compromised due to creative interpretations of the laws and regulations for the sake of political expediency."

The Privacy Act of 1974, 5 U.S.C. 552a, and FOIA exemption 6, 5 U.S.C. 552(b)(6), pertain to the disclosure of information on individuals. HUD may