or information required to be withheld under the Trade Secrets Act.<sup>80</sup>

Availability of "Public Data"

Section 81.2 of the rule revises the proposed rule's definition of "public data" to clarify that it only includes mortgage data submitted to the Secretary by the GSEs (under section 309(m) of the Fannie Mae Charter Act or 307(e) of the Freddie Mac Act) relating to the GSEs' mortgage purchases, and AHAR information (submitted to the Secretary by the GSEs under sections 309(n) of the Fannie Mae Charter Act or 307(f) of the Freddie Mac Act), to the extent that the Secretary determines such mortgage data or AHAR information is not proprietary and should be made publicly available. Freddie Mac was concerned that the definition in the proposed rule could be misconstrued to require HUD to disclose all nonproprietary mortgage data submitted to HUD, including data submitted for reasons unrelated to the rule's reporting requirement in §81.62. Similarly, Fannie Mae had recommended that the definition be revised to limit its scope.

Under section 1323 of FHEFSSA, HUD has authority to include in the public-use database mortgage data required under section 309(m) of the Fannie Mae Charter Act or section 307(e) of the Freddie Mac Act. In addition, HUD will make publicly available the information in the GSEs' AHARs, except for information the Secretary determines to be proprietary.81

HUD's public-use database will only include mortgage data submitted by the GSEs under section 309(m) of the Fannie Mae Charter Act or section 307(e) of the Freddie Mac Act and information in the GSEs' AHARs, except for information the Secretary determines to be proprietary, and only where the Secretary determines that it "should be made publicly available." Since other information or data that the GSEs may submit pursuant to subpart E would not fit the definitions of "mortgage data" or 'public data'' used in the rule, that information or data will not be included in the public-use database.

## Timing of Disclosure

In its comments on the proposed rule, Fannie Mae addressed public comments on the June 7, 1994, Temporary Order. Fannie Mae regarded as unpersuasive arguments that competitive harm to the GSEs would not occur because data would be outdated when finally released publicly. Fannie Mae commented that, for single-family products, a time lag of less than 12 months would be insufficient to allow adequate recovery of investment. In the case of multifamily products, Fannie Mae claimed that even the passage of 2 years would be insufficient protection, because competitive harm is caused by affording competitors crucial information allowing them to "pick the loans off at liquidation, thereby eroding our market share and investment return on the market research and development that preceded our booking the loan initially.

NAHB strongly supported the creation of a public-use database, but suggested compromise on the question of release of proprietary information. To address the GSEs' concerns regarding confidentiality of data, NAHB suggested that the Secretary grant requests for proprietary treatment for a specified time period, such as two years.

In analyzing whether information is proprietary, the Secretary will, when appropriate, consider the effect of the passage of time in determining if the release of information would likely cause substantial competitive harm.

## Requests for Proprietary Treatment

The regulation establishes procedures for the GSEs to request proprietary treatment of mortgage data and AHAR information submitted to the Secretary and clarifies and supplements HUD regulations at 24 CFR Part 15 as they apply to GSE requests for confidential treatment of other business information. When a GSE submits information to the Secretary, the GSE shall designate what part of the information the GSE deems to be mortgage data or AHAR information that is "proprietary information" under FHEFSSA or other types of confidential business information for purposes of FOIA. Depending on the type of information submitted, HUD either will process the request in accordance with the procedures in §§ 81.73-81.75, or upon a FOIA request, in accordance with the procedures in 24 CFR Part 15 as clarified and supplemented in this subpart.

Section 81.73(d) of this final rule makes clear that while any request for proprietary treatment is pending, none of the information that is the subject of the request will be disclosed. Part 15 contains a similar protection, which applies to GSE submissions designated as confidential. HUD will not release material marked confidential except in accordance with Part 15 and this final rule.

Fannie Mae objected to the requirement in § 81.73 of the proposed rule that the GSE submit a certification and justification for the Secretary to designate mortgage data or information as "proprietary information" under FHEFSSA.

In response to Fannie Mae's comment, HUD has greatly streamlined the regulation. First, under § 81.73, it is now optional for the GSE to submit a statement explaining the bases for the GSE's assertion that mortgage data or AHAR information is proprietary. In instances in which HUD has not previously issued an order or regulation determining the data or information to be proprietary, HUD urges the GSEs to provide such a supporting statement and address in the statement the factors that the Secretary will consider in making determinations of whether data or information is proprietary. Conclusory statements that particular data or information would aid competitors or would impair business dealings, or similar statements, will not provide the kind of views that will be useful to the Secretary.

Second, the final rule eases the requirements by providing that where there is an existing regulation or order designating mortgage data or AHAR information as proprietary, it is sufficient for the GSE to stamp the information as proprietary and reference the order or regulation. When a GSE supports a request for proprietary treatment by citing an existing order or regulation, HUD will determine whether the data or information comes within the order or regulation. If the data or information is proprietary under such order or regulation, it will not be disclosed except in accordance with other provisions in this subpart, e.g., Congressional requests.

The factors the Secretary will apply in making a determination in response to a request for proprietary treatment are identified in § 81.74. The factors in § 81.74(b) will be applied where the request for proprietary treatment pertains to data submitted by the GSEs in the reports required under section 309(m) of the Fannie Mae Charter Act or section 307(e) of the Freddie Mac Act, or AHAR information for which there is no order or regulation covering the materials for which proprietary treatment is requested.

withhold information from the public pursuant to the Privacy Act or FOIA Exemption 6.

<sup>80 18</sup> U.S.C. 1905.

<sup>&</sup>lt;sup>81</sup> The GSEs are required by sections 309(n)(3)(B) and 307(f)(3)(B) their Charter Acts to make available publicly reports they provide to HUD pursuant to sections 309(n) and 307(f) of the Charter Acts, unless HUD has determined such information to be proprietary under section 1326 of FHEFSSA. HUD will facilitate this requirement by providing public access to this information.