

When the Secretary accords proprietary treatment to mortgage data or AHAR information, the rule establishes procedures for the Secretary to issue a temporary order, an order, or a regulation to withhold proprietary information and to inform the public of the withholding. If the Secretary does not determine such mortgage data or AHAR information to be proprietary information, the Secretary will provide the GSE with an opportunity for a meeting on the matter, during which the GSE may provide comments and additional views. After the meeting, the Secretary will determine, in writing, which data or information is proprietary and will notify the GSE 10 working days before the data or information is made available to the public. The rule is now more consistent with HUD FOIA regulations regarding protections for confidential business information in general.⁸²

FOIA Requests

Information on the GSEs may be requested by the public pursuant to FOIA. Subpart F of this rule clarifies and supplements HUD's FOIA regulations⁸³ with respect to information submitted by the GSEs.

FOIA provides that several classes of records are exempt from mandatory disclosure. A memorandum dated October 4, 1993, from the President to Heads of Departments and Agencies, emphasizes the importance of public disclosures under FOIA. The implementing memorandum from the Attorney General, attached to the President's memorandum, instructed agencies to disclose information unless disclosure would harm an interest protected by a FOIA exemption.

Additional Safeguards for Proprietary and Confidential Information

FOIA Exemption 8 protects from mandatory disclosure information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the Department in connection with its responsibility for the regulation or supervision of financial institutions."⁸⁴ Section 1319F of FHEFSA specifically provides that HUD is an agency responsible for the regulation and supervision of financial institutions for purposes of this exemption. Accordingly, where appropriate, the Secretary may invoke this exemption to withhold GSE information.

To address comments of Fannie Mae requesting additional safeguards for the protection of information, the rule also has been revised to clarify that while HUD may make information available for the confidential use of other government agencies in their official duties or functions, all such information remains the property of HUD, and unauthorized use or disclosure of information may be subject to the penalties provided in 18 U.S.C. 641.

FOIA Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁸⁵ When appropriate, the Secretary may invoke this exemption to withhold GSE information in response to a FOIA request. In addition, the Trade Secrets Act forbids Government officers and employees from releasing trade secrets and other confidential business information. HUD will not disclose information in violation of the Trade Secrets Act, notwithstanding the indication in 24 CFR 15.21 that a requested record will not be withheld under FOIA unless it both comes within one of the FOIA exemptions and there is need in the public interest to withhold the record.

Fannie Mae commented that the Secretary should review the rules of the financial institution regulators governing the confidentiality of materials, and should incorporate the same protections for proprietary information. Fannie Mae commented that OFHEO was adopting its own confidentiality rules to parallel financial institution regulators' protections, and HUD and OFHEO should assure that all submitted materials receive "consistent protection."

On March 3, 1995, HUD promulgated new amendments to its FOIA regulations that incorporate explicit protections for business information in accordance with Executive Order 12600.⁸⁶ Part 15 regulations are fully applicable to GSE data and information provided to HUD. Indeed, Part 15 applies to a broader range of information that the GSEs submit to HUD, since they are not limited in applicability to mortgage data that the GSEs submit under section 309(m) of the Fannie Mae Charter Act or section 307(e) of the Freddie Mac Act and AHAR information the GSEs submit under section 309(n) of the Fannie Mae Charter Act or section 307(f) of the Freddie Mac Act. HUD has carefully reviewed the safeguards afforded by these new FOIA regulation amendments

and this subpart and has concluded that many of the concerns raised by Fannie Mae regarding the protection of proprietary information were previously addressed through those amendments.

As indicated in the preamble to the revised FOIA rules, "[t]he amendment consolidates the FOIA process under the supervision of a designated officer, which assures more consistent and prompt response to FOIA requests." Centralized control also serves to protect against erroneous disclosure. The FOIA amendments state that, except as otherwise provided, HUD officers and employees are prohibited from disclosing business information, except to other HUD officers or employees who are properly entitled to such information for the performance of their official duties.⁸⁷ This provision is similar to that of other financial regulators.⁸⁸

In response to another Fannie Mae comment about disclosures by HUD's agents, HUD notes that its amended FOIA rules prohibit HUD officers and employees from directly or indirectly using or allowing the use of business information obtained through or in connection with Government employment that has not been made available to the general public.⁸⁹ Also, § 81.76(e) of this final rule includes safeguards against disclosure of GSE data and information by contractors. The FOIA regulations also provide other safeguards consistent with Executive Order 12600, which Fannie Mae commented should be included in HUD's regulations.⁹⁰

When a GSE desires that HUD accord confidential treatment to information other than the mortgage 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, and other than AHAR information, the GSE should follow the procedures for protection from disclosure of such information in 24 CFR Part 15, as clarified and supplemented by this subpart.

Release of Information to Congress, Comptroller General, or Pursuant to Legal Process

Paragraph 81.76(d) of the proposed rule stipulated that the Secretary would provide information requested by Congress, the Comptroller General, or pursuant to subpoena or other legal process "without regard to the provisions of this section." Both GSEs

⁸² See 24 CFR 15.54(g).

⁸³ 24 CFR Part 15.

⁸⁴ 5 U.S.C. 552(b)(8); 24 CFR 15.21(a)(8).

⁸⁵ 5 U.S.C. 552(b)(4), 24 CFR 15.21(a)(4).

⁸⁶ See 24 CFR part 15, subpart F.

⁸⁷ 24 CFR 15.54(l)(2).

⁸⁸ See, e.g., 12 CFR 309.6(b) (FDIC).

⁸⁹ 24 CFR 15.54(l)(1).

⁹⁰ See 24 CFR 15.54(f), (g), (i).