objected to this provision, and were supported by the MBA. Freddie Mac commented that the Secretary has a fiduciary duty to maintain the confidentiality of GSE proprietary information and that duty would be breached by proposed § 81.76(d) to the extent the provision allowed disclosure without any exercise of judgment on the part of the Secretary. Furthermore, Freddie Mac argued that materials disclosed based on a subpoena should be safeguarded to the extent possible against further disclosure to third parties. Freddie Mac asked for provisions, similar to those found in existing HUD regulations,[91] to the effect that the Secretary and his or her counsel would determine whether to honor particular subpoenas or requests. Fannie Mae asserted that HUD's ''unconditional commitment'' to provide congressional access to all committees and subcommittees ''totally conflicts with practices observed by other financial institution regulators.''

The intention of the proposed rule was not that HUD would provide GSE data or information to Congress without any appropriate safeguards; rather, that nothing in this subpart of the rule should be construed to grant authority to the Secretary to withhold information from or to prohibit the disclosure of information to Congress, the Comptroller General, a court of competent jurisdiction pursuant to a subpoena, or where otherwise required by law. HUD safeguards for handling such requests would still apply. Accordingly, § 81.77 of the final rule provides that ''nothing in this subpart F may be construed to grant authority to the Secretary under FHEFSSA to withhold any information from or to prohibit the disclosure of any information'' to Congress, the Comptroller General, or pursuant to a subpoena or legal process. This formulation is in keeping with the practice of other agencies.[92] HUD notes that Congress, the Comptroller General, and the courts all have procedures to safeguard proprietary and confidential information.[93]

This final rule specifies that HUD—in providing data or information in response to requests from Congress, the Comptroller General, and the courts—will, where applicable, include a statement to the effect that the GSE regards the data or information as proprietary or confidential, public disclosure of the information may cause competitive harm to the GSE, and the Secretary has determined that the information is proprietary or confidential. In addition, the rule provides that, to the extent practicable, HUD will provide notice to the GSEs after such a request for proprietary or confidential information is received and before HUD provides information in response to the request.

The revised rule makes clear that HUD's discretion to take additional steps to protect GSE data or information in appropriate circumstances is not precluded. These steps could include, for example, seeking on a GSE's behalf, or supporting a GSE motion for, a protective order when a court subpoenas HUD to produce GSE data or information.

Section 81.77 also clarifies the scope of requests that are to be considered official requests from Congress. This change responds to a specific GSE comment that the request must be from a committee with appropriate jurisdiction, to conform more closely to FOIA procedures and similar authorities. The rule has also been modified to conform language concerning HUD disclosures to the Comptroller General to the language in other HUD regulations.[94]

Furthermore, in response to a comment by Fannie Mae, § 81.77(c) of the final rule now makes clear that safeguards under HUD regulations at 24 CFR 15.71–15.74 apply. These provisions govern the production of documents or testimony when a subpoena, order, or other demand of a court or other authority is issued. The rule extends these protections to situations in which demands are made on non-HUD employees (including contractor employees) who have custody of exempt records, and is modeled after regulations of other financial regulators.[95] The Secretary notes that a recent decision [96], may limit the ability to withhold information pursuant to such a regulation and that case law on this issue is evolving. In response to Fannie Mae's comment that OFHEO and HUD should adopt consistent procedures on this point, the Secretary notes that OFHEO is in the process of promulgating rules applicable to OFHEO employees.[97]

Pro-Disclosure Comments

Comments received from the ACLU, which dealt exclusively with proprietary information issues, advocated more expansive disclosure of GSE data. The ACLU argued that only information elements that both GSEs considered proprietary should even be considered for designation as proprietary. The ACLU commented that, even then, proprietary treatment frequently should be declined in an exercise of the Secretary's discretion. The ACLU asserted the public-interest purposes of the Fair Housing Act, ECOA, and FHEFSSA, and stated:

> Given these factors, we believe that Fannie Mae and Freddie Mac cannot be considered similar to purely private, profit-making enterprises. The true measure of the effectiveness of the GSEs is not their maximization of profit, but their compliance with mandates established by the Congress and the Secretary. ''Proprietary'' for the GSEs should not mean ''will harm competition'' but rather ''will harm the ability to carry out governmental mandates. * * *''

The ACLU favored a presumption that information is not proprietary and suggested a standard for determining whether information is proprietary. Under the ACLU formulation, the burden would be on the GSEs to establish the need for nondisclosure. To meet this burden, the GSEs would have to establish that disclosure would frustrate the goals set by the statute or the Secretary, not ''merely'' that disclosure would hurt the GSEs' competitive positions.

HUD, however, must recognize congressional intent, as expressed through the Charter Acts and legislative history, that the GSEs be self-supporting, profit-making entities. Although the GSEs receive substantial Federal benefits, they are not Government agencies. The GSEs do face competition from each other and from other private sector firms and, accordingly, have legitimate proprietary interests that the Congress explicitly intended to be respected. The ACLU's definition would unjustifiably dismiss any competition-based arguments for withholding sensitive information.

The ACLU also objected to the possibility that the Secretary would make determinations that particular material was proprietary solely on the basis of submissions by the GSEs. Such determinations, the ACLU insisted, should be subjected to public

[91] 24 CFR 15.71–15.74.

[92] *See* 12 CFR 309.6(c)(8) (Federal Deposit Insurance Corporation); *see also* 40 CFR 2.209(b)(1) and 2.209(d); 15 CFR 325.16; 21 CFR 20.86 and 20.87.

[93] *See, e.g., United States v. American Tel. & Tel. Co.,* 551 F.2d 384, 386–87 and nn.2–3 (D.C. Cir. 1976) (discussing congressional rules); 4 CFR Part 81–83 (General Accounting Office regulations governing the disclosure of information); Fed. R. Civ. Proc. 26(c) (judicial protective orders).

[94] *See* 24 CFR 16.11(a)(5).

[95] *See, e.g.,* 12 CFR 792.41 and 792.42.

[96] *In re Bankers Trust Co.,* 61 F.3d 465 (6th Cir. 1995).

[97] *See* 60 FR 25162 (1995) (proposed rule May 11, 1995).