

This provision requires use of book-entry procedures and has necessitated that Fannie Mae formally request a waiver each time definitive certificates are to be issued. Fannie Mae's requests for waivers under this section have always been granted. Nonetheless, work on these requests has frequently tied up both HUD and Fannie Mae staff. In removing this section, HUD recognizes that under Freddie Mac's regulations, securities may be issued in definitive form only where the offering circular so provides. While HUD considered adding this provision to current Fannie Mae regulations, it determined instead to await Treasury Department revisions before addressing the matter.

In addition, the current Fannie Mae book-entry regulations are moved to subpart H and renumbered, using the numbering scheme in the proposed regulation, §§ 81.91–99. HUD explored the possibility of maintaining the book-entry procedures as subpart E, and redesignating and renumbering subparts E through I of the proposed rule, as had been suggested by Fannie Mae. HUD determined, however, that the organization of the regulation was more sensible if the book-entry provisions were placed near the end of the part, because other subparts were of more universal interest. Moreover, moving and redesignating five sections of the proposed rule would be more confusing to the public than moving the book-entry procedures. Finally, in the interest of consistency, the term "Fannie Mae" is substituted for the term "Federal National Mortgage Association" in this subpart.

Subpart I—Other Provisions

Both GSEs commented on a provision of HUD's proposed rule that provided that the Secretary could conduct regulatory examinations of the GSEs at any time, to determine whether the GSEs were complying with statutory requirements. The primary argument made by both GSEs was that the Secretary does not possess examination authority, because Congress specifically took this authority away from the Secretary under FHEFSSA and gave it to the Director of OFHEO. Freddie Mac also argued that the Secretary does not possess this authority pursuant to FHEFSSA's grant to the Secretary of "general regulatory authority," because examination authority may only be implied if that authority is necessary, indispensable, and essential. Freddie Mac argued that the authority is not necessary, indispensable, or essential, because the Secretary may monitor the GSEs' compliance by using the reports and data that the GSEs provide to HUD.

The section on regulatory examinations has been removed. However another provision, making clear the Secretary's authority to verify information, has been added to the rule at § 81.102. Sections 1381(k) and 1382(e) of FHEFSSA removed the Secretary's explicit statutory authority to "examine and audit the books and financial transactions" of the GSEs. However, that elimination of the Secretary's explicit statutory grant of authority to conduct examinations does not mean that the Secretary has no alternative but to accept, as accurate and complete, whatever data, information, or reports the GSEs may provide. Rather, the Secretary may independently verify the accuracy and completeness of the data, information, and reports, including conducting on-site verification, when verification is reasonably related to determining whether the GSEs are complying with the law. The Secretary does not anticipate exercising this authority often, but only where such verification is necessary.

The authority to verify information when necessary is derived from section 1321 of FHEFSSA, which accords the Secretary "general regulatory power over each enterprise," as well as the enumerated powers conferred on the Secretary by FHEFSSA. The Supreme Court has repeatedly held that a grant to an agency of "general regulatory authority," extends to the agency those unenumerated powers that are "reasonably related to the purposes of the enabling legislation."¹¹⁰ This standard has been accepted by every Federal Court of Appeals.¹¹¹ Independent verification of the information provided by the GSEs is reasonably related to the Secretary's performing out his or her statutory duties.

Freddie Mac acknowledged in its comments that "HUD could have implicit examination authority only if that authority were necessary, indispensable and essential to monitor GSE compliance with" provisions of the Charter Acts. In support of its "necessary, indispensable, and essential" standard, Freddie Mac cited one Circuit Court decision,¹¹² which involved the authority of bankruptcy judges to conduct jury trials. That case is distinguishable on several grounds

and does not represent the correct standard to apply here, in light of Supreme Court holdings adopting a "reasonably related" standard, which every Federal Circuit Court has followed.

In a landmark decision, the Supreme Court specifically addressed the scope of an agency's authority to investigate a regulated entity absent an explicit grant of statutory authority to conduct such investigations.¹¹³ In that case, the Court held that the Federal Trade Commission (FTC) possessed authority to require additional reports from a corporation it regulated, even though the FTC did not have specific authority to require such reports under applicable law or the consent decree that it sought to enforce.

In reaching its decision, the Court rejected Morton Salt's argument that enforcing compliance with the decree had to "rest upon respondents' honor unless evidence of a violation fortuitously comes to the Commission." Rather, "the Commission, in view of its residual duty of enforcement," could "affirmatively satisfy itself that the decree is being observed."¹¹⁴ The Court indicated that the FTC's authority to investigate compliance with consent decrees in this manner derived from its authority to initiate contempt proceedings for the violation of such decrees, concluding that the authority to initiate contempt proceedings "must have contemplated that the Commission could obtain accurate information from time to time on which to base a responsible conclusion that there was or was not cause for such a proceeding."¹¹⁵

The Secretary, like the FTC, is charged with the authority to initiate enforcement actions upon determining that the law has been violated. This enforcement responsibility contemplates that the Secretary will obtain accurate information on which to base a responsible conclusion that there is or is not cause for such a proceeding. The Secretary, like the FTC, is accorded a number of investigative functions. For the Secretary, these investigatory functions include the authority to require reports (e.g., FHEFSSA, section 1327), gather data from the GSEs on their mortgage purchases (FHEFSSA, sections 1381(o) and 1382(r)),¹¹⁶

¹¹³ *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

¹¹⁴ 338 U.S. at 640.

¹¹⁵ *Id.* at 639.

¹¹⁶ Sections 1381(o) and 1382(r) of FHEFSSA require that the GSEs "collect, maintain, and provide to the Secretary, in a form determined by the Secretary," mortgage data pertaining to single-family and multifamily mortgages. These provisions provide the Secretary with broad discretion to

¹¹⁰ *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) (quoting *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 280–81 (1969)).

¹¹¹ See, e.g., *Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1212 (D.C. Cir. 1983).

¹¹² *In re United Mo. Bank of Kansas City, N.A.*, 901 F.2d 1449, 1456 (8th Cir. 1990).