

purposes of the Fair Housing Act.¹⁴⁶ The Secretary is in the process of developing regulations under the Fair Housing Act that will update HUD's current regulations concerning fair housing and fair lending. Those forthcoming regulations will supplement these GSE regulations. Nothing in these regulations is intended to diminish in any manner the GSEs' responsibilities under the Fair Housing Act.

Subpart D—Review of New Programs

Background

Under both Charter Acts, prior to amendment by FHEFSSA, the Secretary had statutory authority to approve the GSEs' purchasing, servicing, selling, lending on the security of or otherwise dealing in conventional mortgages. Under provisions of FHEFSSA, the Secretary must approve new programs unless the Secretary determines that the program was not authorized under specific provisions of the GSEs' Charter Acts or that the program was not in the public interest.¹⁴⁷ Until one year after the Director's regulations under section 1361(a) of FHEFSSA are issued, the Director also must review new programs and, if the Director determines that the new program would risk significant deterioration of the GSE's financial condition, the new program must be disapproved by the Secretary.¹⁴⁸ The purpose of the Secretary's approval is "to ensure that (programs) are authorized by the relevant (C)harter Act, not detrimental to housing availability and affordability, and, for an undercapitalized (GSE), to ensure that such programs (will) not worsen the financial condition of the (GSE)."¹⁴⁹

Scope of Authority

The Secretary intends to make certain that the GSEs continue to have sufficient latitude to develop innovative programs to serve America's housing needs. In the area of housing finance, dramatic innovations have occurred during the last 25 years, with the introduction of the mortgage-backed security, the REMIC, and other financing vehicles that have brought new sources of investment capital into housing. The GSEs have either developed or refined these vehicles. The Secretary wants to ensure that future innovations are also allowed to develop without unnecessary impediment.

As noted in the House Report on the Act, "(t)he Secretary's role with regard to approval authority over new

programs is not designed to entangle Fannie Mae and Freddie Mac in unnecessary delays, bureaucratic red tape, or extraneous consideration by HUD."¹⁵⁰ In reviewing new programs, the Secretary will follow judiciously the standards for review in the Act and will only disapprove a request for new program approval where the program is not within the scope of the GSE's statutory authority, the program is not in the public interest, or, during the transition period, where the Director determines that the new program would risk significant deterioration in a GSE's financial condition.¹⁵¹

Each GSE is required to obtain the approval of the Secretary for any "new program" before the GSE implements the program.¹⁵² Section 1303(13) of the Act defines "new program" as "any program for the purchasing, servicing, selling, lending on the security of, or otherwise dealing in, conventional mortgages that—(A) is significantly different from programs that have been approved under this Act or that were approved or engaged in by (a GSE) before (October 28, 1992); or (B) represents an expansion, in terms of the dollar volume or number of mortgages or securities involved, of programs above limits expressly contained in any prior approval." (Programs that were specifically approved are referred to as "approved programs.")

Under the Act, all GSE programs engaged in prior to October 28, 1992, which are referred to in the regulations as "authorized programs," are deemed to be approved even where the GSE did not actually obtain approval from the Secretary and such programs need not be submitted to the Secretary for further review. However, where programs are significantly different from authorized programs, unless such programs are otherwise approved they are "new programs" subject to the Secretary's approval.

Under these regulations, the "new program" approval procedure applies to ongoing "programs," pilots, and demonstration programs that "significantly differ" from authorized or approved programs. "New program" also would include a program that is expanded, in dollar volume or number of mortgages or securities involved, above any limits expressly contained in any prior approval by the Secretary.

Where a question exists as to whether an activity is a program, if submission

is otherwise required, the GSE must submit the activity for Secretarial review. As noted in the legislative history, where a planned program "could reasonably raise significant questions" as to whether the program is within a GSE's statutory purposes or in the public interest, that program "should be viewed as significantly different from existing programs and, therefore, must be submitted for approval."¹⁵³ Accordingly, the GSEs shall submit programs for review if the Secretary could reasonably consider the program to be new, even where the GSE believes the program is not new. Where the GSE does not believe that the program is new, the GSE may, in its submission, fully explain its basis for that position.

Fannie Mae undertakes certain housing related activities under section 309(a) of its Charter Act, which authorizes Fannie Mae "to do all things as are necessary or incidental to the proper management of its affairs and the proper conduct of its business." Freddie Mac has similar authority under which Freddie Mac's "(f)unds * * * may be invested in such investments as (its) Board of Directors may prescribe," and Freddie Mac has the power "to determine its necessary expenditures and the manner in which the same shall be incurred, allowed, and paid."¹⁵⁴ Where any of these activities could be regarded as new programs subject to the Secretary's review, the proposed regulation would require the GSEs to submit requests for program approval for those activities (under sections 309(a) of the Fannie Mae Charter Act or 303(c)(9) or (d) of the Freddie Mac Act). The purpose of this requirement is to ensure that the Secretary appropriately reviews all new programs and ensures that the GSEs do not, through use of their corporate powers, violate any provisions of their Charter Acts such as the prohibition against the GSEs originating mortgage loans.¹⁵⁵

Although new programs will be subject to Secretarial review, the Secretary does not intend to interfere with the GSEs' other activities under sections 309(a) of the Fannie Mae Charter Act or 303(c)(9) or (d) of the Freddie Mac Act. The Secretary encourages the GSEs to continue their activities under these provisions.

¹⁵³ S. Rep. at 15.

¹⁵⁴ Freddie Mac Act, sections 303(d) and 303(c)(9).

¹⁵⁵ See sections 304(a)(2)(B) of the Fannie Mae Charter Act and 305(a)(5)(B) of the Freddie Mac Act.

¹⁴⁶ 42 U.S.C. 3608(e)(5).

¹⁴⁷ Section 1322(b)(2).

¹⁴⁸ Section 1322(b)(2).

¹⁴⁹ S. Rep. at 15.

¹⁵⁰ H. Rep. at 55.

¹⁵¹ Section 1322(b)(1).

¹⁵² Sections 1322(a) of FHEFSSA, 305(c) of the Freddie Mac Act, and 302(b)(6) of the Fannie Mae Charter Act.