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Department of Housing and Urban Development

24 CFR Part 81

**Release in the Public Use Database of
Certain Mortgage Data and Annual
Housing Activities Report (AHAR)
Information of the Federal National
Mortgage Association (Fannie Mae) and
the Federal Home Loan Mortgage
Corporation (Freddie Mac); Proposed Rule**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 81

[Docket No. FR-4947-P-01; HUD-2004-0019]

RIN 2501-AD09

**Release in the Public Use Database of
Certain Mortgage Data and Annual
Housing Activities Report (AHAR)
Information of the Federal National
Mortgage Association (Fannie Mae)
and the Federal Home Loan Mortgage
Corporation (Freddie Mac)**

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Proposed rule.

SUMMARY: The Department of Housing and Urban Development is proposing a change to its regulations to permit the release to the public of certain data and information that have been, and will be, submitted to HUD by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the government sponsored enterprises, or GSEs). The changes the Department is proposing would allow for the release of GSE mortgage data that fall into two separate categories. The first category involves the Department's public release, both prospectively and in all preceding years' public use databases, of GSE mortgage data that the Secretary, by regulation or order, reclassifies from proprietary to non-proprietary status. This first category also involves the Department's public release, both prospectively and for all preceding years, of certain aggregated data derived from proprietary loan-level mortgage data that the Secretary determines are not proprietary when presented in aggregated form. The second category involves the release of certain GSE mortgage data that are at least five years old and that the Secretary determines, by regulation or order, to reclassify from proprietary to non-proprietary status because of the passage of time. The Department is proposing that such data may lose proprietary status once they have aged a minimum of five years, with the time interval for particular data elements to be determined by the Secretary on a case-by-case basis. The proposed rule describes the procedures and standards that the Secretary would use to make determinations under both of these categories, and clarifies that these same procedures and standards are equally applicable whenever the Secretary seeks

to modify the list of proprietary determinations. In addition, the Department is proposing some minor technical and editorial changes to its regulations at 24 CFR 81.75.

DATES: *Comment Due Date:* March 11, 2005.

ADDRESSES: Interested persons are invited to submit written comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Interested persons may also submit comments electronically through either:

- The Federal eRulemaking Portal at: <http://www.regulations.gov>; or
- The HUD electronic Web site at: <http://www.epa.gov/feddocket>. Follow the link entitled, "View Open HUD Dockets". Commenters should follow the instructions provided on that site to submit their comments electronically.

Facsimile (FAX) comments are *not* acceptable. In all cases, communications must refer to the above docket number and title.

All comments and communications submitted will be available, without charge, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Copies are also available for inspection and downloading at <http://www.epa.gov/feddocket>. Comments that are submitted electronically to the above websites, or that are submitted to the HUD Regulations Division at the above address, during the 60-day opportunity for notice and comment are placed in the public rules docket and are available to the public for inspection and copying. As a result, these comments are in the public domain and will be treated by the Department as public comments.

FOR FURTHER INFORMATION CONTACT:

Sandra Fostek, Director, Office of Government Sponsored Enterprises, Office of Housing, Room 3150, telephone 202-708-2224. For questions on data, contact John L. Gardner, Director, Financial Institutions Regulation Division, Office of Policy Development and Research, Room 8212, telephone (202) 708-1464. For legal questions, contact Paul S. Ceja, Assistant General Counsel for Government Sponsored Enterprises/RESPA, or Sharmeen Dosky, Senior GSE/RESPA Division Attorney, Office of the General Counsel, Room 9262, telephone 202-708-3137. The address for all of these persons is the Department of Housing and Urban Development, 451 Seventh Street, SW.,

Washington, DC 20410-0500. Persons with hearing and speech impairments may access the phone numbers via TTY by calling the Federal Information Relay Service at (800) 877-8399.

SUPPLEMENTARY INFORMATION:

I. Purpose of This Proposed Rule

The Department of Housing and Urban Development (HUD) is proposing to release to the public certain mortgage data and aggregated data that have been, and will be, submitted to HUD by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the government sponsored enterprises, or GSEs). The data that HUD proposes to release fall into two separate categories:

- The first category involves the Department's public release of GSE mortgage data after the Secretary modifies the list of proprietary determinations and reclassifies certain mortgage data as non-proprietary. The GSE mortgage data would be released to the public both prospectively and for all years preceding the date of the Secretary's determination, unless otherwise provided by the Secretary. Such data would be released to the public via the public use database established by section 1323 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Pub. L. 102-550, approved October 28, 1992) (FHEFSSA). This proposal to release prior years' data would also apply to the Department's public release of certain aggregated data derived from proprietary loan-level mortgage data that the Secretary determines are not proprietary when presented in aggregated form. The aggregated data also would be released to the public both prospectively and for all years preceding the date of the Secretary's determination, unless otherwise provided by the Secretary. The Department would release periodically to the public such aggregated data in the form of a compendium, or by other means.

- The second category involves the release of certain GSE mortgage data included on the list of proprietary determinations that are at least five years old and that the Secretary has determined, by regulation or order, to reclassify from proprietary to non-proprietary status because of the passage of time. The Department is proposing that, subject to the Secretary's determination, data classified as proprietary that have aged a minimum of five years could be subject to reclassification as non-proprietary data for release to the public. However, the

time interval for particular data elements would be determined by the Secretary on a case-by-case basis.

To implement the public release of GSE mortgage data and aggregated data, as described above, the Department is proposing to change its regulations at 24 CFR 81.75. These changes would include redesignating a portion of the current text as paragraph (a) and moving to a new paragraph (b)(1) the Secretary's existing authority to modify, by regulation or order, the list of proprietary determinations. The Department also is proposing to eliminate the name of the list of proprietary information (which currently is identified as "GSE Mortgage Data and AHAR Information: Proprietary Information/Public Use Data"). The Department will continue to issue such a list, but believes it is unnecessary for its regulations to specify the name of the list.

Section 81.75(b)(2) of the proposed rule provides that whenever the Secretary determines to modify the list of proprietary determinations by reclassifying certain GSE mortgage data on that list as non-proprietary, the Secretary will release to the public the reclassified, non-proprietary mortgage data both prospectively and for all years preceding the effective date of the Secretary's determination, unless otherwise provided by the Secretary.

Section 81.75(b)(3) of the proposed rule provides that certain GSE mortgage data that are included on the list of proprietary determinations may lose their proprietary status if they are at least five years old (as measured from the end of the calendar year to which the mortgage data pertain). If the Secretary determines that such mortgage data have lost their proprietary status, the proposed rule provides that these data shall be released publicly.

Section 81.75(c) of the proposed rule provides that the Secretary may determine that certain aggregated data derived from proprietary loan-level GSE mortgage data are not proprietary and that, in such case, the Secretary will release the aggregated data to the public both prospectively and for all years preceding the effective date of the Secretary's determination, unless otherwise provided by the Secretary.

The Department provides in § 81.75(b) that the Secretary may, based upon a consideration of the regulatory factors in § 81.74(b), modify the list of proprietary determinations by regulation, or by order using the procedures in § 81.74(f)(1) and (f)(2), as applicable. This proposal represents a codification of the Department's existing practice of using the standards in § 81.74(b)

whenever the Secretary seeks to modify under § 81.75 the list of proprietary determinations. Similarly, the proposal represents a codification of the Department's existing practice of using the procedures in § 81.74(f)(1) and (f)(2) (with the exception of § 81.74(f)(2)(i), which does not apply to the reclassification of GSE mortgage data from proprietary to non-proprietary status) whenever the Secretary seeks to modify, by order under § 81.75, the list of proprietary determinations.

The Department proposes similar language in § 81.74(c), which deals with the release of aggregated data that the Secretary determines to be non-proprietary. The proposed rule provides that the Secretary may, based upon a consideration of the factors in § 81.74(b) and using the procedures in § 81.74(f)(1) and (f)(2), as applicable, determine that certain aggregated data derived from proprietary loan-level mortgage data are not proprietary.

In addition to the above changes, minor editorial corrections to § 81.75 are proposed.

II. Background

A. FHEFSSA and the Public Use Database

The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 requires HUD to establish and monitor the performance of Fannie Mae and Freddie Mac in meeting annual goals for purchases of mortgages on housing for low- and moderate-income families, housing located in central cities, rural areas, and other underserved areas, and special affordable housing (*i.e.*, housing meeting the needs of and affordable to low-income families in low-income areas and very low-income families).

Section 1323 of FHEFSSA requires the Department to make available to the public, in forms useful to the public (including forms accessible by computers) data relating to the GSEs' mortgage purchases.

Fannie Mae submits to the Department data on its mortgage purchases and aggregated data pursuant to sections 309(m) and (n) of the Fannie Mae Charter Act. Freddie Mac makes these submissions pursuant to sections 307(e) and (f) of the Freddie Mac Act.¹

In conjunction with this mandate of public access to GSE mortgage data, the law prohibits the Secretary from disclosing mortgage data that he or she

determines to be proprietary.² Specifically, section 1326 of FHEFSSA states that the Secretary may, by regulation or order, "provide that certain information shall be treated as proprietary information and not subject to disclosure under section 1323 of [title 12 of the United States Code], section 309(n)(3) of the [Fannie Mae Charter Act], or section 307(f)(3) of the [Freddie Mac Act]."

This prohibition on the disclosure of proprietary information is repeated in section 1323(b)(1) of FHEFSSA, which states that "[e]xcept as provided in paragraph (2) [of this section], the Secretary may not make available to the public data that the Secretary determines pursuant to section 1326 are proprietary information." The exception set forth in paragraph (2) of section 1323(b) of FHEFSSA states that the Secretary may not restrict access to GSE single-family mortgage data submitted to the Secretary under section 309(m)(1)(A) of the Fannie Mae Charter Act or section 307(e)(1)(A) of the Freddie Mac Act relating to "the income, census tract location, race, and gender of mortgagors under such mortgages."

Thus, the Secretary is authorized by section 1326 of FHEFSSA to make determinations, by regulation or order, that certain GSE mortgage data are proprietary, except as expressly prohibited by section 1323(b)(2) of FHEFSSA.

B. Department's Authority To Propose Rule Changes

The Department notes that section 1326(a) of FHEFSSA broadly confers on the Secretary the authority to determine, through either regulation or order, "that certain information shall be treated as proprietary information and not subject to disclosure under section 1323."

Inherent in this authority is the Secretary's authority to reconsider and modify a prior determination that information is proprietary. This inherent authority is expressed in the Department's implementing regulations at 24 CFR 81.75, which authorize HUD to issue a list providing that certain information shall be treated as proprietary information, but expressly authorizing the Secretary to modify the list by regulation or order.

² HUD's regulations at 24 CFR 81.2 define the term "proprietary information" to mean "all mortgage data and all AHAR information that the GSEs submit to the Secretary in the AHARs that contain trade secrets or privileged or confidential, commercial, or financial information that, if released, would be likely to cause substantial competitive harm."

¹ HUD defines the term "mortgage data" at 24 CFR 81.2 to mean "data obtained by the Secretary from the GSEs under subsection 309(m) of the Fannie Mae Charter Act and subsection 307(e) of the Freddie Mac Act."

Moreover, the Department's express authority to modify the list of proprietary data and information is repeated in each of HUD's prior public use database orders.³ Thus, by the terms of HUD's regulations and prior orders, the Department has provided the GSEs, and the public at large, with notice that it may seek to withdraw or modify its list of proprietary determinations "by regulation or order."

The Department believes that its proposed disclosure of additional GSE mortgage data and aggregated data will bring it into greater conformity with data that currently are available from the Home Mortgage Disclosure Act (HMDA) database. The legislative history of FHEFSSA specifically provides that " * * * every effort should be made to provide public disclosure of the information required to be collected and/or reported to the regulator consistent with the exemption for proprietary data."⁴ The FHEFSSA legislative history further indicates that Congress intended that the GSE public use database would help fill the "information vacuum" on GSE mortgage activities and complement the database established under HMDA.⁵ In addition, the FHEFSSA legislative history affirmed that "public access and disclosure of information is a key tool for permitting appropriate public scrutiny and oversight of the activities of the [GSEs] and in evaluating possible improvements in housing finance markets."⁶

More recently, the Comptroller General of the United States echoed this view when he testified before the U.S. Senate Committee on Banking, Housing and Urban Affairs. In specifically identifying a framework for strengthening GSE governance and oversight that described the need to establish standards to measure GSE mission compliance,⁷ the Comptroller General testified that:

GSEs should strive to achieve * * * reasonable transparency of financial and performance activities * * * Because of a

³ See the discussion under Section III of this proposed rule regarding HUD's prior issuances in 1994, 1995, and 1996 of orders relating to the public use database. Each of these orders provides that it "shall be effective until such time as it is determined necessary or appropriate to withdraw or modify it."

⁴ See S. Rep. No. 102-282, 102d Cong., 2d Sess. 40 (1992).

⁵ *Id.* at 39.

⁶ *Id.* at 44.

⁷ See testimony of David M. Walker, Comptroller General of the United States, before the U.S. Senate Committee on Banking, Housing and Urban Affairs in a report entitled, "Government Sponsored Enterprises: A Framework for Strengthening GSE Governance and Oversight", Report No. GAO-04-269T, issued for release on February 10, 2004.

lack of clear measures, it is difficult for Congress, accountability organizations, and the public to determine whether the benefits provided by the GSEs' activities are in the public interest and outweigh their financial risks. * * * In some cases, there is a lack of measurable mission-related criteria that would allow for a meaningful assessment of the GSEs' mission achievement or whether the GSEs' activities are consistent with their charters.⁸

Congress has mandated in the GSEs' charter acts that the GSEs carry out public purposes not required of other private sector entities in the housing finance industry. Public disclosure, including disclosure via the public use database authorized by section 1323 of FHEFSSA, is critical to ensure that there is public accountability and transparency concerning the GSEs' accomplishment of their clear and explicit Congressional missions and charters.

Accordingly, the Department believes that it has both the legal authority and obligation, as the GSEs' housing mission regulator, to ensure that the GSEs provide as much data as possible to the public, via the public use database and otherwise, to heighten the level of public transparency and accountability while also protecting GSE mortgage data that qualify as "proprietary information."

III. Summary of Prior HUD Regulatory Actions

Beginning with October 13, 1993, the Department has issued a series of orders detailing the type of loan level mortgage data and other information on mortgages the GSEs purchase that it would make available to the public and the data elements it would classify as proprietary and not release to the public. Orders addressing these classifications and the structure of the GSE public use database were issued on June 7, 1994 (59 FR 29514; the "1994 Temporary Order"), October 17, 1996 (61 FR 54322; the "1996 Final Order"), and October 4, 2004 (69 FR 59476; the "2004 Final Order"). The Department has also addressed the structure and content of the public use database in its final order and rulemaking of December 1, 1995 (60 FR 61846; the "1995 Final Order") and its proposed rule dated March 9, 2000 (65 FR 12660; the "2000 Proposed Rule").

In 2000 and 2001, the Department further determined that certain data, when aggregated at the national level, were not proprietary and could be released into tables for public use. In April 2002, the Department released a compendium of 18 tables of aggregated

⁸ *Id.* at 9.

data describing the GSEs' loan purchases in 1999-2000.

IV. Discussion of HUD's Proposals

A. Release of Prior Years' Mortgage Data and Aggregated Data

As the Department noted in its 2000 Proposed Rule, it has previously taken "a conservative approach in making determinations about the proprietary nature of the loan level data elements."⁹ Consequently, the Department believes that mortgage data that it previously and conservatively determined to be proprietary could, with the benefit of several years of experience, be reclassified as non-proprietary as HUD reviews its initial determinations of data elements. Moreover, significant portions of the GSE mortgage data that the Department has previously determined to be proprietary are, in fact, available publicly through private vendors, or are otherwise made available by lenders under HMDA. As the Department noted in the 2000 Proposed Rule, most of the changes to the GSE public use database were intended " * * * to make available to the public the same data from the GSEs that is made available by primary lenders under HMDA" and thus " * * * affirm Congress' intent that the HMDA database and the GSE database complement each other."¹⁰ The Senate Committee Report accompanying Senate bill S. 2733, which preceded the enactment of FHEFSSA, stated that "[i]mposing data collection requirements on the enterprises will close gaps that exist in the current HMDA system."¹¹ These are the reasons why the Department recently undertook in the 2004 Final Order to re-examine the proprietary status of certain GSE mortgage data that it had previously classified as proprietary and which, upon re-examination, the Department determined to reclassify as non-proprietary.

The Department is concerned, however, that even after reclassifying proprietary mortgage data as non-proprietary, or even after determining that proprietary loan-level mortgage data are not proprietary when presented in aggregated form, a significant gap in the public availability of these data will remain. It is this gap that HUD proposes to fill in this proposed rule.

Accordingly, the Department is proposing that upon a reclassification, by regulation or order, of mortgage data from proprietary to non-proprietary

⁹ See 65 FR 12632, 12670 (March 9, 2000).

¹⁰ *Id.* at 12669; also, see, S. Rep. 102-282, 102d Cong., 2d Sess. 39 (1992).

¹¹ S. Rep. 102-282, 102d Cong., 2d Sess. 39 (1992).

status, the reclassified mortgage data will be released to the public both prospectively and for all preceding years' public use databases. Similarly, the Department is proposing that, upon making a determination that certain aggregated data derived from proprietary loan-level mortgage data are not proprietary, the aggregated data will be released to the public both prospectively and for all preceding years, in the form of compendia or by other means.

The Department believes that any concerns about the public release of multiple and successive prior years' mortgage data and aggregated data under the above circumstances are unwarranted. Multiple and successive prior years' data already are available in the public use database for any mortgage data that HUD has previously determined to be non-proprietary.

Moreover, even with respect to newly reclassified mortgage data, or with respect to aggregated data that the Department has determined can be released to the public, there will emerge after a number of years data and information that cover multiple and successive years of GSE mortgage purchases. Consequently, the Department believes that its determinations to reclassify mortgage data from proprietary to non-proprietary status, and to release to the public in one-year increments data and information covering successive future years (*e.g.*, covering the years 2004–2014), equally support and justify the automatic release to the public of data and information covering successive prior years (*e.g.*, covering the years 1993–2003) for such mortgage data. This same rationale also supports the Department's release to the public of successive prior years of aggregated data following a determination that such data does not qualify for proprietary status.

The proposed rule also would codify the Department's existing practice of: (1) Using the regulatory factors described in § 81.74(b) whenever the Secretary seeks to modify, by regulation or order, the list of proprietary determinations; and (2) using the procedures in § 81.74(f)(1) and (f)(2), as applicable, whenever the Secretary seeks to modify, by order under § 81.75, the list of proprietary determinations. The Department also is proposing to use the regulatory factors in § 81.74(b) and the procedures in § 81.74(f)(1) and (f)(2), as applicable, whenever the Secretary evaluates whether certain aggregated data derived from proprietary loan-level mortgage data are non-proprietary and can be released to the public.

In its recent 2004 Final Order, the Department noted that it would release in the public use database, beginning in 2005, the mortgage data elements that were reclassified in that Order from proprietary to non-proprietary status and covering the GSEs' 2004 mortgage purchases. When the Department finalizes this rulemaking by issuing a final and effective rule, it will release in the public use database GSE mortgage data that HUD has determined to be non-proprietary for the years 1993 through 2003, including GSE mortgage data that HUD has determined in the 2004 Final Order to be non-proprietary.

In the future, the Department intends that whenever it makes a determination that certain GSE mortgage data, or aggregated data, are non-proprietary and may be released to the public, it will release mortgage data and aggregated data both prospectively and for all years preceding the effective date of HUD's determination.

The Department is proposing to implement this regulatory authority by its addition of a new § 81.75(b)(2) (which applies to the Secretary's release of prior and future years' GSE mortgage data following a reclassification from proprietary to non-proprietary status) and a new § 81.75(c) (which applies to the Secretary's release of prior and future years' aggregated data derived from proprietary loan-level data after the Secretary determines that such data are not proprietary).

B. Release of Aged Data

In its 2000 Proposed Rule, the Department requested comments on whether certain data elements that are classified as proprietary when submitted to the Department might no longer be so classified after several years because they would be unlikely to provide proprietary information about the GSEs' current business activities.¹² While numerous commenters on the 2000 Proposed Rule expressed general views favoring, or opposing, expanded release of GSE mortgage data, only three commenters responded specifically to the Department's request for comments on the release of aged data. These included Fannie Mae and Freddie Mac (which both opposed disclosure of aged data) and an academic organization (which supported the Department's proposal to release aged data that it determines, on reconsideration, to no longer be proprietary).

After considering the comments submitted on the 2000 Proposed Rule, the Department has decided to propose

the addition of a new regulatory provision to address the issue of aged data that would be codified at § 81.75(b)(3). Under this proposal, the Secretary could determine by regulation—or by order using the procedures in § 81.74(f)(1) and (f)(2), as applicable—that certain GSE mortgage data that are included on the list of proprietary determinations may lose their proprietary status if they are at least five years old. The Secretary would make his or her determination based upon a consideration of the regulatory factors in § 81.74(b). This consideration of the proprietary status of data would affect only mortgage data after the expiration of the minimum five-year period, as measured from the end of the calendar year to which that mortgage data pertain. Mortgage data that are less than five years old would remain proprietary and, as a result, could not be released publicly until at least five years have elapsed.

A commenter on the 2000 Proposed Rule asked the Department to conform any regulation that it may ultimately adopt authorizing the release of aged GSE data with the 10-year confidentiality period granted under the Department's regulations implementing the Freedom of Information Act (FOIA). In response to this comment, the Department notes that its current proposal to establish a minimum five-year period for the reconsideration of aged data is fully consistent with its existing regulations implementing the FOIA. Under the Department's Exemption 4 FOIA regulations at 24 CFR 15.108(b)(1), a submitter may request confidential treatment of business information at the time the information is submitted to HUD, or within a reasonable time thereafter.¹³ A submitter's designation of confidentiality expires 10 years after the date the information is submitted to HUD, unless the submitter provides a reasonable explanation in support of a later expiration date.¹⁴ However, the Department does not make a determination under FOIA as to whether the submitter's assertion of confidentiality is valid until it actually receives a request for disclosure of the information.¹⁵

The Secretary does, however, make determinations (or reconsiderations of

¹³ Under section 15.108(b)(2), the submitter must support its request with an authorized statement or a certification giving the facts and the legal justification for the confidential request and stating that the information has not been made public. In addition, the submitter must designate the specific information that it deems to be confidential.

¹⁴ See 24 CFR 15.108(b)(3).

¹⁵ See 24 CFR 15.108(g)(2).

¹² See 65 FR 12632, 12674 (published March 9, 2000).

initial determinations) about the confidential and proprietary status of GSE information under its separate and independent authority under section 1326 of FHEFSSA and the implementing regulations under 24 CFR part 81, subpart F ("Access to Information"). Under the current proposed rule, the Secretary would also have the authority to determine based on the criteria in § 81.74(b), either by regulation, or by order using the procedures in § 81.74(f)(1) and (f)(2), as applicable, that data may lose proprietary status once they have aged a minimum of five years.

Thus, if the Secretary determines in accordance with its proposed regulations that certain aged data do not qualify for confidential and proprietary treatment under FHEFSSA and its regulations at 24 CFR part 81, then this information would be released to the public. Since this would constitute an official and lawful Departmental release of GSE information to the public in accordance with FHEFSSA and its regulations at 24 CFR part 81, the information also would not be withholdable under Exemption 4 of FOIA.¹⁶

Conversely, the Secretary will not release to the public data that he or she has determined to be proprietary under FHEFSSA and its implementing regulations even after the expiration of the 10-year period described in the FOIA regulations. Thus, the expiration of the 10-year confidentiality period under FOIA does not affect the continued confidentiality of the same information under FHEFSSA and its implementing regulations.

For all of the above reasons, the Department believes that its proposal to adopt a minimum five-year period for the release of aged data pursuant to FHEFSSA does not in any way contradict the ten-year confidentiality period referred to in HUD's FOIA regulations.

The Department wishes to clarify that its proposal in § 81.75(b)(3) to release certain mortgage data that have aged a minimum of five years does not limit its current ability under § 81.75(b)(1) to seek, at any time, to reclassify GSE mortgage data from proprietary to non-proprietary status. This is because the Department's current proposal deals only with the reclassification and release of aged GSE mortgage data. This provision is independent of, and does not remove or limit, the Department's existing authority under § 81.75 (§ 81.75(b)(1) in this proposed rule) to modify at any time the list of

proprietary determinations by changing the *current* classification of GSE mortgage data from proprietary to non-proprietary status.

Public comment is solicited, in particular, on whether five years represent a reasonable minimum period after which mortgage data might lose their proprietary character and, as a result, warrant a reconsideration of proprietary status under HUD's regulations. The Department also solicits public comment on whether a longer or shorter period should be adopted in the final rule, and the point at which the period should begin to run.

The Department is proposing to implement this regulatory authority by its addition of a new paragraph (b)(3) to 24 CFR 81.75.

V. Findings and Certifications

Executive Order 12866. The Office of Management and Budget (OMB) reviewed this proposed rule under Executive Order 12866, *Regulatory Planning and Review*, which the President issued on September 30, 1993. Any changes made to this proposed rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC.

Paperwork Reduction Act. HUD's collection of information on the GSEs' activities has been reviewed and authorized by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), as implemented by OMB in regulations at 5 CFR part 1320. The OMB control number is 2502–0514.

Environmental Impact. This proposed rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Regulatory Flexibility Act. The undersigned, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule would not have a

significant economic impact on a substantial number of small entities. This final regulation is applicable only to the GSEs, which are not small entities for purposes of the Regulatory Flexibility Act, and, thus, does not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism. Executive Order 13132 ("Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on State and local governments and is not required by statute, or preempts State law, unless the relevant requirements of section 6 of the Executive Order are met. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act. Title II of the Unfunded Mandates Reform Act of 1995 (12 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and the private sector. This proposed rule would not impose any Federal mandates on any State, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects in 24 CFR Part 81

Accounting, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Securities.

Accordingly, 24 CFR part 81 is proposed to be amended as follows:

PART 81—THE SECRETARY OF HUD'S REGULATION OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION (FANNIE MAE) AND THE FEDERAL HOME LOAN MORTGAGE CORPORATION (FREDDIE MAC)

1. The authority citation for 24 CFR part 81 continues to read as follows:

Authority: 12 U.S.C. 1451 *et seq.*, 1716–1723h, and 4501–4641; 42 U.S.C. 3535(d) and 3601–3619.

2. Section 81.75 is proposed to be revised to read as follows:

§ 81.75 Proprietary information withheld by order or regulation.

(a) *Secretarial determination of proprietary classification.* Following a determination by the Secretary that mortgage data or AHAR information are proprietary under FHEFSSA, the Secretary shall expeditiously issue a

¹⁶ See 24 CFR 15.108(c)(2)(ii).

temporary order, final order, or regulation withholding the mortgage data or AHAR information from the public-use database and from public disclosure by HUD in accordance with 12 U.S.C. 4546. The Secretary may, from time to time, by regulation or order, issue a list providing that certain information shall be treated as proprietary.

(b) *Modification of proprietary classification.* (1) *General.* The Secretary may, based upon a consideration of the factors in § 81.74(b), modify the list of proprietary determinations by regulation, or by order using the procedures in § 81.74(f)(1) and (f)(2), as applicable.

(2) *Release of data following a modification of proprietary classification.* Following the Secretary's determination under paragraph (b)(1) of this section to modify the list of

proprietary determinations by reclassifying certain mortgage data on that list as non-proprietary, the Secretary shall release the reclassified, non-proprietary mortgage data to the public both prospectively and for all years preceding the effective date of HUD's determination, unless otherwise provided by the Secretary.

(3) *Release of aged data.* The Secretary may determine under paragraph (b)(1) of this section that certain mortgage data that are included on the list of proprietary determinations may lose their proprietary status if they are at least five years old (as measured from the end of the calendar year to which the mortgage data pertain). If the Secretary determines that such aged mortgage data have lost their proprietary status, these data shall be released publicly.

(c) *Release of aggregated data derived from proprietary loan-level data.* The Secretary may, based upon a consideration of the factors in § 81.74(b) and using the procedures in § 81.74(f)(1) and (f)(2), as applicable, determine that certain aggregated data derived from proprietary loan-level mortgage data are not proprietary. If the Secretary makes such a determination, then the aggregated data shall be released to the public both prospectively and for all years preceding the effective date of the Secretary's determination, unless otherwise provided by the Secretary.

Dated: December 3, 2004.

John C. Weicher,

Assistant Secretary for Housing-Federal Housing Commissioner.

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