support among the other industry commenters concerning what they considered the limited evidentiary value of GSE application data. MBA noted that information solely from the GSEs would "give a distorted view of a lender's performance since lenders originate loans for other investors and loans with FHA insurance are sold into the secondary market through Ginnie Mae."

HUD is aware that lender information received from the GSEs generally will include only those transactions in which a GSE has been a participant. However, that is not a basis for concluding that there is no evidentiary value in information provided by the GSEs in accordance with the requirements of FHEFSSA and this final rule. The legislative history of FHEFSSA clearly indicates that Congress considered information possessed by the GSEs to be of potential value in investigations.<sup>58</sup>

Submission of Information to the GSEs

HUD will make information regarding violations of ECOA or the Fair Housing Act available to the GSEs pursuant to § 81.45. Information to be made available regarding violations will include decisions by Administrative Law Judges, Federal courts, the Secretary, or decisions of other courts applying Federal, State or local fair lending laws. HUD recognizes that the information to be made available to the GSEs will be limited by applicable law, memoranda of understanding between the agencies and other arrangements regarding such issues as confidentiality, the right to privacy, and the protection of supervisory information.

HUD recognizes that because the GSEs may take action pursuant to their own policies and agreements, the clause in the proposed rule at § 81.45(b) which authorized them to do so was not necessary. Therefore, the clause has been deleted from this final rule.

In consultations, the federal financial regulators raised concern that § 81.45 of the proposed rule, which directed the Secretary to obtain information from federal financial regulators and others regarding violations of the Fair Housing Act and ECOA, would require the reporting of violations which might be unrelated to mortgage lending discrimination.

In response to these concerns, § 81.45(b) of this final rule limits the

information required to be obtained from other Federal regulatory or enforcement agencies to violations by lenders involving discrimination with respect to the availability of credit in a residential real-estate-related-transaction. This change more clearly describes the scope of the data required by this final rule.

In addition, while the rule directs the Secretary to obtain information regarding single violations of the Fair Housing Act in real-estate-related transactions, in response to federal financial regulator concerns involving ECOA violations, the Secretary will obtain information from regulators regarding violations of ECOA by lenders only in circumstances in which there is either more than a single ECOA violation, or the ECOA violation could also be a violation of the Fair Housing Act.

## Remedial Actions

Section 1325(5) of FHEFSSA authorizes the Secretary to direct the GSEs to take various remedial actions against lenders that have been found to have engaged in discriminatory lending practices in violation of the Fair Housing Act or ECOA, pursuant to a final adjudication on the record, and after opportunity for an administrative hearing. Freddie Mac commented that HUD had not defined "final adjudication on the record" in the proposed rule, and had employed the term "final determination" in its place, contrary to section 1325(5) of FHEFSS Freddie Mac requested that the term "final adjudication on the record" be defined to include recognition that such an adjudication could only result from a United States court or established administrative proceeding, with an unappealable decision on the merits having found a lender to have violated substantive (i.e., not technical or recordkeeping) provisions of ECOA or the Fair Housing Act.

Congress intended that remedial actions would be imposed only on lenders that had been found to have violated the Fair Housing Act or ECOA by a court or administrative law judge, after a trial on the merits, and after that decision was no longer subject to appeal.<sup>59</sup>

Section 81.46(c)(1) provides that the Secretary shall direct a GSE to take remedial action only after a final determination has been made that a lender has violated ECOA or the Fair Housing Act. The term "final determination" means, within the context of §81.46, a final administrative or judicial decision, after hearing or trial on the merits, which is not subject to appeal. For the purposes of finding that there has been a final determination that a lender violated the Fair Housing Act, the implementing regulations at 24 CFR 104.930 and 104.950 establish that a final decision may be made by the Secretary or a HUD Administrative Law Judge, and that a final decision becomes conclusive unless appealed within the statutory period. If a party to the case elects to have that case heard in U.S. District Court pursuant to section 812(o) of the Fair Housing Act, 42 U.S.C. 3612(o), the District Court may decide the case, and that decision becomes conclusive unless appealed within the period established by the Federal Rules of Appellate Procedure. For the purposes of finding a violation of ECOA, a final determination means that a final decision on a complaint must have been made by an appropriate United States District Court or any other court of competent jurisdiction, and that decision must be no longer subject to

Congress also indicated that after a final determination has been made that a lender violated the Fair Housing Act or ECOA, HUD should conduct a hearing on the record before imposing any remedial action.<sup>60</sup> The term "final adjudication on the record," as used in section 1325(5) of the statute, provides for the use of the formal adjudicative process set forth in §§ 554–557 of the Administrative Procedure Act.

Freddie Mac objected to the phrase "indefinite suspension" as used in the rule. Freddie Mac claimed that, as used in the statute, "suspension" clearly implied a temporary (and definite) remedial action, and that HUD's use of the term "indefinite" suspension constituted a rule-created additional, more severe, form of remedy.

MBA addressed a related concern. In light of the broad scope of remedies outlined in the statute, MBA objected to the rule's use of the phrase "other remedial action," saying that it was inappropriate for the Secretary to assert general discretion to take any other action against lenders without providing

<sup>&</sup>lt;sup>58</sup> "In the course of their day-to-day operations the enterprises are privy to and collect certain data which may be instructive regarding the practices of mortgage lenders. The reporting of such data should aid investigative efforts." S. Rep. at 43–44; see also sections 1325(2) and (3) of FHEFSSA.

<sup>&</sup>lt;sup>59</sup> "This section also provides for remedial actions against lenders who have been found to have violated the Fair Housing Act or the Equal Opportunity Act [sic] by the appropriate administrative agency with enforcement responsibility . . . . Any hearing regarding a remedial action should be held only after there has been a final administrative or judicial decision, after hearing or trial on the merits, and not subject to appeal, as provided in the applicable statute." S. Rep. at 44.

<sup>60 &</sup>quot;Before imposing any remedial action, HUD shall conduct a hearing on the record in accordance with the Administrative Procedure Act." S. Rep. at