the opportunity for notice and comment rulemaking as to what that action might be.

This final rule no longer includes the phrase ''other remedial action.'' However, HUD does not agree with Freddie Mac's assertion that the statutory term ''suspension'' is a limiting one. The terms ''temporary'' and ''indefinite'' clarify the statutory term, which did not provide any time limits for suspensions to be applied. Accordingly, this final rule continues to provide for temporary suspension or indefinite suspension as alternative remedial actions, depending upon the severity of the discriminatory conduct.

Freddie Mac also objected to the fact that the rule does not provide it with a role in connection with any administrative hearing concerning remedial action against a lender. In contrast, the ABA, although supportive of GSE positions on several issues, found no fault with the procedural protections in the proposed rule, and stated its belief that the rule provides necessary and appropriate procedural safeguards for lenders. The statute does not provide a role for the GSEs in connection with an administrative hearing concerning remedial action against a lender.

Additionally, Freddie Mac regarded the list of factors to be considered in determining whether to apply a remedial action, found at § 81.46(c)(3) of the proposed rule, as excessively broad, inclusive of potentially irrelevant considerations, and in contravention of the statute's express intent to limit remedial actions to final adjudications. This final rule provides useful guidance in carrying out the statutory requirement, in section 1325(5), that the Secretary shall direct the GSEs to undertake appropriate remedial actions. The rule states that before giving the GSEs and the lender notice of any remedial action to be taken, the Secretary shall, as a threshold matter, solicit and fully consider the views of the Federal financial regulatory agency responsible for the subject lender. If such responsible Federal financial regulatory agency makes a written determination that a particular remedial action will threaten the financial safety and soundness of the lender, the Secretary shall consider other remedial actions. For the purposes of § 81.46, ''remedial actions'' will include only those actions relating to the business relationship between the GSE and the lender.

The rule provides a list of factors to be considered when directing remedial action. This list has been shortened in this final rule to combine similar factors, in accordance with the President's initiative on regulatory reform. For example, in determining the appropriate remedial action, the Secretary may consider a lender's history with respect to enforcement actions or lawsuits brought against it under ECOA, the Fair Housing Act, or substantially equivalent state or local laws, including cases that are conciliated, settled, or otherwise resolved, as well as private fair housing lawsuits and judgments, settlements, conciliations, or other resolutions. Conciliations and settlements may be considered as mitigating or aggravating factors. For example, a broad class settlement with comprehensive remedial relief may evidence a lender's good faith and affirmative attempts to correct discrimination and may be a mitigating factor when determining whether to impose a remedial action pursuant to § 81.46 against that lender based on an adjudicated finding involving isolated discriminatory acts of a single employee. On the other hand, if a lender enters into a similar settlement, but fails to adhere to it, that may be viewed as an aggravating factor when determining whether to impose a remedial action based on an adjudicated finding that the lender has engaged in discrimination. Similarly, if a GSE has taken action against a lender under its own policies or contractual agreements, such action may also be considered as a mitigating or aggravating factor, depending upon the circumstances and the remedial action under consideration.

HUD recognizes that in selling loans to the secondary market, lenders are required to use the secondary market's underwriting guidelines. Under § 81.46(c)(3)(viii) of this final rule, to the extent that a primary lender is found liable under the Fair Housing Act or ECOA for use of a facially neutral, appropriately applied underwriting guideline that is required in order to sell loans to a secondary mortgage market, the Secretary will take that into account in determining the appropriate sanction, if any, to direct the GSE to impose on the primary lender. In such instances, the Secretary will generally direct a settlement or a reprimand as a remedial action.

The statute did not provide for any special consideration of the effect of remedial actions on the GSEs. However, as provided in § 81.46(c)(3), where warranted, the Secretary shall solicit and fully consider the views of the Director regarding the effect of the action(s) that are contemplated on the safety and soundness of the GSE. In addition, § 81.46(c)(3)(ix) of this final rule provides that ''[a]ny other information deemed relevant by the Secretary'' may be taken into account in determining the level of remedial action, and information concerning the impact on the GSEs may be relevant in particular cases.

Additional Fair Lending Issues

The Western League of Savings Institutions encouraged HUD to approach the task of overseeing fair lending practices from an entirely different perspective. HUD, the commenter said, should be concerned with marketplace entities ''not currently subject'' to Federal regulation, and objected to what it perceived as ''dual oversight'' of some depositary institutions. It also recommended that, since HUD will review and comment on existing and revised GSE underwriting guidelines under the regulation, lenders who rely on those underwriting guidelines should be provided a ''safe harbor'' in the regulation.

Regarding the commenter's concern about ''dual oversight,'' FHEFSSA requires HUD to assume certain enforcement responsibilities, and it does not permit HUD to limit this oversight to particular institutions. In response to the request for a ''safe harbor,'' HUD does not believe this regulation is the appropriate vehicle to address the liability of lenders under the Fair Housing Act. The statute speaks only to the sanctions which the Secretary shall mandate that a GSE impose on a primary lender after an adjudication that the primary lender has discriminated. In directing a sanction under FHEFSSA, the Secretary relies on a prior judicial or administrative determination of a Fair Housing Act or ECOA violation. HUD recognizes that lenders are subject to the investigative and enforcement powers under the fair lending laws of HUD, the Department of Justice, the federal financial regulatory agencies and the FTC. To limit duplicative enforcement activities, HUD will ordinarily ensure that remedial actions the Secretary directs a GSE to take against a lender will not be in the nature of those which could have been, but were not, imposed directly against a lender in the course of an enforcement action by HUD, the Department of Justice, or the lender's primary regulator. HUD will consider, as factors in this determination, whether HUD, the Department of Justice, or the lender's primary regulator took an enforcement action, whether the sanction was a result of private litigation, whether additional facts have come to light, and whether the law has changed.