"except within jurisdiction delegated to the agency and as authorized by law." 98

While HUD agrees that it is the statute, and not the regulations, that serves as the foundation for any order sought by the Secretary, Freddie Mac's argument suggests that regulatory elaboration may never properly be employed to augment the recitation of statutory authority in connection with an enforcement provision. This is incorrect; it is clear that regulatory references legitimately may be included. Only reference to a regulatory section that exceeds the Secretary's authority would raise a valid legal issue; the references Freddie Mac refers to are reasonably related to the purposes of the enabling legislation. Rather than causing 'confusion,'' these regulatory references help to clarify, and even to limit, the statutory language. The change sought might itself create confusion. Accordingly, the rule retains the regulatory cross-references, and cites both them and the statutory references.

Freddie Mac suggested that the final rule include various procedures to avoid enforcement actions. Freddie Mac cited Executive Order 12778 on Civil Justice Reform in support of its argument that the rule should mandate a preenforcement process, which could include informal discussions, negotiations, and compromise.

HUD expects that, in connection with a pending enforcement action against a GSE, it will frequently be appropriate to solicit the GSE's views in order to explore mutually agreeable resolutions of perceived problems. This option is always available to the Secretary; every reason exists to expect it will be used. However, Freddie Mac's suggestion that the rule should provide expressly for preenforcement procedures in every case—that is, to turn an existing option of the Secretary into a right of the GSEs—is unwarranted. Fact situations may differ too markedly to expect that obligatory preenforcement procedures would always be the proper course. Under §81.21, the GSE already is afforded an opportunity to respond to the Secretary's preliminary determination that it has failed to meet its housing goals—a response that will precede any HUD requirement for submission of a housing plan. Settlement following the issuance of charges also is permitted under hearing procedures at 24 CFR 30.420. (Part 30 procedures are incorporated by reference into this final rule.)

Given the already-available procedures that will foster the amicable resolution of most disputes, the change

Freddie Mac has proposed is unnecessary and is contrary to the spirit of the Administration's efforts to simplify regulations. Potentially, the change could result in institutionalized delay in the hearing process. Executive Order 12278 is, in relevant

Executive Order 12278 is, in relevant part, directed at encouraging techniques to avoid full litigation after charges have been filed. By its own terms, the Executive Order creates no obligation on an agency's part to alter its standards for the acceptance of settlements, or to change existing delegations of settlement or litigation authority. While the Secretary shares the GSEs' interest in minimizing needless litigation, the existing authority to attempt a voluntary pre-charge resolution on a case-by-case basis will accomplish this goal as well as Freddie Mac's suggested procedure.

Freddie Mac also asked for modification of the rule to allow a GSE to recommend and request the appointment (at the GSE's expense and with the Secretary's approval) of "special expert" hearing officers to hear all or part of any enforcement action. These special officers would then sit in lieu of, or under the supervision of, a HUD Administrative Law Judge (ALJ).

Freddie Mac commented that these enforcement actions are likely to involve "highly technical statistical and financial proof on arcane issues * * *." While the Secretary hopes and believes that the ALJs will not be called upon to hear these matters often, the ALJs do have experience with handling technical, statistical, and financial matters; there is every reason to believe they will make well-reasoned decisions in any enforcement actions brought under this rule

Furthermore, the option suggested by Freddie Mac is not available: the person who must preside over the taking of evidence in these proceedings is prescribed by the APA. While procedures authorized under the Alternative Dispute Resolution Act 99 could be used in particular instanceswhen the parties agreed to their usea regulatory procedure calling for unilateral Secretarial designation of a special expert at the behest of a GSE would conflict with the APA, as applicable under FHEFSSA. No necessity exists to cite in the rule the existence of alternatives that are available via agreement of the parties.

The Public Interest

Freddie Mac commented that $\S\,81.83$ (c) (calling for the Secretary's consideration of "other factors that the Secretary determines in the public

interest warrant consideration" in the course of imposing civil money penalties) cannot be adopted in the manner set out in the proposed rule. Rather, Freddie Mac claimed, FHEFSSA required the Secretary to establish, by rule, following notice and comment, those "other factors" to be considered in measuring the conduct of violators.

The reference in the proposed rule to "other factors * * *" is too broad, and that formulation has been deleted. However, inasmuch as the Secretary is authorized to consider the nature of the injury to the public in establishing the amount of the penalty and other factors that the Secretary may determine by regulation to be appropriate, the final rule eliminates the "other factors" phrase in favor of a "public interest" formulation like that contained in FHEFSSA.

Freddie Mac also commented that the statutory language permits the Secretary to consider only "actual" injury to the public, and that the use of the term "nature of the injury to the public" in the proposed rule is unacceptably subjective. Clearly, under the Secretary's authority to adopt other factors through rulemaking, the rule could include "nature of the injury to the public" as a separate factor, if necessary. The final rule, however, returns to the concise statutory formulation, "injury to the public," without regulatory elaboration. HUD does not intend to place narrow limits on the interpretation of the statutory phrase, and will consider, in evaluating a particular fact situation, reasonable application of this factor, including the nature of the injury involved.

Consultation

Freddie Mac also requested that the Secretary limit consultation with the Director of OFHEO concerning any enforcement proceeding against a GSE to consultation before the enforcement proceeding is actually undertaken. Freddie Mac suggested that the proposed rule's formulation allowing the Director's participation in an ongoing enforcement proceeding would be "inconsistent with the Director's independence from the Secretary, and would be in the nature of a prohibited ex parte contact." However, Freddie Mac said, ex parte problems could be avoided if the consultation (which Freddie Mac favored) took place only before institution of an enforcement proceeding.

Freddie Mac asserted that once an adversary proceeding has commenced, due process requires that any review by the Director be conducted openly, in writing, and included in the