administrative record. Further, the affected GSE should be provided an opportunity to supplement the record and to respond.

Limiting the Secretary's consultations with the Director of OFHEO to communications that occur before the institution of an action would needlessly limit the Secretary's authority in a manner not contemplated by FHEFSSA. Section 81.83(d)(5) of the rule, cited by Freddie Mac as the source of its comments on the subject matter, is, with one minor exception, a recitation of the statutory language.[100]

Freddie Mac's suggestion that these communications between the Secretary and the Director would be ''in the nature of'' *ex parte* communications prohibited by the APA simply is off the mark. Section 1345(c)(1)(C) of FHEFSSA provides that, in establishing standards and procedures governing the imposition of civil money penalties, the Secretary may provide for such review by the Director. Under this provision, Congress intended that open communication between the Secretary and the Director of OFHEO be permitted without implicating the *ex parte* prohibitions in 5 U.S.C. 557(d)(1).

With reference to Freddie Mac's due process concerns, the Secretary is mindful of the need for fairness and openness throughout the process leading to a possible imposition of penalties. An affected GSE would have full access to discovery procedures that will permit review of any decisionmaking process that involves the Director of OFHEO. Accordingly, the final rule does not place limits on Secretary/Director communications.

Standard of Proof

Both GSEs commented on the standard of proof in cease-and-desist and civil money penalty proceedings. Freddie Mac cited *Steadman* v. *SEC*, 450 U.S. 91 (1981) as authority for application of the ''preponderance of the evidence'' standard of proof to both types of proceedings. Fannie Mae stated that the APA's standard of proof is ''substantial evidence,'' and that this standard should be made consistent in provisions governing both cease-and-desist and civil money penalty proceedings.[101]

Under FHEFSSA, the standard of proof to be applied is governed by the APA.[102] As Freddie Mac noted in its comments, the Supreme Court in *Steadman* has found the statutory ''substantial evidence'' phrase to mean a ''preponderance of the evidence'' burden of proof for the proponent of an order, and the final rule reflects this change.

General Procedural Questions

Freddie Mac asked for a variety of other revisions affecting § 81.84 on Hearings:

Freddie Mac requested a ''clarification'' to the effect that the ALJ must modify a hearing schedule at the GSE's request, unless HUD can show good reason why the GSE's request should be denied. Freddie Mac urged that the GSE, rather than the hearing officer, is in the best position to judge the feasibility of a particular hearing schedule. Furthermore, Freddie Mac argued, FHEFSSA ''suggests a congressional determination that such requests should ordinarily be allowed.''

The proposed rule at § 81.84(c) provided that the ALJ would set a hearing schedule ''[u]nless an earlier or later date is requested by a GSE and is granted by the Administrative Law Judge * * *.'' The regulatory formulation is similar to the statute, which provides, at section 1342(a)(2), ''* * * unless an earlier or later date is set by the hearing officer at the request of the enterprise * * *.'' Therefore, on its face, the statute provides for the setting of the date by the ALJ, with an opportunity for the GSE to ''request'' a change. The Secretary sees no basis for limiting the ALJ's discretion, and the rule is unchanged.

Freddie Mac also asked that the rule be modified to provide a procedure for a GSE to request the Secretary to seek enforcement of a subpoena issued and served in connection with a hearing or in discovery proceedings under the rule. The Secretary is sympathetic to the thrust of this comment by Freddie Mac, i.e., that the GSE should have the same right to enforcement of a subpoena as does the Secretary. However, FHEFSSA does not grant a right to subpoenaing parties to apply directly for a judicial order requiring compliance with a subpoena. The Secretary, under FHEFSSA, can only request that the Attorney General bring judicial actions to enforce subpoenas. Because direct judicial enforcement by either party is not specifically provided as a matter of law, HUD has developed an administrative mechanism in the final rule providing for recognition of the GSEs' interest in requesting enforcement action through the Secretary. Consistent with the availability of remedies under the statute, this will improve equity between HUD and the GSEs in discovery.

Freddie Mac asked that the final rule be amended to specify that waiver, by a GSE, of an ALJ hearing on the disapproval of a new program on public interest grounds would not constitute a ''failure to appear'' within the meaning of § 81.84(g). (As proposed, the rule stated that a failure to appear by a GSE shall be taken as consent to the disapproval of a new program.) Freddie Mac said that, in cases involving program disapprovals, a GSE may sometimes wish to expedite judicial review, and urged that the GSE's waiver of an administrative hearing on program disapproval not be treated as a consent to the HUD action.

The final rule does not adopt the change. The statute requires, in section 1322, that HUD provide the GSEs with ''notice of, and opportunity for, a hearing on the record'' after the Secretary submits a report to the Congress to the effect that a new program has been disapproved. The Secretary concludes that this language indicates a preference for providing the GSEs with administrative remedies. Therefore, if the Secretary has refused to approve a new program because the Secretary believes it is not in the public interest, HUD should provide the forum in which appeal of the Secretary's initial disapproval is heard and in which the GSE can offer further evidence on the matter.

Both GSEs requested language indicating more expressly that conduct is only ''alleged'' in notices of charges for cease-and-desist proceedings. (The proposed rule at § 81.82(b)(1)(i), in describing the content of a ''charge'' notification, made reference to a ''* * * concise statement of the facts constituting the conduct upon which the Secretary has relied * * *.'') The final rule includes the word ''alleged'' before ''conduct'' where the reference is to conduct that remains to be proven. However, it is not necessary to reiterate in the rule that the conduct remains to be proven in a hearing.

Fannie Mae recommended revising § 81.84(e) of the rule to increase its specificity regarding how the Secretary will serve notices and filings required under this subpart G. Fannie Mae suggested that HUD follow the Federal Reserve Board rules of service—rules that provide, among other things, details on what types of U.S. mail may be used, and when electronic transmission is acceptable.

[100] Only a reference to the Notice of Intent—a reference to which Freddie Mac made no objection—contains material not found in the text of FHEFSSA.

[101] The proposed rule set out the preponderance of the evidence standard to govern civil money penalty cases, and the substantial evidence standard for other administrative proceedings under FHEFSSA.

[102] 5 U.S.C. 556(d).