

income. Comparing county median income to the greater of statewide nonmetropolitan or nationwide nonmetropolitan median income ensures that poor counties in poor States will be included in the definition of rural areas.

Moreover, the addition of the nationwide designation of median income addresses a concern expressed by HAC that the proposed definition cover states that have counties with high poverty rates but low minority concentrations. With the nationwide designation, counties in poor States, such as Fulton County, Kentucky, which has a 30 percent poverty rate, will be included as rural areas. The county median income is low relative to national median income, but not low relative to State median income. Without availability of comparison to nationwide income, Fulton County would not be considered a rural area.

Remote Areas. HAC expressed concern that remote rural areas are more likely to be underserved than those closer to urban areas. NAHB also addressed the issue of rural remoteness and recommended that HUD include counties in certain Beale Codes based on their rural character, low urbanization, and non-adjacency to a metropolitan area. The rule's revised nonmetropolitan county definition adequately targets remote counties. The definition picks up 84 percent of the population that reside in remote counties, as determined by Beale Codes.

Geographic Coverage of Rural Areas and Demographic Indicators. HUD uses two demographic indicators—median income and minority concentration—to identify rural areas. These two indicators correlate with the common characteristics of underservedness. Fannie Mae recommended that the rural definition include no demographic indicators, stating "the geographic goal was not supposed to focus on fractions of geographic areas." Fannie Mae's definition of rural areas, therefore, would include all nonmetropolitan counties. As noted below, HUD does not agree that the Geographically Targeted Goal was meant to include all rural areas.

Freddie Mac suggested that HUD use a definition covering rural areas where median income was at or below 100 percent of State median or where 20 percent of the population was minority. Under Freddie Mac's definition, 221 counties in addition to those covered by the definition on the final rule, covering an additional 5.97 million people, would be considered rural areas. Because HUD does not consider these additional counties as being

underserved by the mortgage market, HUD is not including these additional counties in its definition of rural areas.

Legal Authority To Limit Goal to Underserved Portions

As noted above, part of Fannie Mae's justification of a definition using whole "central cities" as defined by OMB was based on Fannie Mae's interpretation of FHEFSSA. HUD believes that Fannie Mae has interpreted the statutory language too narrowly, and that FHEFSSA did grant HUD latitude to select from among reasonable definitional approaches to establish a goal that is appropriately targeted toward areas underserved by the mortgage lending industry.

Fannie Mae's comments and an opinion prepared for Fannie Mae by the law firm of Arnold and Porter, and submitted with Fannie Mae's comments, raised several legal objections to the proposed rule. One argument was that HUD cannot apply the qualifier "underserved" to limit central cities or rural areas to only portions of central cities or rural areas that are underserved.

While FHEFSSA does not refer to "underserved areas of central cities" or "underserved areas in rural areas," a general rule of statutory construction provides that, to determine the word or words to which the antecedent applies, one may look to legislative history.²⁷ "Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent."²⁸

The legislative history of FHEFSSA makes clear that the goal is to address underserved areas. In explaining the conference bill on the floor of the Congress, then-Chairman Gonzalez stated: "In establishing the definition of a central city and in determining compliance with such a goal, the Secretary should, to the extent possible, exclude purchases made in non-low income census tracts that happen to otherwise be within the central cities area."²⁹ Focusing on "inner-cities" rather than entire OMB cities, the legislative history provides that "[t]he

purpose of these goals is * * * to service the mortgage finance needs of low- and moderate-income persons, racial minorities and *inner-city* residents," and noted that "mortgage discrimination and redlining have effectively disadvantaged certain geographic areas, particularly *inner city* and rural areas."³⁰

The "Plain Meaning"

Fannie Mae commented that the plain meaning of FHEFSSA had been breached by HUD in changing the definition of "central cities" from the transition definition and that Congress did not intend that HUD revise that definition in the years following the 2-year transition period. For the transition years of 1993–94, FHEFSSA mandated that the Geographically Targeted Goal be directed only to "central cities" as defined by OMB, and HUD extended this approach to 1995 by regulation. However, following the transition, FHEFSSA authorized the Secretary to define central cities and to expand the goal to target "rural areas" and "other underserved areas." Fannie Mae commented that Congress intended that only "other" underserved areas—that is, areas in addition to central cities and rural areas generally (which, Fannie Mae declared, also were to be considered "underserved")—be subject to HUD redefinition in the rule. Fannie Mae commented that "Congress actually provided the definition of 'central cities' in the subsection on the two-year transition period. . . . There is no indication in the statute that Congress intended the definition of 'central cities' to be restricted or narrowed after the two-year transition period."

Section 1334(d)(3) of FHEFSSA did define "central cities" as the OMB list of central cities. Congress, however, placed that definition in the transitional provisions of the Geographically Targeted Goal and thereby limited it to the transition period (1993–94). Had Congress chosen for HUD to continue using that definition after the transition period, Congress could have placed the definition in the general definition section of FHEFSSA. Congress did not do so.

Fannie Mae's argument that HUD must continue with the transition period definition of central cities would effectively render superfluous the language of the statute that explicitly limits the application of the definition to the transition period. The argument,

²⁷ *United States v. Brandenburg*, 144 F.2d 656, 660–61 (3d Cir. 1944) ("a clause modifies that antecedent which the draftsman intended it to modify").

²⁸ *Sutherland* §§ 47.33 and 47.26. See also *State v. McGee*, 122 Wash.2d 783, 864 P.2d 912, 914 (1993); *Nemzin v. Sinai Hospital*, 143 Mich. App. 798, 372 N.W.2d 667, 668–69 (1985).

²⁹ 138 Cong. Rec. H11453, H11457 (daily ed. Oct. 5, 1992). Rep. Gonzalez made the identical statement at 138 Cong. Rec. H11077, H11099 (daily ed. Oct. 3, 1992).

³⁰ S. Rep. at 32, 34, and 41 (emphases added). See also 138 Cong. Rec. S8606 (daily ed. June 23, 1992) (statement of Sen. Riegle) ("inner-city lending * * * is a very important part of this legislation").