August 06, 2008

By electronic delivery to
http://www.regulations.gov.

Mr. Gary K. Van Meter
Deputy Director, Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102-5090

Re: Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; Mission-Related Investments, Rural Community Investments; Farm Credit Administration, 12 CFR Part 615; RIN 3052-AC42.

Dear Mr. Van Meter:

The American Bankers Association (ABA) respectfully submits its comments to the Farm Credit Administration (FCA or Agency) in response to the notice of proposed rulemaking to amend Farm Credit Administration Regulations, 12 CFR Part 615.[1]

The ABA is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. Its members - the majority of which are banks with less than $125 million in assets - represent over 95 percent of the industry's $13.3 trillion in assets and employ over 2 million men and women. The ABA works to enhance the competitiveness of the nation's banking industry and to strengthen America's economy and support its communities.

As is discussed more fully below, the ABA believes the proposed regulations present an unprecedented attempt to fundamentally transform the mission of the Farm Credit System (FCS or System) via an administrative rulemaking process. The proposed rule, if adopted, would shift System institutions away from their express statutory task of serving farming and agriculture and thrust the FCS into a role that it is unprepared to carry out – that of a traditional commercial lender.

The ABA submits that it is beyond the authority granted by Congress to the Farm Credit Administration to approve such a fundamental change in statutory mission. Simply stated, the present attempt to redirect the System away from its mandated limited task of serving bona fide farmers, ranchers, producers and harvesters of aquatic products, agricultural processing and marketing operations, and farm related business operations (farming and agriculture), into broad-based "investment" in rural revitalization that is indistinguishable from commercial lending, is an ultra vires exercise of the Farm Credit Administration's authority. [2]

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[1] Federal Register Vol. 73 No. 116 Monday, June 16, 2008; 12 C.F.R. 615.5176.
[2]Congress has also authorized System institutions to finance non-farm rural housing, limited to areas with populations of 2,500 or under (discussed below). Additionally, banks for cooperatives are authorized to fund cooperatives that establish or operate water and waste disposal facilities in rural areas (also discussed below).

Moreover, wholly apart from the clear lack of statutory authority to promulgate the proposed regulations, as a matter of public policy, the proposed amendments should be withdrawn due to the unprecedented expansion of FCS lending authority, and the end result of placing the capital of FCS farmer and rancher owners at risk. For these reasons, the ABA urges that the proposed regulations be abandoned as illegal, ill-considered, and irresponsible.

Summary of Comment

The proposed amendments to section 615 are beyond the authority granted by Congress in the *Farm Credit Act of the 1971* (Act), as amended. Congress created System institutions for the purpose of supplying needed credit and financial services in support of farming, agriculture and related businesses. By contrast, the stated purpose of the amendments would fundamentally alter this mission, authorizing System institutions to enter the arena of traditional commercial lending by purchasing and holding debt securities, and investing in venture capital funds, intended to facilitate and finance community and economic development in rural America. The FCA wrongly relies on the non-statutory preamble of the 1971 Act and the System's administrative investment powers as authorizing language to conduct the proposed activity. However, Congress did not empower System institutions to place their assets and financial health at risk via "investments" in rural development beyond farming, agriculture and other legislatively authorized businesses, as identified in the *Farm Credit Act.*

The rule proposes an expansion of FCS authority that is truly breathtaking: as currently crafted, each FCS institution would be empowered to make "investments" in all areas of the country that are not "urban," i.e., those areas with fewer than 50,000 residents, or according to the FCA, "rural" America. Based upon the definition contained in the proposal, the area considered to be "rural" (and thus qualifying for "investments" from FCS institutions) is home to 89.5 million people – representing 31.8 percent of the total population – and covers 98 percent of the land area in the United States.[3]

The ABA firmly believes that the proposed rule is beyond the intent and purpose of the *Farm Credit Act*, and will result in the diminution of the capital of FCS farmer and rancher owners. Furthermore, the proposed amendments ignore decades of banking regulatory practice governing the principles of safety and soundness.

Background

Farm Credit is a GSE system of financial institutions specially created by Congress for the purpose of meeting the credit and financial needs of American farming and agriculture.[4] The FCS had its beginnings in the *Federal Farm Loan Act of 1916*, when credit was often not available or unaffordable in rural areas. Today, FCS institutions are owned by farmer and rancher shareholders who receive System credit and other financial services. The Farm Credit Administration is responsible for ensuring the safety and soundness of the FCS and protecting farmer and rancher ownership interests.

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[3] United Stated Department of Agriculture, Economic Research Service, September 2007.
[4] 12 U.S.C. 2001.

On June 16, 2008, the FCA published its proposed regulations: *Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; Mission-Related Investments, Rural Community Investments.*[5] The proposed regulations would authorize FCS institutions to finance the building of hospitals, healthcare facilities, emergency facilities, roads, bridges, transportation infrastructure, and any other types of investments identified as appropriate, potentially including but not limited to financing the development of hotels, office parks, market rate housing, and restaurants. System institutions would additionally be permitted to invest in venture capital funds. The ABA concedes System institutions have authority to invest in and establish Rural Business Investment Companies (RBIC), pursuant to 7 U.S.C. 2009cc, and so does not address the following comments to the RBIC provisions of the proposed rule.

FCA Does Not Have Authority to Enact the Proposed Rule

The FCS and FCA operate pursuant to the *Farm Credit Act of 1971*, as amended. The proposed regulations would radically depart from the System's statutory mission of serving farming, agriculture and other defined activity, by authorizing FCS institutions to finance economic development projects in parts of America that are not urban. The preamble of the *Farm Credit Act of 1971*, and the statute's corporate powers provisions are cited as authorizing this radical departure from the System's traditional mission. [6]

Preamble as Authority

The preamble, while explanatory, is merely text preceding the bill and is not part of enacting or statutory language. The ABA submits that the preamble of the *Farm Credit Act* does not grant the required authority for the proposed regulations; it has no legal effect other than to provide context for the statute. The preamble to the 1971 Act reads:

> To further provide for the farmer-owned cooperative system of making credit available to farmers and ranchers and their cooperatives, for rural residences, and to associations and other entities upon which farming operations are dependent, to provide for an adequate and flexible flow of money into rural areas and to modernize and consolidate existing farm credit law to meet current and future rural credit needs, and for other purposes.[7]

The FCA suggests the preamble's emphasis on "rural" and the clause "to provide for an adequate and flexible flow of money into rural areas," provide the Agency its necessary mandate and authority to offer the proposed rule. The ABA submits that even if a bill's preamble has actual legal effect over express statutory language, and it does not, the FCA's interpretation is misplaced. A bill's preamble does not sit in isolation as an island unto itself, and if used as operative authority for agency action, the interpretation at the very least must be consistent with the statutory history and actual statutory text.

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[5] Federal Register Vol. 73 No. 116 Monday, June 16, 2008 p. 33931.
[6] Federal Register, Supplementary Information (I)(A) p. 33932.
[7] House Report No. 92-593, Farm Credit Act of 1971, p. H10179.

The FCA's reliance on "rural" and "flexible flow of money" in the preamble of the 1971 farm credit legislation completely ignores the statutory historical context and the plain language of the Act. On nearly every occasion since 1971, as Congress has considered expanding FCS financing authority beyond farming and agriculture, Congress has dictated no expansion. For example, during the 1971 debate, the House and Senate considered whether FCS institutions should fill the need of extending credit to finance the purchase of non-farm rural housing. Concerned with a dilution of farmer and rancher System ownership, Congress declined, limiting institutions to financing non-farm rural housing for populations up to 2,500.[8] According to the record, "[t]he bill was amended to require that rural areas shall not be defined to include cities and villages in excess of 2,500 inhabitants. It will help assure continued farmer control of their banks and associations..."[9]

Most recently, during the 110th Congress, as part of the *Food Conservation and Energy Act of 2008* (2008 Farm Bill), the House and Senate again took up the issue of expanding FCS finance authority. The System, as part of its HORIZONS initiative, sought to expand ownership interests, financing eligibility, and to raise the population limits for non-farm rural housing from 2,500 to 50,000.[10] In support, some Members of Congress authored mission extending language that became part of the House of Representatives version of the Farm Bill as the legislation moved through the Committee on Agriculture.

When the bill reached the House Floor, the Chairman of the House Financial Services Committee, Representative Barney Frank (D-MA), supported by the Committee Ranking Member, Representative Spencer Bachus (R-AL), offered an amendment to remove the expansive provisions. The Chairman and Ranking Member were concerned that the language would move the Farm Credit System away from its original limited GSE purpose of serving farming and agriculture. Following debate on Mr. Frank's proposal, the full House voted for the amendment, removing the expanding provisions from the *2008 Farm Bill*, thus retaining the pre-existing non-farm rural housing restriction, which remains at its 1971 *Farm Credit Act* level, 2,500.[11] Following the House refusal to extend Farm Credit's mission, no such provisions reappeared in the Senate version of the farm legislation, despite vigorous lobbying efforts by the Farm Credit System.

The thirty seven year history of the *Farm Credit Act of 1971* makes three things clear: (1) The Farm Credit System was created for the limited purpose of providing credit and financial services for farming and agriculture; (2) Congress has a strong interest in protecting the Farm Credit ownership interests of farmers and ranchers; and (3) When there is a departure from the original mission, Congress is the entity that authorizes expansion. This is a history the FCA cannot deny, and authority the Agency cannot usurp.

That said, a historical analysis of non-statutory language, while providing an excellent lens through which to understand Congressional intent, cannot take the place of the actual statute. *The Farm Credit Act*, as amended, clearly defines the limited financing role of the Farm Credit System.

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[8] *Id* at 12. See Also 12 U.S.C. 2019(b)(3) and 2128(f) where Congress extended authority to finance water and waste treatment facilities, limited to rural population not exceeding 20,000.

[9] House Report Farm Credit Act of 1971, Report No. 92-593, p.12.

[10] FCS desired 50,000 as the language for the bill; submitted language limited non-farm rural housing to populations of 6,000 and under. See House Report 110-261 Congressional Record.

[11] House Report 110-261 Congressional Record, H8727-8730.

Pertinent financing and eligibility provisions of the statute are found in 12 U.S.C. 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2128, and 2129; The sections provide authorizing language for the Farm Credit System, and importantly define the recipients of financing. According to the provisions, eligible recipients include bona fide farmers, ranchers, producers and harvesters of aquatic products, agricultural processing and marketing operations, farm related business operations, owners of rural homes (limited to populations of 2,500), and cooperatives formed for the purpose of establishing or operating water and waste disposal facilities (limited to populations of 20,000 and under).[12] In no language of the Act is an eligible recipient identified as an individual, business, or project located in rural America, with "rural" being defined as populations of 50,000 and under. Nonetheless, the FCA proposes, despite the plain reading of the statute, and regardless of the Congressional history, Congress intended System institutions to finance the building of hospitals, bridges, schools, roads, office parks, hotels, and restaurants. The FCA would further propose that Congress gave the System authority to define its service area when seeking to participate in non-farm and non-agriculture financing.

Reliance on the preamble as statutory authority blatantly ignores the Congressional history from which the text is derived. Moreover, the Agency's interpretation of the preamble's enacting authority and meaning is not reasonable, in that such an interpretation is in direct conflict with the law; the proposed rule is not a permissible statutory construction, and cannot be seen as anything other than arbitrary and capricious. The *Farm Credit Act* and the associated legislative history are well understood to mandate that FCS institutions are limited-service entities specifically designed to provide credit and financial services to farmers and America's agricultural interest.[13]

Investment Provisions as Authority

The FCA again misapprehends statutory construction when relying on the Act's investment powers as delineated in the statute's corporate administrative provisions.[14] Congress granted System institutions the authority to make investments for the purpose of managing institution capital, hence the provisions' location in parts of the statute addressing System corporate structure, and not in parts of the Act addressing financing and eligibility.[15] Historically, the FCA has adopted the capital management interpretation, as provided in 12 CFR 5132, and as stated in the Proposed Rule Supplementary Information.[16]

Section 12 CFR 615.5132, *Investment Purposes*, addresses FCS investment powers provisions, and states: "Each Farm Credit Bank is allowed to hold eligible investments… in an amount not to exceed 35 percent of its total outstanding loans, to comply with the liquidity reserve requirement of section 615.5134, manage surplus short-term funds, and manage interest rate risk under section 615.5135." Section 12 CFR 615.5133 requires Boards of Directors of the various banks to adopt written policies for managing investment activities.

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[12] See 12 U.S.C. 2015; 2017; 2018; 2019; 2128.
[13] House Report Farm Credit Act of 1971, Report No. 92-593.
[14] Federal Register, Supplementary Information (I)(A) p. 33932.
[15] See 12 U.S.C. 2013(15); 2122(13);(A);2073(10); and 2093(18). Compare to 12 U.S.C. 2019; 2020;2128; and 2129.
[16] See Federal Register, Supplementary Information (II)(E)(3) p. 33938.

The FCA forwards the position that Congress granted FCS investment powers for the purposes of managing System risk and liquidity, *and* to finance the building of hospitals, schools, bridges, roads, office parks, hotels, and restaurants. The FCA further proposes that Congress intended System institutions to finance these projects by purchasing non-marketable securities, using the surplus capital of the farmer and rancher owners. This interpretation simply cannot be what Congress intended in light of the statutory history, Congressional Record, and the plain statutory language, as discussed above. Congress would not specifically debate and limit FCS institutions to farming and agriculture, consider and decline expansion for nearly four decades, all the while covertly intending to allow institutions to escape their limited financing mission through the Act's corporate and administrative investment provisions. The FCA's interpretation plainly is not reasonable and only represents an interpretation stretched to permit desired expanded commercial lending activities, and not an honest attempt to apply the *Farm Credit Act.*

Admittedly courts provide agencies great deference when evaluating an agency's interpretation of its own statute; however, as articulated by the U.S. Supreme Court in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., in analyzing agency action, courts consider "first whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter… If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute… Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[17]

The Farm Credit Administration's proposal fails under any possible Chevron test. At issue is whether the System can finance activity not related to farming and agriculture as specified in the *Farm Credit Act of 1971*, as amended. The Act is clear that FCS institutions are statutorily restricted and so the proposed financing is prohibited. Congress has directly spoken on the issue of what and where System institutions can finance and what and where they cannot, and the activity envisioned in the proposed rule is not included. Even if the issue were not one of financing but "investing," the proposal still fails. The Agency's interpretation of statutory corporate powers provisions cannot be permissible considering the long-standing limited and restricted mission of the Farm Credit System as plainly provided in the historical Congressional Record and Act. In fact, the FCA's interpretation is in direct conflict with the System's mission.

The ABA submits that the proposed interpretation does not serve farming and agriculture, and arguably dilutes the interests of the farmer and rancher owners, a concern often voiced by Congress when considering expanding FCS institution authority. Clearly, throughout the legislative record and Congressional history, Congress has sought to protect the interests of farming and to limit the scope of FCS authority. No reasonable person could conclude that Congress intended the FCS to finance non-farming/agricultural activity, particularly the "investments" envisioned by the proposed rule; the Congressional record is far too complete to reason otherwise. The record also provides plain evidence that any time Congress expands FCS authority it has done so by legislative statute. The proposed interpretation of the Act's investment powers is an impermissible construction of the *Farm Credit Act of 1971* as amended, and is arbitrary and capricious.

[17] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837.

The Defined Activity is Financing not Investing

Even if the FCS possessed additional "investment" powers, the proposed activity is financing and not "investing," and therefore prohibited by statute. The Office of the Comptroller of the Currency defines an "investment security" as a "marketable debt obligation that is not predominantly speculative in nature."[18] The Oxford Dictionary of Finance and Banking states that an investment is "the purchase of assets, such as securities... with a primary view to their formal return, either as income or capital gain." Black's Law Dictionary defines investment as "an expenditure to acquire property or assets to produce revenue; a capital outlay." Finance is defined "to raise or provide funds." Oxford states that finance is "[t]he capital involved in a project, especially the capital that has to be raised to start a new business."

The purpose of the proposed rule is to "finance essential community facilities... finance basic infrastructure... [and] directly finance economic development."[19] By definition and practice, System institutions would finance activity unrelated to farming and agriculture. This would be activity antithetical to the *Farm Credit Act* and inconsistent with Congressional intent, and therefore prohibited. The FCA proposes System institutions utilize their surplus, not for the purpose of investing, but to directly fund "rural" economic development, a role more suitable for traditional commercial lenders. Cloaking financing as investments, debt securities, or obligations does not cure the statutory prohibition, in that the literal and practical effect is the direct financing of rural economic development unrelated to the mandate and authorization of the *Farm Credit Act.*

Authority to Define Rural

Statutory language is stretched further when the Agency defines "rural." According to the FCA, "rural" includes all U.S. geography "outside an urban area," i.e., populations under 50,000.[20] Under the proposed definition, 89.5 million Americans would qualify for Farm Credit assistance, covering 98 percent of the country's land mass. In California the System would finance economic development in 95.8 percent of the state, reaching approximately 4 million people; New York would provide FCS institutions just over 93.1 percent of its state, and 3.5 million residents; and Florida would allow FCS authority in 89.9 percent of the state, accessing 2.6 million.[21]

As a rule, Congress defines "rural" under the *Farm Credit Act.* This has occurred on two occasions, first, for rural housing as noted above, and second, in regards to banks for cooperatives to finance water and waste disposal facilities, wherein rural is limited to populations not exceeding 20,000.[22]

It is significant that Congress specifically and differently defines rural in some provisions of the Act and is silent in other parts. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in disparate inclusion or exclusion."[23] Because Congress has occupied

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[18] 12 CFR 1.2.
[19] Federal Register, Supplementary Information (II)(B)(1-5) p. 33935-36.
[20] Federal Register, Supplementary Information (II)(A) p. 33934.
[21] United Stated Department of Agriculture, Economic Research Service, September 2007 (Year 2000 data). See attached maps: California, New York, and Florida, depicting rural areas pursuant to FCA proposed rule.
[22] 12 U.S.C. 2128(f).
[23] Rusello v. United States, 464 U.S. 16, 23.

the field of defining "rural" under the *Farm Credit Act*, and has specifically done so in different provisions of the statute governing non-farm activity, the FCA is prohibited from defining "rural" on its own accord. If the Agency wants to employ a new definition for purposes of conducting the proposed activity, it must go before the U.S. Congress, and not to the Code of Federal Regulations.

The Proposed Rule Threatens the Safety and Soundness of the Farm Credit System

The Farm Credit Administration, not satisfied with its assault on statutory construction, does further damage by trampling on general standards guiding safety and soundness. Section 615.5176(e) of the proposed rule would authorize System institutions to utilize up to 150 percent of their surplus to finance economic development that is unrelated to farming and agriculture. It is beyond reason that the FCA, a financial institution regulator, would authorize the System to bet all the surplus of farmer and rancher owners, plus 50 percent, on investments the Agency admits are not marketable and would not trade.[24] To redirect farming and agriculture surplus, which derived from statutory related financing, specifically removes that surplus from farming and America's agricultural interests, into financing long-term, uncertain, less liquid "rural" development projects. Should a significant percentage of the non-*Farm Credit Act* "investments" fail, the owners of the System (farmers and ranchers), and the country's agricultural industry would suffer severe consequences. The Agency's first and only priority must be its statutory mission, and not the role of market speculator. It is extraordinary the FCA would gamble away 150 percent of the capital Congress specifically designated to support farming and agriculture. That the FCA proposes to risk such large amounts of farmer and rancher capital via "investments" in which the System has little or no familiarity exposes the Agency's inexperience and lack of credibility when managing such non-mission "investments."

The proposed rule also violates principles limiting the mixing of banking and commerce, a practice long curtailed by banking regulators due to the potential manipulation of normal market functions. When banking and commerce are integrated there exists a genuine risk of insider activity, preferential treatment, undue influence, and anti-competitive lending.

Under the proposal, FCS institutions could finance Farm Credit eligible business activity, via an equity stake or securities purchase, and would then be able to also provide credit as additional financing. As a result, the institutions would have the ability to exercise undue influence to coerce the business to accept credit terms, or otherwise offer attractive terms contingent upon the receipt of the equity stake. If the business is non-farm or non-agriculture related, System institutions could finance through securities or an equity position and then connect the business to a favored non-System lender for debt financing, from whom the System institution could later purchase the same debt as a security. FCS institutions could further protect their interests by providing financing to the suppliers and customers of the businesses in which System institutions have invested.

In essence, businesses, projects, suppliers and customers would become de-facto commercial affiliates of the Farm Credit System, with FCS institutions possessing the power to control the terms of financing and lending, while excluding a large portion of the private sector. Such insider-non-

[24] Federal Register, Supplementary Information (II) (E) (1) p. 33937. See also Supplementary Information (II) (E) (2) p. 33938.

arms length and anti-competitive transactions are the very type of activities Congress and banking regulators have sought to guard against.

Rural Business Investment Companies

Congress authorized the establishment of Rural Business Investment Companies (RBIC) under the Rural Business Investment Program (RBIP), 7 U.S.C. 2009cc. Within the provision, Congress specifically authorizes Farm Credit System institutions to establish and invest in RBIC entities. In doing so, Congress placed limits on the percentage of capital and surplus any institution can invest (5 percent), in addition to threshold restrictions on ownership amounts.[25] According to RBIP, an FCS institution may hold up to 25% of the shares of any RBIC entity, either singly or jointly with other System institutions or affiliates, after which the RBIC is restricted to only investing in or providing financial assistance to *Farm Credit Act* eligible entities.[26]

The ABA does not oppose System institutions investing in Rural Business Investment Companies pursuant to the Rural Business Investment Program. However, the RBIC provision supports the ABA's position that it is Congress who authorizes FCS activity outside of farming and agriculture. RBIC further demonstrates Congress's intent on ensuring the System does not stray far from the identified *Farm Credit Act* mission, thus the 25 percent threshold restriction.

Conclusion

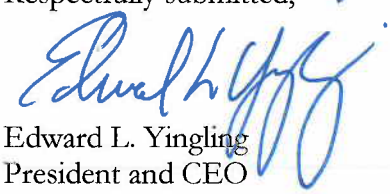
The purpose of the Farm Credit System is to provide credit and financial services for farming and agriculture, as defined by the Act. The FCA proposes to circumvent express statutory language of the *Farm Credit Act* and Congressional intent by imposing through regulation what Congress has refused to grant by legislation. Should the proposed rule be made final, it would be an affront to Congress and show complete disregard for America's legislative process. FCS institutions were created to serve America's farming and agricultural interests; that those interests may be shrinking does not provide a mandate to move beyond the System's mission. Expansion of the type proposed will erode the interests of the farmer and rancher owners and forever change the mission of the Farm Credit System.

The ABA strongly urges the Farm Credit Administration to abandon this latest attempt to rewrite the *Farm Credit Act of 1971* through regulation. The proposal that System institutions be the equivalent of non-GSE commercial lenders is illegal, not a reasonable application of the statute, and not in the best interest of the Farm Credit System and American farming and agriculture. Farmer and rancher owners require preservation of their capital, and the safety and soundness of the Farm Credit System deserves protection.

[25] 7 U.S.C. 2009cc-9(b) and (c).
[26] 7 U.S.C. 2009cc-9(c).

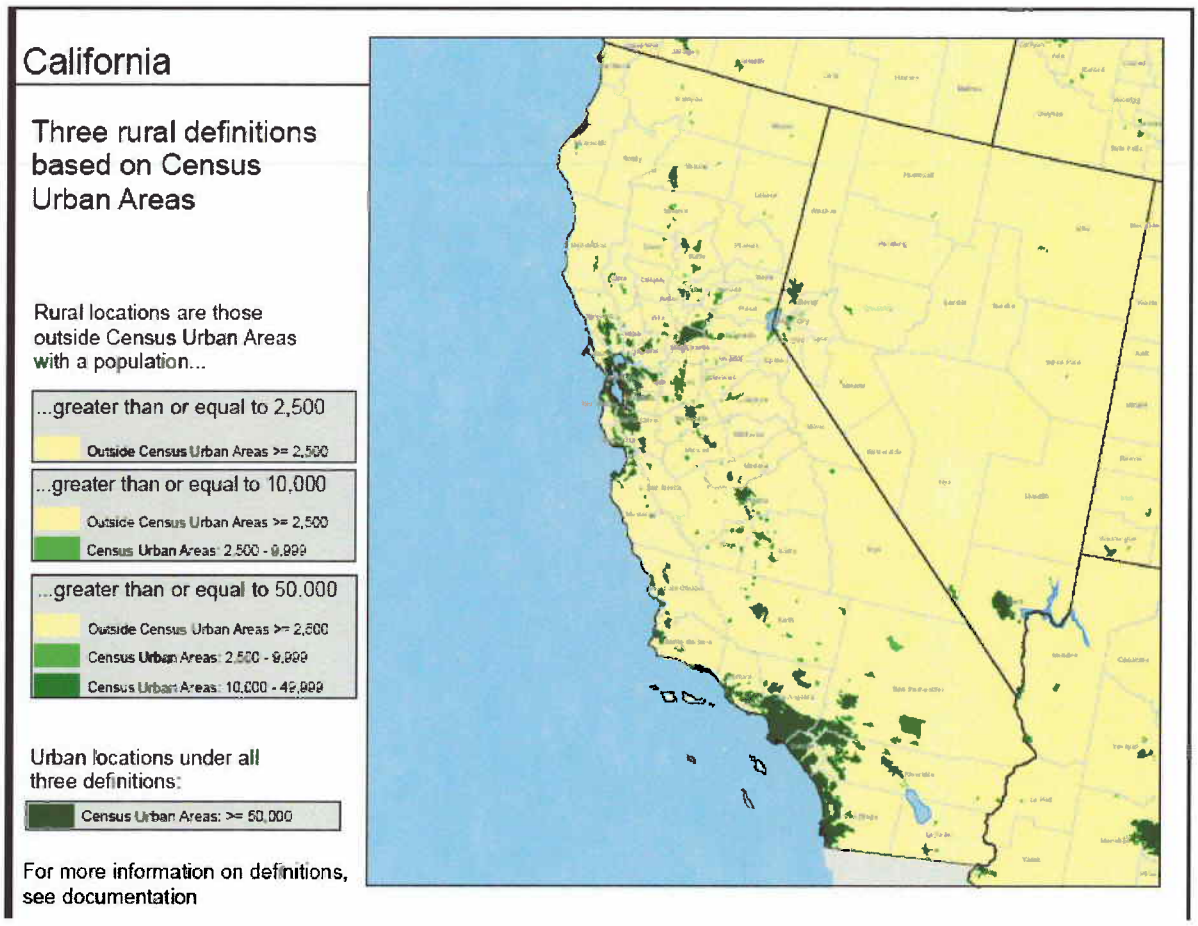
If you have any questions regarding these comments, please contact Vincent Barnes at (202) 663-5230 or John Blanchfield at (202) 663-5100.

Respectfully submitted,

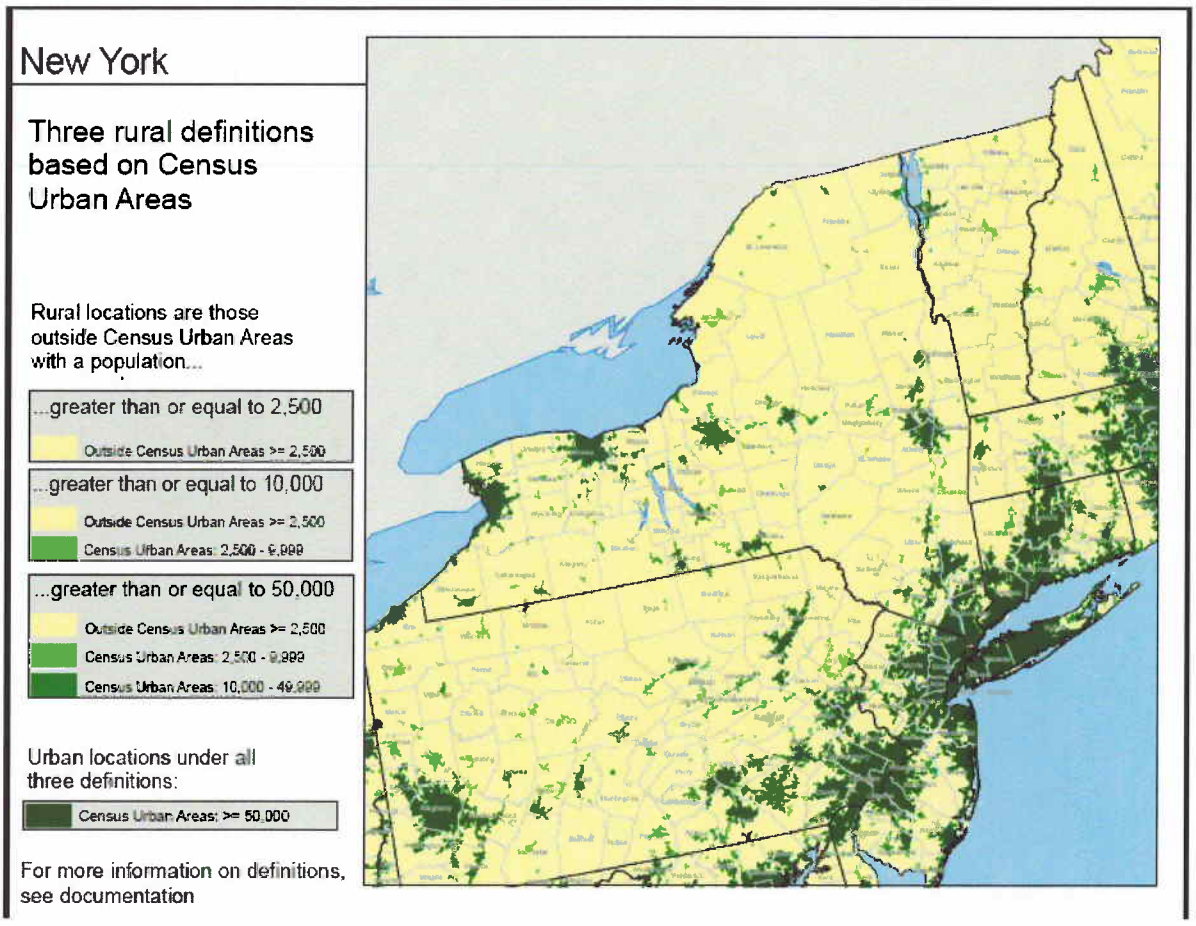
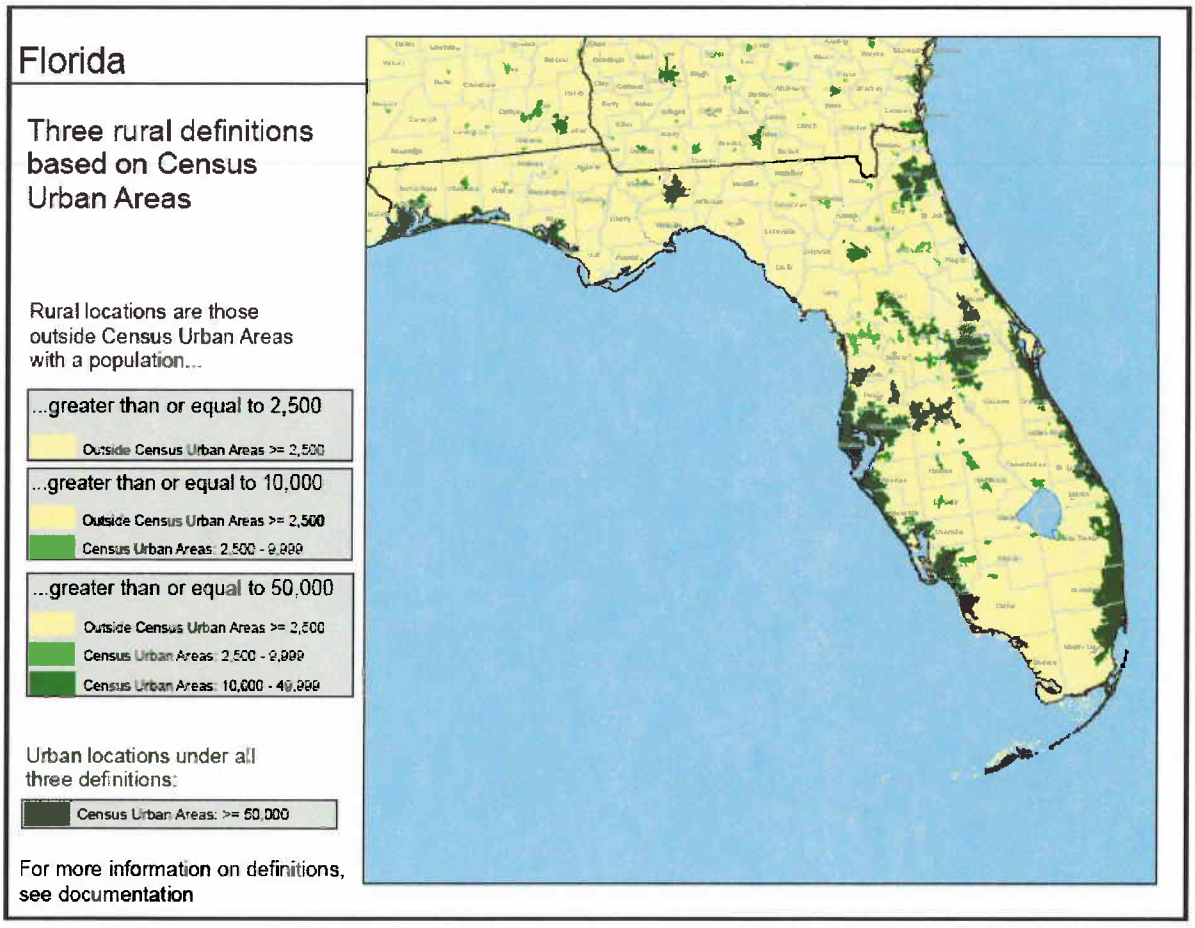


Edward L. Yingling
President and CEO

Attachment 1



Attachment 2



Attachment 3