JOINT EDITORIAL BOARD
for
UNIFORM REAL PROPERTY ACTS

February 11, 2020

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
400 Seventh Street SW
Washington, DC 20219

Re: Notice and Request for Input, No. 2020-N-1, Property Assessed Clean Energy (PACE) Program

Dear Mr. Pollard:

As conservator for Fannie Mae and Freddie Mac, the FHFA has requested public input on potential changes in its policies related to loans affected by PACE loans. This letter expresses our caution regarding the nature of any changes to these policies.

The JEBURPA is comprised of representatives from the American Bar Association Real Property, Trust and Estate Law Section, the Uniform Law Commission (ULC), and the American College of Real Estate Lawyers, as well as liaisons from the American College of Mortgage Attorneys, the Community Associations Institute (CAI), and the American Land Title Association (ALTA). The JEBURPA members advise the ULC regarding prospective uniform law projects relating to real estate, and seek to promote law reform by encouraging states to adopt existing uniform and model real estate laws. We emphasize, however, that the comments in this letter represent solely the collective views of the members of JEBURPA and have not been considered or approved by the ULC or the other constituent organizations of JEBURPA. In fact, we understand that both CAI and ALTA have submitted or will submit their own separate responses.

The Notice and Request for Input clearly reflects the FHFA's concern about the existence and operation of state PACE lending programs and the risks associated with PACE liens obtaining "superlien" priority over pre-existing first mortgage loans. The JEBURPA shares this general concern about PACE lending as a structural matter. We share this concern not because the possibility of a superlien is inherently unfair—quite the contrary—but because the empirical case for lien priority for PACE loans appears weak. First, there is a dearth of empirical evidence to establish that energy-efficiency improvements financed by PACE loans enhance the value of homes to an extent sufficient to justify PACE liens receiving priority over pre-existing mortgage liens. Second, there is likewise a dearth of empirical evidence to demonstrate that PACE loan superpriority is needed to facilitate home energy efficiency improvements (as compared to other traditional financing sources, such as second mortgage or home equity lending).

At present, however, the FHFA has offered no data to demonstrate the actual magnitude of the risks posed to the Enterprises by PACE lien priority. Without data on "which loans have PACE liens and in what amount," [Question 5], we are unable to offer informed suggestions regarding whether the Enterprises face meaningful safety and soundness concerns or what steps (if any) that the FHFA could or should take to address those concerns. Any substantial change in policy should await data showing that the change is at least roughly calibrated to respond to the actual risk posed by PACE lending.

Further, even assuming that these risks are of a magnitude to justify some policy change, we would strongly discourage the FHFA from considering or adopting certain of the policy changes discussed in the Notice. For example, Question 1 seeks input on whether the FHFA should direct the Enterprises to "decrease loan-to-value ratios for new loan purchases in states or in communities where PACE loans are available." Such a policy change would be unfortunate, as it would be the proverbial "launch[ing] of a missile to kill a mouse" (in the words of the late Justice Blackmun). Even in states and communities with active PACE lending programs, it seems likely that the vast majority of mortgages held by the Enterprises are not affected by a PACE lien at all, and the percentage of those mortgages affected by a defaulted PACE lien is likely even smaller. Requiring increased downpayments of all borrowers to account for the risks posed by a small minority of borrowers would be an unfortunate housing policy, as it could both diminish home values in those states generally and compromise the FHFA's general mission to encourage home ownership. Increases in Loan Level Price Adjustments or credit enhancements on all loans in communities with PACE lending [Question 2] would likewise punish all borrowers on account of risks posed by a few.

To the extent that the FHFA decides to modify policies for the Enterprises to account for risks posed by PACE loan programs, we encourage the FHFA to consider adjustments and/or credit enhancements more narrowly tailored to the risks posed by PACE lending. One mechanism for doing so would be through private mortgage insurance. Consider an example in which a borrower obtains a PACE loan on a property secured by a mortgage held by an Enterprise, without the Enterprise's consent, and of a size which places the loan at a loan-to-value ratio at which the Enterprise would customarily require the borrower to maintain private mortgage insurance. In that example, it would be appropriate for the Enterprise to require the borrower to continue or to reinstate PMI coverage for as long as the loan amount remains at a level at which the Enterprise legally could insist on PMI coverage. This type of approach would distribute the enhanced risk of PACE lending where it belongs—on PACE borrowers—rather than distributing it across all borrowers.

We agree that the lack of uniformity in PACE lending programs from state to state, and from community to community within a state, is suboptimal. But in the current environment in which existing state and local laws vary, if federal law is not going to pre-empt state law altogether, then the FHFA should act with circumspection and should make policy changes (1) only as demonstrably needed to offset the quantified risks posed by PACE lending, and (2) only in ways that distribute those risks across the universe of PACE loans rather than the universe of all home mortgage loans.

Respectfully submitted,

R. Wilson Freyermuth
Executive Director, JEBURPA