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March 16, 2020

The Honorable Mark A. Calabria
Director
Federal Housing Finance Agency
400 7th Street, SW
Washington DC, 20219

RE: PACE Request for Input, Notice No. 2020-N-1

Dear Director Calabria:

I am pleased to submit the following comments to the above referenced docket on behalf of Community Associations Institute (CAI).

Summary:

- » CAI commends FHFA for acknowledging critical differences between community association lien authority and PACE programs.
- » CAI supports cooperation with state and local government to document PACE liens and supports additional communication between borrowers and mortgage servicers regarding PACE loans.
- » CAI asserts the dearth of relevant data on PACE liens impedes analysis and is a counter argument to imposition of arbitrary and capricious credit restrictions on California and Florida housing markets.

Background on Community Associations

Community associations are commonly referred to as condominium associations, homeowner associations, and housing cooperatives. Generally organized as private non-profits, community associations operate pursuant to various state statutes and certain conventional real estate practices.

The community association housing model has experienced continuous growth. In 1970, there were an estimated 10,000 community associations accounting for approximately 700,000 housing units and 2.1 million residents. In 2018, there were an estimated 26.9 million homes in

CAI is the only national organization dedicated to fostering competent, well-governed community associations (condominiums, cooperatives and planned communities) that are home to approximately one in every five American households. For more than 40 years, CAI has been the leader in providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI's 36,000 members include community association volunteer leaders, community managers, community management firms, and other professionals and companies that provide products and services to community associations.

community associations, and an estimated 73.5 million individuals resided in community associations. This accounted for 25%–27% of the national population.

Homeowner associations accounted for between 54% and 60% of community associations, condominium associations between 38% and 42%, and housing cooperatives between 2% and 4%. In 2018, the value of community association housing units was estimated at \$6.28 trillion.¹

Community Association Lien Priority

Community associations provide municipal-type services for residents. Common association services and activities include maintenance of parking lots, sidewalks, roads, culverts, and bridges and contracting for waste removal services. Many community associations purchase water, sewage, and electric utility services for residents. Community associations insure common property against multiple perils to safeguard community assets.

Owner assessments are typically the sole resource available to associations to fund these vital community services and activities. Accordingly, association assessments are lien-based, with state statutory frameworks providing community associations a lien against association housing units or lots for assessments at the time a declaration of covenants is recorded. Courts have upheld this statutory framework on the basis that assessment revenue is fundamental to the “financial integrity” of community associations.²

To further safeguard the financial integrity of community associations, many states provide a limited priority for community association liens when assessments become delinquent. This policy of limited community association lien priority reflects a balancing of interests among all interested parties, promoting financial stability of association households and limiting losses for mortgagees and secondary market actors.

Community Association Lien Priority Protects Owners, Mortgagees, and Secondary Market

In 1978, Henry Judy, former general counsel of Freddie Mac wrote, “the problems resulting from defaults in payment of unit assessments may be felt beyond the condominium itself. Not only the

¹ Foundation for Community Association Research: Statistical Review for 2018-2019 (Summary). Available at <https://foundation.caionline.org/wp-content/uploads/2019/07/2018-19StatsReview.pdf>.

² See *Trustees of the Prince Condominium Trust v. Prosser*, 412 Mass. 724-726 (1992), where the Massachusetts Supreme Court held, “A system that would tolerate a unit owner’s refusal to pay an assessment because the unit owner asserts a grievance, even a seemingly meritorious one, would threaten the financial integrity of the entire condominium operation. For the same reason that taxpayers may not lawfully decline to pay lawfully assessed taxes because of some grievance or claim against the taxing governmental unit, a condominium unit owner may not decline to pay lawful assessments.”

unit owners, but also their creditors, including their mortgagees...”³ Mr. Judy’s comments were directed to the Uniform Law Commission (ULC), which was developing the Uniform Condominium Act. The far-reaching impact of assessment defaults was a concern of commissioners who broadly understood that community association assessments are analogous to property taxes.

To protect and balance the financial interests of numerous parties the ULC recommended states provide a limited priority for community association liens. Under this statutory framework an association is provided a true priority for the portion of its lien that is equal to 6 months of unpaid assessments. At present, 21 states, the District of Columbia, and the Commonwealth of Puerto Rico have statutes providing limited priority for community association assessment liens.⁴

Enforcement of the association’s limited lien priority is the only available remedy to offset assessment defaults that does not broadly damage homeowner, mortgagee, and secondary market interests. Deferred maintenance decreases the value of property, eroding equity to the detriment of owners, mortgagees, and the secondary market. Reduced reserves contributions increase the risk of future financial shocks to homeowners and impede the repair or replacement of association capital assets. Increased assessments to cover revenue shortfalls resulting from assessment defaults make homeowners, mortgagees, and secondary market entities involuntary creditors funding association services for defaulting owners and negligent mortgagees.

Community association lien priority prevents shifting of financial burdens from delinquent property owners or negligent mortgagees to other vested parties in the community. The balancing of interests achieved by community association lien priority protects the financial viability of households and the association. This has a net direct and positive impact on all association households, mortgagees, and the secondary market.

Community Association Lien Priority is Disclosed to Housing Finance System Actors

Community association lien priority is enshrined in state statutes which are a matter of public record. All mortgagees and secondary market actors have an obligation to be familiar with applicable statutes governing commerce in the jurisdictions in which they conduct operations. No participant in the housing finance system is without notice of the limited lien priority in the 23 United States jurisdictions having adopted such a statute.

Community association covenants are recorded in local land records and are available to title researchers, mortgagees, servicers, and the secondary market. Information from these records are

³ Henry L. Judy and Robert A. Wittie, “Uniform Condominium Act: Selected Key Issues” *Real Property, Probate and Trust Journal*, Vol. 13, No. 2 (Summer 1978) p. 482.

⁴ States with at least a 6-month limited lien priority for community association assessments: Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia.

broadly available and routinely used in the housing finance system. As an example, the Uniform Residential Loan Application (URLA), which is designed to integrate with the Mortgage Industry Standards Maintenance Organization's mortgage data architecture, captures several community association housing model datapoints.⁵ The URLA identifies housing units or lots subject to a declaration of covenants, the association type (PUD, condominium, cooperative), the jurisdiction in which the real property securing the transaction is located, and if the property is subject to a lien that may become prior to the first mortgage. It can only be through negligence that a housing finance system participant is unaware of the applicability of association lien priority statutes.

Community association lien enforcement authority is constrained by statute. Association foreclosures in judicial and non-judicial foreclosure jurisdictions often take 1 year to complete.⁶ Community association state foreclosure statutes require opportunity to cure, notice to parties with a recorded interest in the property, and notice in publications of record.⁷

These constraints afford a defaulting property owner opportunity to cure an assessment deficiency and allow interested or contractually obligated parties to protect the priority position of a first mortgage. Housing finance system participants have an obligation to comprehend the foreclosure procedures in the jurisdictions in which they conduct operations, respond to notices, participate in foreclosure proceedings, and comply with contractual obligations to protect the priority of a first mortgage.

It is CAP's general experience that community associations seek to avoid foreclosures. Foreclosure is time consuming, costly, and exposes the association to risk. Community associations prefer to work with homeowners and housing finance system actors to cure assessment defaults and association lien priority is a balanced incentive for all parties to work to this end.

Community Association Lien Priority Broadly Accepted by the Housing Finance System

Fannie Mae, Freddie Mac, and the Federal Housing Administration (FHA) have for decades accommodated lien priority statutes in rules and guidance.⁸ The FHA explicitly rejected policy excluding homeowners in states with a limited community association lien priority from participation in the Home Equity Conversion Mortgage program.⁹ A review of Enterprise loan acquisition data shows continued support for the community association housing model in states providing community associations a limited lien priority. In sum, the housing finance system has

⁵ See, for example, January 29, 2020 ULAD Map Unique ID fields 2.001, 2.002, 2.0052, and 2.0060.

⁶ [Example of association foreclosure timeline in judicial foreclosure jurisdiction.](#) [Example of association foreclosure timeline in non-judicial foreclosure jurisdiction.](#)

⁷ See, for example, MA Gen. Law Ch. 183A § 6 and NRS 116.31162.

⁸ See Fannie Mae Single Family Servicing Guide B-1-01, Administering an Escrow and Paying Expenses. See also Freddie Mac Single-Family Seller/Servicer Guide 8201, Escrow. See also FHA Single Family Housing Policy Handbook 4000.1.III.2.r: Foreclosure.

⁹ 82 FR 7094-Federal Housing Administration: Strengthening the Home Equity Conversion Mortgage Program.

incorporated association lien priority in its operational guidelines, rejected policy that restricts access to credit for association lien priority jurisdictions, and continued to supply credit to community association homeowners across the nation.

FHFA Inquiries Concerning PACE Liens

CAI shares some concerns expressed by FHFA regarding PACE liens. In contrast to community association limited lien priority, the current PACE framework is opaque and impedes title searches and other prudential measures to verify existence of a PACE lien. Unlike community association limited lien priority, PACE liens are not subject to statutory cap or limitation.

Community association assessments are subject to state disclosure laws and are included as mortgage related obligations in ability to repay tests under the federal Truth in Lending Act (TILA). These consumer protections minimize the risk of homeowner assessment default, protecting the financial interests of borrowers, community associations, mortgagees, servicers, and secondary market investors. While Congress enacted legislation to subject PACE loans to TILA ability to repay tests, the Consumer Financial Protection Bureau has yet to finalize compliance regulations and guidance to PACE lenders. This could lead to household financial distress and overextension absent the benefit of comparable, strong state consumer protections afforded community association homeowners.

CAI understands FHFA's desire to quantify risks associated with PACE loan programs and PACE liens. Analysis of risks requires data FHFA lacks and through this request for information seeks. The lack of analysis has led FHFA to request feedback on certain policy solutions that are not evidence-based. CAI urges caution to avoid unintended consequences sure to emerge if policy is adopted based on conjecture and ideology rather than empirical evidence.

CAI Urges Cooperation with State and Local Government to Create a PACE Registry

FHFA asks what actions a state or local government can or should take to disclose PACE liens. CAI agrees state and local governments have both capacity and data required to disclose PACE liens. CAI urges FHFA to work cooperatively with state and local governments to develop a disclosure framework to identify properties encumbered by a PACE lien.

CAI Supports Increased Communication between Servicers and Borrowers

FHFA inquires if mortgage servicers should provide more frequent notice to borrowers in jurisdictions authorizing PACE loans that liens resulting from PACE loans violate the terms of the mortgage contract. Communication between servicers and borrowers is valuable and CAI supports a notification program to educate borrowers on their obligations as mortgagors.

CAI Opposes Increased Fees for Borrowers in California and Florida

Mortgage underwriting criterion such as loan-to-value ratios and Loan Level Price Adjustments (LLPAs) must have a valid empirical basis. FHFA presents no loan loss data to support an evidence-based policy to increase equity or credit enhancement requirements for borrowers in California and Florida. Indeed, FHFA admits the agency lacks data on PACE-related losses, even to the point of inquiring of market participants if such data exist. While CAI may share FHFA's concerns about the lack of data on PACE liens, the absence of data does not justify imposition of arbitrary and capricious fees on borrowers. FHFA is a world class regulator and world class regulation is evidence based.

CAI notes California and Florida are states where the community association housing model is prevalent. These community association homeowners already face high housing costs—FHFA should not position the agency as an additional impediment to housing opportunity.

CAI does not believe FHFA desires to impose arbitrary and capricious fees on borrowers at the risk of its regulatory reputation. CAI urges FHFA to abandon any plan for increased equity, additional credit enhancement requirements, or new LLPAs on California and Florida borrowers unless justifiable safety and soundness concerns emerge that are based on validated empirical analysis.

Conclusion

CAI notes the substantive, statutory differences between community association limited lien priority and PACE liens. CAI commends FHFA for its recognition that PACE liens are a supervisory issue separate and apart from community association liens.

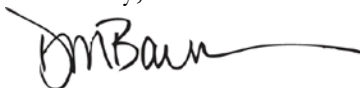
PACE liens are structured to benefit private lenders while community association limited lien priority is an appropriate balancing of interests that benefits all responsible parties in the housing finance system. Community association lien priority is a long-standing feature of the housing market and is reflected in Fannie Mae and Freddie Mac seller and servicer guidelines. Courts and the broad policy community have examined community association lien priority and determined a limited lien priority to be in the public interest.

CAI shares FHFA's goals of enhancing PACE lien disclosure and urges the agency to work cooperatively with state and local government to establish a workable disclosure regime. CAI does not believe increasing fees on borrowers in California, Florida, or other jurisdictions—state or local—that have adopted PACE programs is appropriate. FHFA can provide no empirical evidence

justifying such a course of action, exposing the agency to well-grounded accusations of arbitrary and capricious regulation. CAI does not believe this to be in the best interest of consumers or FHFA's reputation as an evidence-based regulator.

Thank you for the opportunity to respond to FHFA's request for information concerning PACE liens.

Sincerely,

A handwritten signature in black ink, appearing to read "DM Bauman", with a long horizontal flourish extending to the right.

Dawn M. Bauman, CAE
Senior Vice President, Government and Public Affairs
Community Associations Institute