TexasBankers Association
One Industry. One Vision. One Voice.

Submitted via Electronic Delivery
at RegComments@fhfa.gov

March 16, 2020

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

Re: PACE Request for Input Notice No. 2020–N–1

Dear Sir:

The Texas Bankers Association (TBA) takes this opportunity to submit the following comments in response to the Request for Information (RFI) on the desirability and feasibility of Property Assessed Clean Energy (PACE) programs.[1] TBA is the oldest and largest state banking association in the nation consisting of approximately 420 federally-insured depository institutions headquartered or doing business in the State of Texas.

In Texas, the PACE program, or TX-PACE as it is often called, was adopted in 2013 and is applicable only to commercial and industrial loans.[2] Included within the scope of the coverage, however, are residential real properties of more than five units.

By way of further limitation, any mortgagee on the property must be given written notice of the owner's intention to participate in the PACE program at least 30 days before the PACE loan closes and the holder of the underlying mortgage must consent to the PACE loan before that loan can be closed.

These limitations notwithstanding, the essence of this state constructed financing alternative is that the PACE loan is accorded "super-lien" status which is not only superior to the purchase money and all other prior liens but, as a property tax-based assessment, allows any delinquent balance to carry-over to a subsequent title holder. While this financing structure can

[1] 854 *Fed. Reg.* 2736 (Jan. 16, 2020).

[2] Property Assessed Clean Energy Act, 83rd Leg., Chapter 399, Local Government Code (June 14, 2013).

be appropriate in a non-residential commercial setting, the super-lien structure runs counter to the traditions and prudent practices of residential mortgage finance.

Historically, the Federal Housing Finance Agency (FHFA) and numerous other federal supervisory authorities have skeptically viewed any impediment to the legal underpinning of the "first mortgage."[3] For those federal entities whose responsibility it is to provide federal guarantees to mortgage obligations in both the primary and secondary market, we see no reason to depart from the current FHFA position that:

> One of the bedrock principles in this process is that the mortgages supported by Fannie Mae and Freddie Mac must remain in first-lien position, meaning that they have first priority in receiving the proceeds from selling a house…[4]

We are aware that in early 2016 both the Federal Housing Administration (FHA) and Department of Veterans Affairs (VA) announced that they would begin insuring mortgages on homes encumbered by PACE obligations.[5] But it is instructive that both agencies have since rescinded those rulings and no longer allow loans proposed for their insurance or guarantee to be to be closed with an outstanding PACE obligation.[6]

Another pertinent factor is the rising concern that consumer borrowers may not fully understand the consequences of assuming an increased financial obligation on their tax bill. The National Consumer Law Center has noted, for example, that "recent trends raise alarming questions about the potential for scams and abuse, especially against older consumers."[7]

In California, which is among the three states authorizing residential PACE programs,[8] state officials also seem to be having second thoughts:

> State officials are crediting the Bakersfield City Council and the Kern County Board of Supervisors with taking actions that may have protected local residents from an energy-upgrades financing mechanism that has since produced a wave of financial fraud allegations elsewhere in the Central Valley. Both local political bodies voted in July 2017 to ban local use of federal Property Assessed Clean Energy programs … Since then, other valley communities have seen multiple fraud

---

[3] OCC Supervisory Guidance 2010-25, programs that failed to observe existing lien preference to pose "significant regulatory and safety and soundness concerns." (July 6, 2010).

[4] https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx.

[5] https://www.moodys.com/research/PACE-ABS-and-RMBS-US-FHAs-Acceptance-of-PACE-Is--PBS_1036110.

[6] *See, e.g.*, VA Correspondent Seller Guide § 2.23 "All PACE obligations must be paid off as a condition to obtaining a new mortgage loan."

[7] "Property Assessed Clean Energy (PACE) Loans: State and Local Consumer Protection Recommendations" (November, 2019).

[8] info@pacenation.org.

cases and other problems related to the program better known as PACE. People unable to keep up with payments have lost their homes, in some instances.[9]

Our point, however, is primarily the larger one that state programs should not be permitted to take advantage of federally provided assistance (mortgage guarantees in this instance) when these very same state programs could serve to interpose both operational and financial (i.e., taxpayer) risks to the federally supported secondary mortgage market.

The RFI poses the specific question as to whether purchase price or pledging requirements could be modified to accommodate the super-lien status of PACE loans within federally assisted residential mortgage programs. Given the limited and less than uniformly positive experience to date, we respectfully suggest that the current FHFA limitations remain warranted in the residential mortgage market.

The U.S. Treasury Department has enunciated the same principle in its 2019 Housing Reform Plan observing that states and jurisdictions which have adopted laws that could have the effect of interfering with local housing markets should not then seek to utilize federal resources "to offset the adverse effects of these laws."[10]

Lastly, we would note that there is, of course, also a private label mortgage-backed securities market available for PACE loans and it could be that fuller performance records in that market could merit reexamination of this issue at a later date.

Thank you for the opportunity to submit these views.

Sincerely,

Chris Furlow
President & CEO

---

[9] *Bakersfield.com* (Feb. 12, 2020).

[10] U.S. Dept. Of the Treasury "Housing Reform Plan," p. 22 (Sept., 2019).