



March 16, 2020

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

Re: No. 2020–N–1

Dear Mr. Pollard:

The American Land Title Association (ALTA) applauds the Federal Housing Finance Agency (FHFA) for its leadership on Property Assessed Clean Energy (PACE) loans. As stated in the Request for Information, while these residential energy retrofitting programs may have the laudable goal of reducing America’s carbon emissions, their complicated authorizing laws and program structures give these loans a “super-priority lien” over existing and subsequent mortgages. This creates unreasonable and unnecessary risks for the entire mortgage market, including Fannie Mae, Freddie Mac and the Federal Home Loan Banks (FHLB).

FHFA’s decision in 2010 to direct Fannie Mae and Freddie Mac (Enterprises) not to purchase or refinance mortgages with existing PACE liens was prudent. We are not aware of any data that would suggest that the risks of PACE loans to the safety and soundness of the Enterprises or the efficient functioning of the mortgage market have lessened. ALTA’s 6,400 member companies urge FHFA to use caution before changing any of these policies.

### **Real Property Ownership in the United States**

Ownership of real estate involves the possession of interests in a “bundle of rights” relating to the use and disposition of real property. This includes the right to secure repayment of a debt through a grant of the right to take possession of the property given as security for the debt, commonly known as placing a lien against the real estate. Each state establishes its own laws providing for the priority of these liens. As a rule of thumb, the first lien that appears in the public record has the highest priority.

First-lien position minimizes credit risk for mortgage investors by giving them access to the collateral in the case of default. This results in lower risk for investors and

lower interest rates for borrowers. In the United States, the market standard for determining and assuring lien priority is a title insurance policy

In each state, property interests are transferred by private contract. Americans publicly record their interests in real property at the county or town recorder's office to impart constructive notice of the transfer. Public recordation in local property records systems is essential for protecting property interests and establishing lien priority.

Courts ultimately determine who possesses which property rights. Title professionals use their expertise to review public records, analyze those records against the requirements of state laws, and insure ownership and lien priority. This provides strong and cost-effective collateral protection to homeowners, the Enterprises, and mortgage investors.

## **Response to RFI**

ALTA has followed the development of PACE programs and FHFA's response to those programs with great interest. ALTA members recognize the value in lowering energy costs for consumers, creating jobs for the economy, and reducing buildings' carbon footprint for the environment. However, we have significant concerns that PACE programs present an unreasonable and unnecessary risk to the real estate market.

In this letter we will respond to questions 6, 5, 1, 2 and 3 of the RFI.

**Question 5: How might the Enterprises best gather or receive information on their existing guaranteed or owned mortgage loan portfolios to understand which loans have PACE liens and in what amount? Should mortgage loan servicers be required to gather and report such information to the Enterprises on a periodic basis? What would the costs and implications be of such a requirement?**

**Question 6: Would it be most effective for states that authorize PACE programs to require a registry of PACE lending so that information currently only held by PACE vendors or local tax rolls could be available and maintained on an ongoing basis? What data should be included in such a registry? What access would be permitted while protecting consumer privacy? Should a federal agency provide for such a registry? What minimum information would be available to allow credit reporting agencies to include PACE obligations in credit reports obtained in connection with mortgage origination or servicing?**

The most important concern for ALTA is the difficulty that title professionals and mortgage lenders face when attempting to discover the existence of a PACE loan, the amount outstanding on the loan and the amount of the periodic payment. To address this issue, ALTA believes states should require the filing of a PACE lien in a manner and form consistent with other types of private liens in the appropriate county or local property records system which the state has established for the provision of constructive notice of real property interests.

Records of PACE loans are typically only maintained in tax records. Specific charges for PACE loans versus other tax obligations may not be broken out on tax bills or other public records. Currently, only three states have active residential PACE (R-PACE) programs where the PACE loans obtain super-priority. These include California, Florida, and Missouri. In two additional states, (Maine<sup>1</sup> and Vermont<sup>2</sup>) the R-PACE programs issue loans that are subordinate to the first lien mortgage lender. According to the National Association of State Energy Officials, as of March 2018, \$4.3 billion in R-PACE debt is outstanding<sup>3</sup>.

PACE loans are typically structured as non-ad valorem special assessments. Historically, special assessment laws allowed government to finance specific, publicly owned improvements such as streets, schools, or sewers. Due to this structure, special assessments are commonly treated like real estate taxes. Thus, state law allows local governments to file a lien that gains super-priority over already recorded mortgages when the property owner fails to repay the assessment. Typically, it is only when there is a failure to repay that the PACE obligation appears in the property records.

In a typical real estate transaction, ALTA members search and examine property records to determine the marketability and insurability of the title. PACE programs make this process harder because under many state laws, PACE liens are not recorded in the property records and are instead only recorded with the tax assessor.

Title professionals typically obtain outstanding tax bills. This determines what amounts need to be paid at settlement to bring the taxes current. Often the periodic payment for the PACE loans are shown on the non-ad valorem tax line of a property's bill. Many times, the amounts provided on the tax bill are not specifically broken out to list the amount owed for PACE versus other taxes or special assessments. This structure makes it difficult for ALTA members to underwrite the transaction and provide information to owners or creditors about lien priority.

It would be more effective if states required PACE loans to be recorded in the county property records, just like mortgages or mechanics liens. As the Department of Energy acknowledges, "a reliable public information source is important for potential buyers, lenders, appraisers, title agents, and real estate professionals to confirm whether a property is encumbered by a PACE assessment."

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<sup>1</sup> See Me. Stat. tit. 35A, Chapter 99. "PACE assessments do not constitute a tax" and "a PACE mortgage is not entitled to any special or senior priority" over a primary home mortgage. Additionally, the law requires that in a forced sale or foreclosure, "any deficiency with respect to amounts previously secured by a PACE mortgage must be satisfied from the reserve fund."

<sup>2</sup> 24 V.S.A. § 3255

<sup>3</sup> Residential Property Assessed Clean Energy (R-PACE): Key Considerations for State Energy Officials Issue Brief. National Association of State Energy Officials. March 2018. Available at <https://www.naseo.org/data/sites/1/documents/publications/NASEO%20R-PACE%20Issue%20Brief.pdf>

Recording PACE liens in the property records system is preferable to creating an additional state database or registry. Recording in the property records system would make it easier for title companies to identify these obligations. This makes it easier to underwrite how the PACE obligation impacts title to real estate.

ALTA members take their privacy obligations seriously, however the purpose of public records is to provide constructive notice about the ownership rights impacting a property. Just like conventional mortgages, PACE liens should include sufficient information to allow title companies and buyers to identify the lien, when it was created and recorded, the property it encumbers, and whom to contact to obtain information about its current status.

States should also pass consumer protection measures governing PACE laws like those included in California AB 2063 (2018). This includes provision of better consumer disclosures to the homeowner, analysis of a borrowers' ability to repay, and real time sharing of information about the status of the loan with the borrower and their representative.

PACE loans make it more difficult for homeowners to sell their property. These consumer protections should ease that burden. While PACE loans are marketed as assumable by future owners, in practice these loans will have to be paid off at the time of sale because the buyer does not want to assume the obligation or their lender will not allow the obligation to remain.

California took a step in the right direction to solve this issue by requiring program administrators to work quickly to respond to homeowners and more importantly their representatives (commonly a title or settlement professional) about payoff. Additionally, state law should require homeowners not only to provide buyers with a disclosure about the PACE loan in the written sales contract<sup>4</sup>, but also require data about the obligation to be included in a listing on a multiple listing service.

**Question 1: Should FHFA direct the Enterprises to decrease loan-to-value ratios for all new loan purchases in states or in communities where PACE loans are available? By how much should available loan-to-value ratios be reduced to address the increased risk of such liens being placed on the property and what related implications would result from such actions? Should loan-to-value (LTV) ratios be reduced for all loan purchases sufficient to take into account the maximum amount of a PACE financing available in that community? Should potential future increases in permitted percentage of available PACE financing-to-assessed value be considered?**

**Question 2: Should FHFA direct the Enterprises to increase their Loan Level Price Adjustments (LLPAs) or require other credit enhancements for mortgage loans or re-financings in communities with available PACE financing? What increased**

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<sup>4</sup> Fla. Stat. 163.08 (14).

**levels would be appropriate for such LLPAs in light of the risks of PACE financing posed to the Enterprises?**

**Question 3: Should FHFA consider other actions regarding Enterprise purchase or servicing requirements in jurisdictions with PACE programs?**

As the RFI states, its purpose is to gather information to determine the need or ability to enhance “the actions to be taken regarding PACE liens in light of their continued threat to first lien mortgages.” However, without more empirical data, it is impossible to understand whether further action as suggested in questions 1, 2 and 3 is warranted.

To determine whether it is appropriate for FHFA to direct the Enterprises and the FHLBs to alter loan to value ratios, Loan Level Price Adjustments (LLPAs) or take other action due to the prevalence of PACE loans, it would be helpful to know the current outstanding balances of PACE loans, the percentage of Fannie and Freddie loans also encumbered by a PACE loan and the impact of collateral valuation of the types of energy efficiency upgrades financed by PACE loans. We are aware that some commercial data providers have built products to obtain data on outstanding PACE loans. As we understand it, these data sources provide coverage for most of the states with R-PACE. This data could be helpful in an academic exercise to evaluate the risks presented to the Enterprises of PACE lending and ongoing trends in PACE lending.

## **Conclusion**

Thank you for taking the opportunity to listen our concerns. We look forward to continuing to work with the FHFA on this issue. Should you have any questions about this letter, please do not hesitate to contact ALTA Senior Counsel Steve Gottheim at [sgottheim@alta.org](mailto:sgottheim@alta.org).

Sincerely,

A handwritten signature in blue ink that reads "Diane L. Tomb". The signature is fluid and cursive, with the first name "Diane" being the most prominent.

Diane Tomb  
Chief Executive Officer