



September 12, 2012

Federal Housing Finance Agency
c/o Alfred M. Pollard
General Counsel
Attn: Comments/RIN 2590-AA53
Eight Floor, 400 Seventh Street SW
Washington, D.C. 20024

Sent via overnight mail with CD of attachments

RE: RIN 2590-AA53

Dear Mr. Pollard:

This letter sets forth the individual comments of the Vote Solar Initiative (“Vote Solar”) on the Federal Housing Finance Agency’s (“FHFA”) Notice of Proposed Rulemaking (“NPR”) concerning mortgage assets affected by Property Assessed Clean Energy (“PACE”). These comments supplement the comment letter on the NPR submitted by Vote Solar together with national local government organizations, individual local governments, trade associations, energy companies, and other environmental groups.

Vote Solar is a non-profit organization that uses public policy and educational initiatives to fight climate change by bringing solar energy into the mainstream. The Vote Solar Initiative is a fiscally-sponsored project of the Tides Center, a 501(c)(3) non-profit organization. As one of the leading organizations which promoted the establishment of PACE programs in states across the U.S., Vote Solar has tremendous insight and perspective on the background, structure and purpose of PACE.

On March 26, 2012, Vote Solar submitted extensive comments on the Advanced NPR (ANPR Comments). Those comments are attached hereto as Exhibit 1. Our ANPR comments cited to numerous studies and analyses regarding the economic benefits of PACE programs. We now attach digital copies of these studies in the accompanying CD. Please ensure these references are included in the administrative record for this action.

Sincerely,



Adam Browning
Executive Director
Vote Solar Initiative

Enc: The following references are included in the accompanying CD for your review and inclusion in the administrative record.

ENCLOSED REFERENCES

- Att A** Antonio R. Amado, *Capitalization of Energy Efficient Features into Home Values in the Austin, Texas Real Estate Market*, Massachusetts Institute of Technology, June 2007, available at:
<http://dspace.mit.edu/bitstream/handle/1721.1/39848/182760581.pdf?sequence=1>
- Att B** “Application to Participate in a Contract Special Assessment District Agreement for Single Building Unit Sewer Connection”, available at:
http://www.hamburg.mi.us/utilities/pdfs/02_application_to_participate_in_a_contract_SAD_agreement_for_single_building_unit_sewer_connection.pdf
- Att C** Brian Bloom, MaryEllen C. Nobe, and Michael D. Nobe, *Valuing Green Home Designs: A Study of Energy Star Homes*, 3 J. of Sustainable Real Estate, 109 (2011), available at:
http://www.costar.com/uploadedFiles/JOSRE/JournalPdfs/06.109_126.pdf
- Att D** Brian Hoen, Ryan Wiser, Peter Cappers, and Mark Thayer, *An Analysis of the Effects of Residential Photovoltaic Energy Systems on Home Sales Prices in California*, Lawrence Berkeley National Laboratory, April 2011, available at:
<http://eetd.lbl.gov/ea/emp/reports/lbnl-4476e.pdf>
- Att E** California Governor’s Office of Planning and Research, *A Planner’s Guide to Financing Public Improvements* (June 1997), available at:
<http://ceres.ca.gov/planning/financing/chap3.html>
- Att F** California Office of Emergency Services, *Bay Area Regional Earthquake Preparedness Project, Seismic Retrofit Incentive Programs: A Handbook for Local Governments* (1992), available at:
<http://www.abag.ca.gov/bayarea/eqmaps/incentives/>

- Att G** CreditCards.com, Low Interest Credit Cards, <http://www.creditcards.com/low-interest.php> (last visited Sept. 11, 2012).
- Att H** ECONorthwest, Economic Impact Analysis of Property Assessed Clean Energy Programs (PACE), (April 2011), *available at*: <http://pacenow.org/blog/wp-content/uploads/PACE-Econometric-Study-by-ECONorthwest-for-PACENow-5-4-11.pdf>
- Att I** Energy Loan, Special Financing for Energy-Saving Home Improvements from AFC First, <http://www.energyloan.net/index.php> (last visited Sept. 11, 2012).
- Att J** FHFA, Statement on Certain Energy Retrofit Loan Programs (July 6, 2010), *available at*: <http://www.fhfa.gov/webfiles/15884/PACESTMT7610.pdf>
- Att K** Florida Department of Economic Opportunity, *Florida Special District Handbook*, *available at*: <http://www.floridajobs.org/community-planning-and-development/assistance-for-governments-and-organizations/special-district-information-program/florida-special-district-handbook-online/introduction-to-special-districts#history>
- Att L** GE Capital, EGIA Home Improvement Financing, <https://www.gogecapital.com/en/consumer-credit-financing/merchants/homeimprovement/egia/apply.html> (last visited Sept. 11, 2012).
- Att M** Hamburg Township, Michigan, “Establishment of Contract Special Assessment Districts”, http://www.hamburg.mi.us/utilities/contract_sads_establishment_policies_and_procedures.htm (last visited Sept. 11, 2012).
- Att N** Kevin E. McCarthy, Connecticut General Assembly, Office of Legislative Research, *Property Assessed Clean Energy Programs* (March 13, 2012), *available at*: <http://www.cga.ct.gov/2012/rpt/2012-R-0133.htm>
- Att O** Lawrence Berkeley National Laboratory, Environmental Energy Technologies Division, *Scaling Energy Efficiency in the Heart of the Residential Market: Increasing Middle Income America’s Access to Capital for Energy Improvements* (March 6, 2012), *available at*: <http://eetd.lbl.gov/ea/ems/reports/mi-policybrief-3-6-2012.pdf> (“LBNL 2012 Study”).
- Att P** Lendtrade, “Mortgage Delinquency Rates fell to 7.58%,” <http://www.lendtrade.com/2012/02/mortgage-delinquency-rates-fell-to-7-58/> (last visited Sept 10, 2012).
- Att Q** Mark Muro and Devashree Saha, Bring Residential PACE Back to Life, Brookings Institution, February 22, 2012), *available at*: http://www.brookings.edu/opinions/2011/0830_clean_energy_muro_saha.aspx

- Att R** Massachusetts Department of Environmental Protection, *Community Septic Management Program*, available at: <http://www.mass.gov/dep/water/proman.pdf>
- Att S** Massachusetts Department of Environmental Protection, Community Septic Management Programs, Program Information for Communities, <http://www.mass.gov/dep/water/wastewater/onsite.htm#comm> (last visited Sept 11, 2012).
- Att T** Rick Neven and Gregory Watson, *Evidence of Rational Market Valuations for Home Energy Efficiency*, *The Appraisal Journal*, Oct. 1998, http://pacenow.org/documents/EnergyEfficiency%282%29_appraisal%20J.PDF
- Att U** Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 *SMU L. Rev.* 177, 217 n.138 (2006).
- Att V** Sara Hayes, Steven Nadel, Chris Granda, and Kathryn Hottel, *What Have We Learned From Energy Efficiency Financing Programs*, American Council for an Energy-Efficient Economy, (Sept. 2011), available at: <http://aceee.org/research-report/u115>
- Att W** U.S. Census Bureau, *Local Governments and Public School Systems by Type and State: 2007*, available at: <http://www.census.gov/govs/cog/GovOrgTab03ss.html>
- Att X** U.S. Dept. of Energy, “Guidelines for Pilot PACE Financing Programs” (May 7, 2010), available at: http://www1.eere.energy.gov/wip/pdfs/arra_guidelines_for_pilot_pace_programs.pdf
- Att Y** U.S. Dept. of Energy, Office of Energy Efficiency and Renewable Energy, National Renewable Energy Laboratory, *Economic Impacts from the Boulder County, Colorado, ClimateSmart Loan Program: Using Property-Assessed Clean Energy Financing* (July 2011), available at: <http://www.nrel.gov/docs/fy11osti/52231.pdf>
- Att Z** U.S. Dept. of Energy, Office of Energy Efficiency and Renewable Energy, “Status Update – Pilot PACE Financing Programs” (June 2010), available at: <http://www1.eere.energy.gov/wip/pace.html>
- Att AA** White House, “Policy Framework for PACE Financing Programs” (October 18, 2009), available at: http://www.whitehouse.gov/assets/documents/PACE_Principles.pdf
- Att BB** Wells Fargo, Rate and Payment Calculator, https://www.wellsfargo.com/pi_action/rate_calc (last visited Sept. 11, 2012).

EXHIBIT 1

Vote Solar Initiative Comments on ANPR (March 26, 2012)



March 26, 2012

Mr. Alfred Pollard
General Counsel
Federal Housing Finance Agency
400 7th St., N.W.
Washington, DC 20024

Sent via electronic mail to: RegComments@fhfa.gov

RE: RIN 2590-AA53; Comments of Vote Solar Initiative on the Advanced Notice of Proposed Rulemaking and EIS Scoping Comments

Dear Mr. Pollard:

This letter sets forth the comments of the Vote Solar Initiative (“Vote Solar”) on the Federal Housing Finance Agency’s (“FHFA”) Advanced Notice of Proposed Rulemaking (“ANPR”) concerning mortgage assets affected by Property Assessed Clean Energy (“PACE”) programs and FHFA’s Notice of Intent (“NOI”) to prepare an environmental impact statement (“EIS”) under the National Environmental Policy Act (“NEPA”).¹

Vote Solar is a non-profit organization that uses public policy and educational initiatives to fight climate change by bringing solar energy into the mainstream. The Vote Solar Initiative is a fiscally-sponsored project of the Tides Center, a 501(c)(3) non-profit organization. As one of the leading organizations which promoted the establishment of PACE programs in states across the U.S., Vote Solar has tremendous insight and perspective on the background, structure and purpose of PACE.

Section I of Vote Solar’s comments explains the legal structure and purpose of PACE districts and programs. Section II addresses statements and assumptions made by FHFA in Section II(C) of the ANPR. Section III responds to questions posed by FHFA in Section III of the ANPR, including Vote Solar’s EIS Scoping Comments. Section IV summarizes Vote Solar’s recommendations for development of FHFA’s proposed rule or other guidance (“Proposed Rule”) regarding mortgage assets affected by PACE programs.

¹ Mortgage Assets Affected by PACE Programs, 77 Fed. Reg. 3958 (Jan. 26, 2012).

I. PURPOSE AND LEGAL STRUCTURE OF PACE DISTRICTS

PACE was developed in 2007 to enable local communities interested in increasing energy security and electric grid reliability, creating jobs and reducing emissions of greenhouse gases and other pollutants to provide an affordable mechanism for homeowners to make energy efficiency or renewable energy improvements.² PACE is a means by which local governments can effect these public purposes using longstanding, widely-adopted land-secured municipal finance structures, known around the country as “improvement districts”, “special tax districts”, “assessment districts” and the like (collectively “land-secured municipal finance districts”).

Land-secured municipal finance districts have been used by local governments in the United States to finance improvements since the 17th century.³ Improvements funded via land-secured municipal finance districts include sewer lines, sidewalks, seismic retrofits, fire safety improvements, parks, and even sports arenas.⁴ According to U.S. Census Bureau data, there were over 37,000 “special districts” around the United States in 2007.⁵ Assessments are made against property benefited by such improvements (including improvements made on private property),

² See, e.g., Cal. Sts. & Highways Code § 5898.14(a),(b); N.H. Rev. Stat. § 53-F; Nev. Rev. Stat. § 271.020(1); N.C. Gen. Stat. § 160A-239.

³ See Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 217 n.138 (2006) (discussing the “long history” of special assessments in the United States, “reaching back to the seventeenth century,” and citing *People ex rel. Griffen v. Mayor of Brooklyn*, 4 N.Y. 419, 438 (1851) and Osborne M. Reynolds, Jr., *Local Government Law* 349-54 (2d ed. 2001)); *Hagar v. Reclamation District No. 108*, 111 U.S. 701 (1884) (upholding local government power to finance local improvements via lien-secured assessments against Constitutional challenges); *German Sav. & Loan Soc’y v. Ramish* 138 Cal. 120 (1902) (upholding priority of assessment lien for street improvements over prior mortgage); Florida Department of Economic Opportunity, *Florida Special District Handbook*, available at: <http://www.floridajobs.org/community-planning-and-development/assistance-for-governments-and-organizations/special-district-information-program/florida-special-district-handbook-online/introduction-to-special-districts#history> (describing the history of land-secured municipal finance districts and a voluntary fire protection district created by Benjamin Franklin in 1736 and the first special districts in Florida established in the early 19th Century); California Governor’s Office of Planning and Research, *A Planner’s Guide to Financing Public Improvements* (June 1997), Ch. 3, available at: <http://ceres.ca.gov/planning/financing/chap3.html> (describing the “long history” of special assessments, “traced back to a 1691 levy for street and drain construction in New York City. In California, several of the major assessment acts date from the early part of the 20th Century.”)

⁴ See, e.g., Ariz. Rev. Stat. Title 48; Improvement Act of 1911, Cal. Sts. & High. Code §§ 5000, *et seq.*; Municipal Improvement Act of 1913, Cal. Pub. Res. Code §§ 26500, *et seq.*; Mello-Roos Community Facilities Act of 1982, Cal. Gov’t Code §§ 53311, *et seq.*; Colo. Rev. Stat. §§ 30-20-601, *et seq.*; Fla. Stats. Ch. 189; Consolidated Local Improvements Law, Nev. Rev. Stat. Ch. 271; N.Y. Town Law, art. 11, art. 12, art. 12-A; Or. Rev. Stat. Ch. 223; Tex. Rev. Stat. Ann. § 372.003.

⁵ U.S. Census Bureau, *Local Governments and Public School Systems by Type and State: 2007*, available at: <http://www.census.gov/govs/cog/GovOrgTab03ss.html>.

and typically collected along with property taxes.⁶ These assessments are secured by liens, just as with property tax liens, which have always been senior to privately-held liens such as the first mortgage.⁷ Land-secured municipal finance districts are established pursuant to public processes (typically notice, hearings and a vote of the taxpayers, registered voters or governmental body for the applicable jurisdiction). PACE is but an additional public purpose sought to be carried out by municipalities using an established finance structure well familiar to the real estate and mortgage industries.

PACE financing enables local communities to finance energy efficiency and renewable energy improvements with little or no upfront cost, at competitive interest rates and over a time period that matches the period over which energy savings associated with such improvements are realized. The key feature that distinguishes PACE from other means of financing energy efficiency or renewable energy improvements in the residential sector is that it runs with the land: if the homeowner who consented to the PACE assessment moves, the lien remains on the property and will become an obligation of the new property owner who will benefit from the energy savings or production of the improvement. This feature removes a major barrier to home energy efficiency and renewable energy improvements: the concern that the property owner will move before realizing the energy savings associated with an improvement. With PACE, assessments are made against property that benefits from energy efficiency or renewable energy improvements financed by a local government, tying the repayment obligation with the beneficiary of the financing.

PACE provides a means to scale residential energy efficiency improvements unmatched by other alternatives. Because it is secured financing, it can offer interests rates sufficiently low to drive markets without external subsidization. Secondly, PACE can be standardized and securitized, allowing for access to secondary markets and replenishment of revolving funds. These powerful features have driven the intense national, state and local interest in PACE. Other energy efficiency financing alternatives proposed to date have not come close to this level of momentum, indicating that they may be insufficiently attractive to drive real scale. Effectively financing energy efficiency improvements in the residential sector is fundamental to fighting climate change, and PACE provides local governments and property owners with an effective, affordable, scalable means to achieve this significant public purpose.

⁶ Cal. Str. & Hwy. Code § 5898.30.

⁷ See, e.g., *Hagar*, 111 U.S. at 704 (upholding local government power to finance local improvements such that the “expense of such works may be charged against parties specially benefited, and be made a lien upon their property.”); Cal. Str. & Hwy. Code § 3114; *Zipperer v. City of Fort Meyers*, 41 F.3d 619, 621, n.1 (11th Cir. 1995) (citing Florida Statutes § 170.90); Cal. Civ. Code § 2898(a); Cal. Gov. Code §§ 53340(e) (Providing that a special tax shall be subject to the same lien priority in case of delinquency as is provided for ad valorem taxes), § 53937 (“All special ad valorem assessments shall have the same priority as taxes”); Nev. Rev. Stat. §§ 271.420(3)(c).

The protection of the environment, energy conservation and the prevention of pollution are all significant, legitimate public purposes firmly within the authority of states to regulate.⁸ Further, local governments have always had the power to place liens on property for special assessments that are superior to mortgage loans and deeds of trust.⁹ In fact, the U.S. Supreme Court upheld the right of local governments to finance local improvements through lien-secured assessments on property *benefited* from such improvements in 1884.¹⁰ Courts have consistently upheld the priority of liens to secure assessments collected pursuant to improvement districts.¹¹ PACE falls squarely within this long-held authority of state and local governments.

Local communities and states around the U.S. saw the potential of PACE to solve imminent problems such as climate change and unstable energy prices and to create job growth, particularly in the depressed building sector. In response, 27 states passed legislation to enable local governments to establish PACE districts. In the little time that PACE programs were allowed to go forward, they showed tremendous success. According to a U.S. Department of Energy, National Renewable Energy Laboratory report, in the span of only one year, Boulder, Colorado's PACE program created over 120 jobs, generated more than \$20 million in overall economic activity, and reduced consumers' energy costs by more than \$125,000.¹²

PACE has enormous potential to increase jobs and grow the economy. According to a recent study, if just one percent of America's 75 million single family homeowners had the opportunity to benefit from PACE, with an average project size of \$20,000, the economic impact

⁸ See, e.g., *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 28 (1977); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204, 1215 (D.R.I. 1987).

⁹ See, e.g., *Guinn v. McReynolds* 177 Cal. 230, 232 (1918) ("A lien for unpaid taxes or assessments is generally held to be superior to all contract liens, whether prior or subsequent in time").

¹⁰ *Hagar*, 111 U.S. 701, 704.

¹¹ See *German Sav. & Loan Soc'y*, 138 Cal. 120 (upholding priority of assessment lien for street improvements over prior mortgage); *Thompson v. Clark*, 6 Cal. 2d 285, 290-91 (1936) (upholding the priority of assessment liens over private liens); *Fed. Deposit Ins. Corp. v. New Iberia*, 921 F.2d 610, 611 (5th Cir.1991) (upholding the priority of assessment liens for improvements undertaken at the landowner's request); *Zipperer*, 41 F.3d 619 (upholding lien prioritization of special assessments levied on previously-mortgaged property for various public improvements); *City of Oxnard v. Donlon*, 22 Fed. Appx. 741 (9th Cir. 2001) (upholding legislation making a Mello-Roos Community Facilities Act of 1982 special tax lien superior to the liens of pre-existing deeds of trust and specifically observing that "[i]t is well established that there is ' . . . no constitutional objection to a legislative provision making the county's lien superior to pre-existing mortgages'" (quoting *Guinn*, 177 Cal. at 232).

¹²U.S. Dept. of Energy, Office of Energy Efficiency and Renewable Energy, National Renewable Energy Laboratory, *Economic Impacts from the Boulder County, Colorado, ClimateSmart Loan Program: Using Property-Assessed Clean Energy Financing* (July 2011), at 1, available at: <http://www.nrel.gov/docs/fy11osti/52231.pdf>. The Department of Energy also indicated that program costs would decline with additional implementation, leading to improved economic results in future funding cycles.

would be \$15 billion in gross economic output, \$4 billion in combined federal, state, and local tax revenue, and 226,000 jobs.¹³ Yet this extremely successful engine of job creation ground to a halt after FHFA issued its July 6, 2010 “Statement on Certain Energy Retrofit Loan Programs” (the “Statement”).¹⁴ The Enterprises and FHFA’s actions represent an unprecedented interference with state and local governments’ historic, long-upheld right to make assessments on property to finance improvements in furtherance of their police powers.

Vote Solar urges FHFA to recognize in its Proposed Rule that PACE successfully furthers a vital public purpose using a longstanding, established legal structure which is already well known to the mortgage markets. FHFA must take the actual legal and financial structures, fact-based risk information, and important public policy purposes and potential of PACE into account in establishing its Proposed Rule. The Proposed Rule should rescind the Statement and the Directive, require the Enterprises to rescind their May 5, 2010 Advisories, and provide that the Enterprises are permitted to buy residential mortgage loans on properties subject to PACE obligations originated by programs that conform to standards established via this rulemaking proceeding, such as those set forth in the Department of Energy’s Guidelines for Pilot PACE Financing Programs (“DOE Guidelines”),¹⁵ as further supported by the comments below.

II. COMMENTS ON ANPR SECTION II(C)

A. The ANPR’s Statement that PACE Assessments Accelerate on Foreclosure

The ANPR states that “a mortgagee foreclosing on a property subject to a PACE lien must pay off any accumulated unpaid PACE assessments (i.e., past-due payments) and remains responsible for the principal and interest payments that are not yet due (i.e., future payments) on the PACE obligation.”¹⁶ This concept is neither new, novel nor risky. In most states as a matter of course, liens placed on property for special assessments or other land-secured municipal finance programs do not accelerate if the property owner forecloses on the first mortgage.¹⁷

¹³ Mark Muro and Devashree Saha, Bring Residential PACE Back to Life, Brookings Institution, February 22, 2012), *available at*:

http://www.brookings.edu/opinions/2011/0830_clean_energy_muro_saha.aspx; *see also* ECONorthwest, Economic Impact Analysis of Property Assessed Clean Energy Programs (PACE), (April 2011), *available at*: <http://pacenow.org/blog/wp-content/uploads/PACE-Econometric-Study-by-ECONorthwest-for-PACENow-5-4-11.pdf> (finding that \$4 million of total PACE-financed energy project spending, spread evenly across four cities, would generate \$10 million in gross economic output, \$1 million in combined Federal, State and local tax revenue and 60 jobs).

¹⁴ FHFA, Statement on Certain Energy Retrofit Loan Programs (July 6, 2010), *available at*: <http://www.fhfa.gov/webfiles/15884/PACESTMT7610.pdf>.

¹⁵ Department of Energy, “Guidelines for Pilot PACE Financing Programs” (May 7, 2010) (hereinafter, “DOE Guidelines”), *available at*: http://www1.eere.energy.gov/wip/pdfs/arra_guidelines_for_pilot_pace_programs.pdf.

¹⁶ ANPR at 3960.

¹⁷ *See, e.g.* Cal. Sts. & High. Code §§ 8830-8834; Cal. Gov’t. Code § 53356.1.

Thus, if a property owner who agreed to a PACE assessment sells his or her property, or in the event of a foreclosure, the PACE assessment lien would remain on the property, just as would be the case for other types of assessments. The assessments would become an obligation of the next property owner, who will benefit from the energy efficiency or renewable energy improvement made under the PACE program. The non-acceleration of PACE liens *protects* the mortgage holder by lowering the amount of taxes and assessments that are senior to the first mortgage at foreclosure, and ensures that the cost of repayment is borne by the owner benefitting from the improvement. Non-acceleration provides FHFA with no basis for distinguishing PACE from other forms of land-secured finance, and does not raise safety or soundness issues within FHFA's jurisdiction.

B. The ANPR's Statement Regarding Risks to Mortgage Holders

The ANPR states that:

The mortgage holder is also at risk in the event of foreclosure for any diminution in the value of the property caused by the outstanding lien or the retrofit project, which may or may not be attractive to potential purchasers. Also, the homeowner's assumption of this new obligation may itself increase the risk that the homeowner will become delinquent or default on other financial obligations, including any mortgage obligations.¹⁸

There is no evidence that the existence of PACE liens will increase risk to a homeowner of diminution in value of the property or create a risk of mortgage default. Data from the few existing PACE programs that were able to move forward despite the issuance of the Statement show default rates for mortgages secured by properties which have taken on PACE assessments to be far *below* average mortgage default rates in those communities. Based on data Vote Solar was able to obtain from PACE program administrators, out of 2,723 properties with PACE liens in Sonoma County, CA, Babylon, NY, and Boulder County, CO, there have been 24 known mortgage defaults, a default rate of .88%. By contrast, the national percentage of mortgage loans in foreclosure at the end of the fourth quarter of 2011 was 4.38%.¹⁹

Further, the existence of energy efficiency improvements or distributed renewable energy installations increases the value of residential properties, thereby further reducing risks to mortgage holders. An April 2011 study of 72,000 homes by the Lawrence Berkeley National Laboratory ("LBNL") showed that homes with solar photovoltaic systems had an average \$17,000 sales price premium.²⁰ A 2011 study by researchers from Colorado State University indicated that homes achieving Energy Star ratings for energy efficiency had

¹⁸ ANPR at 3960.

¹⁹ <http://www.lendtrade.com/2012/02/mortgage-delinquency-rates-fell-to-7-58/>.

²⁰ Brian Hoen, Ryan Wiser, Peter Cappers, and Mark Thayer, *An Analysis of the Effects of Residential Photovoltaic Energy Systems on Home Sales Prices in California*, Lawrence Berkeley National Laboratory, April 2011 at iii, available at: <http://eetd.lbl.gov/ea/emp/reports/lbnl-4476e.pdf>.

purchase prices nearly \$9.00 higher per square foot.²¹ A 1998 study by researchers at ICF Consulting Group demonstrated that residential selling prices are positively correlated with lower energy bills, most often attributed to energy efficiency improvements.²² In addition, the demonstrated job creation and other local economic benefits of PACE²³ could further increase home values in jurisdictions with PACE programs. There is no evidence that energy efficiency improvements will have a negative impact on property values or that a homeowner's assumption of a PACE assessment will increase the risk of delinquency or foreclosure on a mortgage. Instead, the weight of the evidence indicates that PACE will increase property values. FHFA must base its Proposed Rule on fact, not speculation.

Moreover, energy efficiency improvements reduce homeowners' monthly energy bills, freeing up cash to make timely mortgage payments.²⁴ The same is true for renewable energy systems, such as rooftop solar.²⁵ Thus, it is highly unlikely that property owners will have more difficulty meeting obligations to mortgage holders as a result of agreeing to assume PACE assessments. Instead, PACE is likely to decrease the risk of mortgage default by decreasing unpredictable and escalating energy costs.

C. The ANPR's Statement that PACE Programs are "Loans" and are Unlike Other Forms of Municipal Land-Secured Finance

The Statement provided that "[f]irst liens established by PACE loans are unlike routine tax assessments and pose unusual and difficult risk management challenges for lenders, servicers and mortgage securities investors." In the Statement and again throughout the ANPR, FHFA repeatedly mischaracterizes PACE assessments as "loans". Under PACE, local governments do not provide homeowners with loans, but rather, as explained in Section I above, such governments collect assessments on properties that benefit from energy efficiency and renewable energy improvements financed by the local government. As set forth in Section I above, PACE is a form of land-secured municipal finance firmly within the boundaries, public purpose and structure of other assessment districts, improvement districts and the like used for over a century

²¹ Brian Bloom, MaryEllen C. Nobe, and Michael D. Nobe, *Valuing Green Home Designs: A Study of Energy Star Homes*, 3 J. of Sustainable Real Estate, 109 (2011), available at: http://www.costar.com/uploadedFiles/JOSRE/JournalPdfs/06.109_126.pdf; see also Antonio R. Amado, *Capitalization of Energy Efficient Features into Home Values in the Austin, Texas Real Estate Market*, Massachusetts Institute of Technology, June 2007, at 2, available at: <http://dspace.mit.edu/bitstream/handle/1721.1/39848/182760581.pdf?sequence=1> (finding that consumers were willing to pay a 4% premium for homes with more efficient heating and ventilation systems).

²² Rick Neven and Gregory Watson, *Evidence of Rational Market Valuations for Home Energy Efficiency*, *The Appraisal Journal*, Oct. 1998, at 401, available at: http://pacenow.org/documents/EnergyEfficiency%282%29_appraisal%20J.PDF.

²³ See note 10.

²⁴ Bloom et al., *supra* at 110.

²⁵ Hoen et al., *supra* at 2.

in tens of thousands of cases. FHFA's Proposed Rule should correctly describe PACE and discontinue the mischaracterization of PACE assessments as "loans".

D. The ANPR's Statement that PACE is Unlike Traditional Tax Assessments Because it is Voluntary.

The ANPR states that "unlike traditional tax assessments, PACE loans are voluntary — homeowners opt in, submit applications, and contract with the city or county's PACE program to obtain the loan."²⁶ The voluntary nature of PACE does not in any way distinguish it from that of other land-secured municipal finance districts, because many other such districts around the country allow property owners to voluntarily "opt-in."

For example, according to Florida's Department of Economic Opportunity, Benjamin Franklin established a voluntary fire protection assessment district in Philadelphia in 1736, where only property owners who agreed to have assessments made against their property benefited from fire protection services.²⁷ In 1988, the City of Torrance, California, created a special assessment district which allowed private property owners to voluntarily apply to receive funding for seismic retrofits on their buildings. Assessments were made only against parcels for which the property owner applied to become a part of the district, and the property owners individually contracted for the projects.²⁸ Under the Massachusetts "Community Septic Management Program," the purpose of which is to prevent water pollution, property owners can voluntarily undertake upgrades to their septic systems and receive financing from the local government, and assessments, secured by a municipal lien, are placed on the participating owners' parcels.²⁹ And since 2001 in Hamburg Township, Michigan, property owners can apply to receive financing for the cost of connecting to the local sewer system by agreeing to participate in a "Contract Special Assessment District."³⁰

²⁶ ANPR at 3960.

²⁷ Florida Department of Economic Opportunity, *Florida Special District Handbook*, available at: <http://www.floridajobs.org/community-planning-and-development/assistance-for-governments-and-organizations/special-district-information-program/florida-special-district-handbook-online/introduction-to-special-districts#history>.

²⁸ California Office of Emergency Services, *Bay Area Regional Earthquake Preparedness Project, Seismic Retrofit Incentive Programs: A Handbook for Local Governments* (1992) at 47, available at: <http://www.abag.ca.gov/bayarea/eqmaps/incentives/>; see also Cal. Str. & Hwy Code § 10100.2(a)(1)(A) (assessment districts for seismic retrofits on private property, in which no parcel may be included without the consent of the property owner).

²⁹ Massachusetts Department of Environmental Protection, *Community Septic Management Program*, available at: <http://www.mass.gov/dep/water/proman.pdf>; see also <http://www.mass.gov/dep/water/wastewater/onsite.htm#comm>.

³⁰ Hamburg Township, Michigan, "Establishment of Contract Special Assessment Districts," available at: http://www.hamburg.mi.us/utilities/contract_sads_establishment_policies_and_procedures.htm; see also "Application to Participate in a Contract Special Assessment District Agreement for Single Building Unit Sewer Connection", available at:

Furthermore, around the country, many land-secured municipal finance programs are established by application, petition or vote of property owners or taxpayers in the applicable jurisdiction or district.³¹

Moreover, it is unclear why the voluntary nature of PACE is relevant to the safety and soundness concerns within FHFA's jurisdiction. If anything, the voluntary nature of PACE increases the likelihood that only homeowners who can afford to pay an additional assessment will participate. In addition, the strict underwriting criteria applied by PACE programs (such as loan-to-value limits, reviews for tax delinquencies and other measures described in Section II(E) below) will increase the safety and soundness of the program with regard to the Enterprises. By contrast, if PACE assessments were imposed on all property owners within a jurisdiction, regardless of interest or property-based delinquencies, as is done with many forms of land-secured municipal finance, this would increase the risk to mortgage holders.

Thus, the Proposed Rule should correct the ANPR's mischaracterization of PACE as being different from traditional assessment districts because PACE is voluntary. Through PACE, environmental, health, energy security and job creation are merely additional public purposes state and local governments seek to further using an extremely well established tool of municipal finance.

E. The ANPR's Statement on Uniform National Standards for PACE Programs

The ANPR states that "no uniform national standards exist" for PACE programs. FHFA's line of reasoning oddly completely ignores the existence and background of the DOE Guidelines. In response to concerns about PACE expressed by the Enterprises, DOE and Obama Administration officials repeatedly met with Fannie Mae, Freddie Mac, and the financial regulators as well as other PACE stakeholders, and then issued the DOE Guidelines on May 7th, 2010.³² The DOE Guidelines include program design features developed to increase the reliability and economic performance of PACE improvements, "for the benefit of program participants, mortgage holders, and investors," including:

- Expected energy savings-to-investment ratio greater than one.
- Term of the assessment should not exceed the useful life of the improvements.
- Mortgage holder should receive notice when liens are placed.

http://www.hamburg.mi.us/utilities/pdfs/02_application_to_participate_in_a_contract_SAD_agreement_for_single_building_unit_sewer_connection.pdf.

³¹ See Special or Local Assessments, 70C Am.Jur.2d §§ 113 - 119 (2012).

³² U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, "Status Update – Pilot PACE Financing Programs" (June 2010), available at:

<http://www1.eere.energy.gov/wip/pace.html>; see also White House, "Policy Framework for PACE Financing Programs" (October 18, 2009), available at:

http://www.whitehouse.gov/assets/documents/PACE_Principles.pdf; H.R. 2599, 112th Cong. § 5(h)(2) (2011).

- PACE liens do not accelerate upon property owner default.
- Property value to lien ratio 10:1 or greater.
- Quality assurance and anti-fraud measures.
- PACE financing is net of rebates and tax credits.
- Disclosures to property owners.
- Reserve funds.
- Data collection.³³

In addition, the DOE Guidelines contain underwriting guidelines “to reduce the risk of default and impairment to the property’s mortgage holders,” including:

- Title searches.
- Property value greater than debt.
- No back taxes or involuntary liens.
- Property not in foreclosure.
- No recent property-related defaults.
- No more than 1 property tax delinquency in past 3 years.
- Property owner has not filed for bankruptcy in past 7 years.³⁴

According to the DOE Guidelines, both the DOE and the Administration offered to work with the FHFA and the Enterprises on “more stringent underwriting criteria, improved consumer protections, and additional measures to significantly reduce the risk and financial exposure to mortgage holders. Despite these efforts, the FHFA issued [the Statement]”.

Thus, it is false and misleading for the ANPR to claim that there are “no uniform national standards” for PACE programs. The Proposed Rule should correct this misstatement. To the extent that the DOE Guidelines are not binding on all PACE programs around the country, FHFA’s Proposed Rule should rescind the Statement and the Directive and issue a Proposed Rule that gives the Enterprises the authority to purchase mortgages on properties subject to PACE liens where the program (or state law) complies with the DOE Guidelines or other similar guidelines established pursuant to this rulemaking and a collaborative public process with key stakeholders.³⁵

³³ DOE Guidelines at 2-5.

³⁴ *Id.* at 5-7.

³⁵ For example, H.R. 2599, the PACE Assessment Protection Act of 2011, bipartisan legislation with 51 co-sponsors, also includes risk mitigation and consumer protection guidelines for PACE. The bill would require rigorous underwriting criteria similar to those contained in the DOE Guidelines, notice to holders of existing mortgages on the property, required consumer disclosures, design features similar to those contained in the DOE Guidelines such as nonacceleration of the PACE lien on a transfer or default, assessment-to-property value minimums, quality standards for contractors and improvements, and privacy protections. H.R. 2599 provides a further example of guidelines which could be incorporated into FHFA’s Proposed Rule.

III. COMMENTS ON ANPR SECTION III

A. Conditions and Restrictions Relating to PACE

1. FHFA Question 1: Are conditions and restrictions relating to FHFA-regulated entities' dealings in mortgages on properties participating in PACE programs necessary? If so, what specific conditions and/or restrictions may be appropriate?

The DOE Guidelines, if implemented, are sufficient to protect against risk to mortgage holders. As discussed in Section II(E) above, the DOE Guidelines provide appropriate measures to protect homeowners, mortgage holders and taxpayers, while respecting the rights of state and local governments to protect public health and the environment through the use of land-secured municipal finance. FHFA should rescind the Statement and the Directive and issue a Proposed Rule that provides that if PACE programs comply with the DOE Guidelines, the Enterprises are allowed to purchase mortgages on homes with PACE liens. If FHFA determines through its rulemaking process that the DOE Guidelines are insufficient, it should develop additional guidelines based on comments received through this rulemaking.

B. Financial Risk to the Enterprises Resulting from Subordination of Mortgage Security Interests to PACE Liens

1. FHFA Question 2(a): How does the lien-priming feature of first-lien PACE obligations affect the financial risks borne by holders of mortgages affected by PACE obligations or investors in mortgage-backed securities based on such mortgages?

Throughout the ANPR, FHFA characterizes PACE programs as having a “lien-priming feature”. This is a fundamental mischaracterization of PACE. As discussed in Section I above, PACE assessments are but one type of traditional governmental means of securing financing for improvements that have a valid public purpose. Such improvement districts or assessment districts have existed as part of the tax lien structure in the United States for several centuries³⁶ and are used for a variety of public purposes, such as seismic improvements, fire safety improvements, sidewalks, sewers and even sports arenas.³⁷ Assessments collected for such improvement districts are secured by liens which have always been senior to the first mortgage.³⁸ Thus, FHFA’s characterization of PACE as having a “lien-priming” feature is misleading. Energy retrofits and renewable energy improvements are merely additional legitimate public purposes for an historic legal structure with seniority on parity with that of other assessment or improvement districts. PACE districts pose no greater risk to mortgage holders than other forms of municipal assessments used to finance improvements across the country dating back to the 17th Century.

³⁶ See note 3.

³⁷ See note 4.

³⁸ See note 5.

Moreover, even if PACE-funded improvements didn't increase property value, the existence of a PACE lien on a property creates scant risk to mortgage holders. For example, assuming a property owner whose home is valued at \$300,000 with a \$250,000 mortgage seeks \$20,000 in PACE financing for energy efficiency improvements. Assuming a high interest rate of 7% and a 20-year assessment period, the annual PACE assessment would be \$1,960.³⁹ In the event of foreclosure, under the law of California and most states, and under the DOE Guidelines, only one past-due PACE assessment of \$1,960 would be owed, and the new owner would carry on with the remaining stream of assessments.⁴⁰ Across the Enterprises vast portfolio of mortgages, assuming an extremely high foreclosure rate of 10%, the risk of PACE liens would average \$196 per home. Assuming a more reasonable foreclosure rate of 5%, the risk of PACE liens across a portfolio would average less than \$100 per home.⁴¹ For all of the reasons above, PACE does not create a significant risk to mortgage holders, nor does it rise to the level of the "safety and soundness" concerns used to justify the Statement, the Directive and the Proposed Action set forth in the ANPR.

2. FHFA Question 2(b): *To the extent that the lien-priming feature of first-lien PACE obligations increases any financial risk borne by holders of mortgages affected by PACE obligations or investors in mortgage-backed securities based on such mortgages, how and at what cost could such parties insulate themselves from such increased risk?*

First, as discussed above, it is unlikely that the existence of PACE creates any appreciable risk to mortgage holders. Instead, homes that have benefited from PACE-financed improvements will be less likely to enter foreclosure and will have increased value. Second, to mitigate any potential risk, FHFA's Proposed Rule could require that PACE programs comply with DOE Guidelines or other guidelines which FHFA derives based on notice and comment rulemaking, such as those contained in H.R. 2599, by limiting the Enterprises' ability to purchase mortgages secured by properties with PACE obligations that do not conform to such standards. Finally, any residual risk to mortgage holders could be mitigated via loan loss reserves, such as those proposed by DOE Guidelines and several states.⁴²

³⁹ Complaint at Exhibit C, People of the State of California *ex. rel.* Edmund G. Brown Jr., Attorney General v. Federal Housing Finance Agency et. al. No. C10-03084 (N.D. CA, 2010).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Lawrence Berkeley National Laboratory, Environmental Energy Technologies Division, *Scaling Energy Efficiency in the Heart of the Residential Market: Increasing Middle Income America's Access to Capital for Energy Improvements* (March 6, 2012) at 9, available at: <http://eetd.lbl.gov/ea/ems/reports/mi-policybrief-3-6-2012.pdf> ("LBNL 2012 Study").

3. FHFA Question 3: *How does the lien-priming feature of first-lien PACE obligations affect any financial risk that is borne by holders of mortgages affected by PACE obligations or investors in mortgage-backed securities based on such mortgages and that relates to any of the following:*

a) The total amount of debt secured by the subject property relative to the value of the subject property (i.e., Combined Loan to Value Ratio for the property or other measures of leverage);

As with other local government assessments which have been used since the 17th Century in tens of thousands of cases, PACE would increase the amount of debt secured by the subject property. As discussed in Section I above, state and local governments are well within their rights to levy assessments in order to address legitimate public concerns such as climate change and pollution. Further, as noted in Section II(B), PACE-financed improvements will increase property values, thereby offsetting the total debt secured by participating properties. Finally, as discussed in Section II(E) above, the DOE Guidelines would require a property value-to-lien ratio of at least 10:1 and a savings-to-investment ratio of at least one.

b) The amount of funds available to pay for energy-related home-improvement projects after the subtraction of administrative fees or any other program expenses charged or deducted before funds become available to pay for an actual PACE-funded project (FHFA understands such fees and expenses can consume up to 10% or more of the funds a borrower could be obligated to repay under some PACE programs);

Based on data Vote Solar was able to gather from existing PACE programs, it appears that the percentage of total assessments used to repay administrative fees of the local government is far lower than 10%. For example, Sonoma County charges a fee of \$250 for initial processing of PACE applications and ongoing administrative fees of \$40 per year.⁴³ Moreover, administrative fees charged by pilot PACE programs are likely to be higher than those charged by programs that follow, as transaction documents, underwriting criteria and procedures for these programs had to be created from scratch. As such, the administrative burden of first-out-the-gate efforts should not be indicative of future costs. With standardization and scale, administrative fees should be expected to fall dramatically.

c) The timing and nature of advancements in energy-efficiency technology;

While energy efficiency technology is evolving and will continue to improve over time, the failure to make improvements now increases the risk of catastrophic loss from climate

⁴³ Shirlee Zane, Chairwoman, County of Sonoma Board of Supervisors, letter to Alfred M. Pollard, FHFA, Comments/RIN 2590-AA53 (March 23, 2012) at 9 (“Sonoma County Comments on ANPR”).

change, air and water pollution, grid instability, and increased energy costs. On an individual level, failure to make improvements now results in a capital opportunity cost as a result of paying higher energy costs. Despite the fact that automotive technology is rapidly advancing, for example, millions of Americans finance automobile purchases every year. By the FHFA's logic, homeowners shouldn't make any home improvements today because they will surely be better and less expensive tomorrow. Individuals and local governments can and should make investments in clean energy now to begin saving energy costs and to mitigate climate change. PACE provides an effective, popular mechanism for financing the energy efficiency and renewable energy improvements that ties repayment obligations to the beneficiary of the improvement.

d) *The timing and nature of changes in potential homebuyers' preferences regarding particular kinds of energy-efficiency projects;*

Although homeowners' preferences for clean energy projects could change over time, it is fair and reasonable to assume that newer, more modern technologies will be preferable and will command a price premium. For example, triple-paned windows will be valued more highly than single-paned windows; new, efficient furnaces will be more valuable than older models; and contemporary, healthy insulation products will be preferable to a lack of insulation, ineffective insulation or insulation with negative health effects. Any risk associated with changing energy efficiency technology is no greater than the risk homeowners take as a matter of course in making home improvements which is not the subject of FHFA regulations.

e) *The timing, direction, and magnitude of changes in energy prices; and,*

PACE enables homeowners to install energy efficiency upgrades and renewable energy systems that will result in energy savings over time. This provides a hedge against rising energy prices, reducing homeowners' monthly energy expenses and thereby freeing up cash to reduce the risk of mortgage delinquencies and defaults. As discussed in Section II(E) above, the DOE Guidelines provide that PACE programs should ensure that energy savings are greater than the total assessment expenditure.

f) *The timing, direction, and magnitude of changes of property values, including the possibility of downward adjustments in value?*

The risk posed by PACE with regard to potentially decreasing property value trends is no different than that associated with liens placed by any local government pursuant to assessment or improvement districts. As discussed in Section I above, the placement of such liens has been within the authority of local governments for centuries and the priority of such liens has been consistently upheld by the courts. Moreover, as discussed in Section (II)(B) above, clean energy improvements increase home values.

4. FHFA Question 4: *To the extent that the lien-priming feature of first-lien PACE obligations increases any financial risk that is borne by holders of mortgages affected by PACE obligations or investors in mortgage-backed securities based on such mortgages and that relates to any of the following, how and at what cost could such parties insulate themselves from that increase in risk:*

a) *The total amount of debt secured by the subject property relative to the value of the subject property (i.e., Combined Loan to Value Ratio for the property or other measures of leverage);*

As discussed in Section II(E) above, the DOE Guidelines would require loan to value ratios of no greater than 1:10, which will insulate mortgage holders from risk. If FHFA remains concerned about the applicability of the DOE Guidelines, its Proposed Rule could provide that so long as a PACE program requires a maximum loan-to-value ratio of 1:10, the Enterprises are allowed to purchase mortgages on properties subject to PACE obligations.

b) *The amount of funds available to pay for energy-related home-improvement projects after the subtraction of administrative fees or any other programs expenses charged deducted before funds become available to pay for an actual PACE funded project (FHFA understands such fees and expenses can consume up to 10% or more of the funds a borrower could be obligated to repay under some PACE programs);*

As discussed above, based on data Vote Solar has been able to obtain, administrative fees represent a small percentage of overall PACE assessment amounts. In addition, the DOE Guidelines provide for a minimum energy savings-to-investment ratio of greater than one. If FHFA is concerned about risk to mortgage holders associated with the percentage of administrative fees contained in PACE assessments, it can adopt a Proposed Rule which permits the Enterprises to purchase mortgages on homes with PACE liens so long as the savings-to-investment ratio is greater than one.

c) *The timing and nature of advancements in energy-efficiency technology;*

FHFA can minimize risk associated with changes in energy efficiency technology by requiring that, in order for the Enterprises to be permitted to purchase mortgages on properties with PACE liens, the applicable PACE program must comply with guidelines such as the DOE Guidelines or those contained in H.R. 2599. As noted, the DOE Guidelines require a minimum energy savings-to-investment ratio of greater than one, require that the term of the assessment should not exceed the useful life of the improvement, and contain quality assurance measures, including the use of licensed, certified contractors and work inspections.

d) *The timing and nature of changes in potential homebuyer preferences regarding particular kinds of energy-efficiency projects;*

FHFA can minimize any risk associated with changes in consumer preferences regarding energy efficiency and renewable energy technology by requiring that, in order for the Enterprises to be permitted to purchase mortgages on properties with PACE liens, the applicable PACE program must comply with guidelines such as the DOE Guidelines or those contained in H.R. 2599. As discussed above, the DOE Guidelines require a minimum energy savings-to-investment ratio of greater than one, require that the term of the assessment should not exceed the useful life of the improvement, and contain quality assurance measures, including the use of licensed, certified contractors and work inspections.

e) *The timing, direction, and magnitude of changes in energy prices; and,*

FHFA can minimize any risk to mortgage holders associated with changes in energy prices by withdrawing the Statement and the Directive and allowing PACE to move forward. Because energy prices are predicted to increase or fluctuate, and because PACE will help lower homeowners' energy bills, PACE will buffer against this risk. Moreover, by requiring that, in order for the Enterprises to be permitted to purchase mortgages on properties with PACE liens, the applicable PACE program must comply with guidelines such as the DOE Guidelines or those contained in H.R. 2599, FHFA will further reduce risk associated with fluctuating energy prices. As discussed above, the DOE Guidelines require a minimum energy savings-to-investment ratio of greater than one.

f) *The timing, direction, and magnitude of changes of property values, including the possibility of downward adjustments in value?*

As discussed in Section II(B) above, clean energy enhancements increase residential property values. By withdrawing the Statement and the Directive and permitting jurisdictions to implement PACE programs, FHFA will mitigate against the risk to the Enterprises posed by potentially decreasing property values. To further reduce risk to mortgage holders, FHFA could require that PACE programs contain the program standards contained in the DOE Guidelines or H.R. 2599, such as loan-to-value limits, minimum savings-to-investment ratios, and property-based underwriting criteria, such as a review for past tax defaults, bankruptcies and a review of the total debt burden on the property.

C. PACE and the Market for Home-Improvement Financing

1. FHFA Question 5: *What alternatives to first-lien PACE loans (e.g., self-financing, bank financing, leasing, contractor financing, utility company “on-bill” financing, grants, and other government benefits) are available for financing home-improvement projects relating to energy efficiency? On what terms? Which do and which do not share the lien-priming feature of first-lien PACE obligations? What are the relative advantages and disadvantages of each, from the perspective of (i) the current and any future homeowner-borrower, (ii) the holder of an interest in any mortgage on the subject property, and (iii) the environment?*

Although a number of new ideas have emerged over the past several years in residential energy efficiency finance, recent research by the Lawrence Berkeley National Laboratory indicates that access to low-cost capital for middle income Americans remains very limited.⁴⁴ The ability to obtain land-secured financing such as home equity lines of credit has declined along with the housing market downturn.⁴⁵ Some homeowners turn to credit cards to finance home energy improvements,⁴⁶ with rates currently ranging from 10.9-22.9%, depending on creditworthiness.⁴⁷

Other energy efficiency loan products on the market also have limited terms and high interest rates. Fannie Mae’s own “EnergyLoan” has a fixed interest rate of 14.99%, and is limited to a term of 10 years.⁴⁸ The Electric and Gas Industries Association offers a “GeoSmart” loan with an interest rate of 26.99%.⁴⁹ By contrast, the average interest rates charged for PACE financing range from 1.04 to 7.25%, with a term of up to 20 years.⁵⁰

Although some state and local governments are employing American Reinvestment and Recovery Act (“ARRA”) dollars to subsidize energy efficiency financing programs, many such programs have high rejection rates for middle income Americans.⁵¹ Some jurisdictions have proposed alternative energy efficiency finance mechanisms such as on-bill financing, deferred loans, and paycheck-deducted loans.⁵² Currently, these programs are in the nascent

⁴⁴ LBNL 2012 Study at 4.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See, e.g., <http://www.creditcards.com/low-interest.php> (comparing current credit card APRs); see also https://www.wellsfargo.com/pi_action/rate_calc (Wells Fargo unsecured personal loans and lines of credit).

⁴⁸ <http://www.energyloan.net/index.php>.

⁴⁹ <https://www.gogecapital.com/en/consumer-credit-financing/merchants/homeimprovement/egia/apply.html>.

⁵⁰ Kevin E. McCarthy, Connecticut General Assembly, Office of Legislative Research, *Property Assessed Clean Energy Programs* (March 13, 2012), available at: <http://www.cga.ct.gov/2012/rpt/2012-R-0133.htm>.

⁵¹ LBNL 2012 Study at 4-8.

⁵² See, e.g., LBNL 2012 Study at 12-14.

development stages and face legal and implementation hurdles, such as resistance by utilities, banking and lender regulations, questions regarding security features, and dependence on dwindling ARRA funds. It is important to note that the majority of these programs do not offer a secured product, and as such offer either unattractively high financing terms, or rely on subsidization. This limits their efficacy and scalability. PACE offers a path to overcome these limitations, which is why there is such strong interest in the model.

The American Council for an Energy Efficient Economy recently found that “most [loan] programs are not penetrating the market of potential consumers” and that more than half of the programs it studied had a participation rate of less than .5% of potential customers.⁵³ Similarly, the LBNL 2012 Study found that “[m]any of the largest energy efficiency loan programs have application decline rates in the 30 to 50 percent range.”⁵⁴ Thus, although several alternative forms of energy efficiency finance have been proposed and are being implemented in the pilot phase, uptake has been very limited, leaving this market underserved.

Finally, the proof is in the pudding. PACE represents a secured form of energy efficiency financing with features that are highly attractive to homeowners and lenders and that enables local governments to protect the environment and public health while increasing jobs. If other alternatives were sufficient to the cause, the problem of financing energy efficiency upgrades to U.S. building stock would be solved, and there would be no interest in PACE. As interest in PACE continues unabated despite the hurdles advanced by FHFA, one might safely assume that the alternatives are insufficient.

2. FHFA Question 6: *How does the effect on the value of the underlying property of an energy-related home-improvement project financed through a first-lien PACE program compare to the effect on the value of the underlying property that would flow from the same project if financed in any other manner?*

As PACE programs around the country were halted as a result of the Statement, and because other forms of energy efficiency finance are nascent with limited uptake, there is insufficient data at this time to make a statistically valid, “apples-to-apples” comparison of the differential impact on home prices from clean energy improvements financed via PACE versus other means.

⁵³ Sara Hayes, Steven Nadel, Chris Granda, and Kathryn Hottel, *What Have We Learned From Energy Efficiency Financing Programs*, American Council for an Energy-Efficient Economy, (Sept. 2011) at iv, available at: <http://aceee.org/research-report/u115>.

⁵⁴ Hoen et al., *supra* at 4.

3. FHFA Question 7: *How does the effect on the environment of an energy-related home-improvement project financed through a first-lien PACE program compare to the effect on the environment that would flow from the same project if financed in any other manner?*

PACE has enormous potential to reduce greenhouse gas emissions and other pollution caused by traditional, fossil-based energy production. If fewer homeowners make energy efficiency or renewable energy improvements on their homes because PACE is unavailable and other means of financing have high interest rates, are unavailable to middle income Americans, are less attractive to homeowners because they remain an obligation of the original homeowner upon a transfer of the property, or are less attractive to the capital markets because they are unsecured, the failure to implement PACE will cause a significant adverse environmental impact. Vote Solar looks forward to reviewing and providing comment on the FHFA's EIS, which must address the significant environmental impacts of the current Proposed Action.

4. FHFA Question 8: *Do first-lien PACE programs cause the completion of energy-related home improvement projects that would not otherwise have been completed, as opposed to changing the method of financing for projects that would have been completed anyway? What, if any, objective evidence exists on this point?*

As discussed in Section III(C)(1) above, currently available forms of financing for energy efficiency improvements in the residential space are limited and have had limited uptake. By contrast, 27 states passed PACE enabling legislation because their legislatures found that it would have enormous potential to increase the adoption of residential energy upgrades and reduce environmental harms. In Sonoma County, PACE improvements already have been made on approximately 1% of homes.⁵⁵ This demonstrates the overwhelmingly positive reaction to PACE where it has been implemented. Yet it is impossible to provide FHFA with "objective evidence" as to whether PACE would enable more energy improvements to take place because FHFA's Statement and Directive had the effect of halting PACE before it had the chance to go forward.

⁵⁵ Personal communication with Kathleen Larocque, Chief Deputy County Counsel, County of Sonoma, California (March 23, 2012).

D. PACE and Protections for the Homeowner-Borrower

1. FHFA Question 9: *What consumer protections and disclosures do first-lien PACE programs mandate for participating homeowners? When and how were those protections put into place? How, if at all, do the consumer protections and disclosures that local first-lien PACE programs provide to participating homeowners differ from the consumer protections and disclosures that non-PACE providers of home-improvement financing provide to borrowers? What consumer protection enforcement mechanisms do first-lien PACE programs have?*

The DOE Guidelines contain numerous consumer protection standards for PACE programs, such as minimum savings-to-investment ratios, a requirement that the term of the assessment should not exceed the useful life of the improvements, a requirement that PACE liens do not accelerate upon property owner default, a minimum property value-to-lien ratio of at least 10:1, quality assurance and anti-fraud measures, risk disclosures to property owners, and underwriting criteria. Each of the active PACE programs that were able to go forward despite the Statement and the Directive contain meaningful consumer protection standards as well. For example, Sonoma County's PACE program contains strict underwriting standards, extensive disclosures to consumers regarding the risks of assessment financing and consumer declarations.⁵⁶

2. FHFA Question 10: *What, if any, protections or disclosures do first-lien PACE programs provide to homeowner-borrowers concerning the possibility that a PACE-financed project will cause the value of their home, net of the PACE obligation, to decline? What is the effect on the financial risk borne by the holder of any mortgage interest in a subject property if PACE programs do not provide any such protections or disclosures?*

As demonstrated by the studies cited in Section II(B) above, PACE will enable homeowners to make improvements to their homes that are highly likely to increase property values. If FHFA is concerned that PACE assessments may decrease property values, it must base any element of its Proposed Rule on evidence on the record. If such evidence supports FHFA's concern that a decrease in property values caused by the presence of PACE liens is likely, it can incorporate disclosure guidelines into its Proposed Rule.

⁵⁶ See Sonoma County Comments on ANPR, Exhibit B.

3. FHFA Question 11: *What, if any, protections or disclosures do first-lien PACE programs provide to homeowner-borrowers concerning the possibility that the utility-cost savings resulting from a PACE-financed project will be less than the cost of servicing the PACE obligation? What is the effect on the financial risk borne by the holder of any mortgage interest in a subject property if first-lien PACE programs do not provide any such protections or disclosures?*

As discussed above, the DOE Guidelines require a savings-to-investment ratio of greater than one. H.R. 2599 also requires a minimum savings-to-investment ratio. FHFA can reduce any risks outlined in Question 11 by permitting the Enterprises to purchase mortgage loans on homes with PACE liens so long as the applicable program requires such a minimum savings-to-investment ratio.

4. FHFA Question 12: *What, if any, protections or disclosures do first-lien PACE programs provide to homeowner-borrowers concerning the possibility that over the service life of a PACE-financed project, the homeowner-borrower may face additional costs (such as costs of insuring, maintaining, and repairing equipment) beyond the direct cost of the PACE obligation? What is the effect on the financial risk borne by the holder of any mortgage interest in a subject property if first-lien PACE programs do not provide any such protections or disclosures?*

As with any home improvement, homeowners will be required to insure, maintain and/or repair equipment or pay for such services. FHFA can reduce any risks associated with a homeowner's need to maintain his or her property by permitting the Enterprises to purchase mortgage loans on homes with PACE liens so long as the applicable program requires disclosure that such insurance, maintenance and repair requirements remain the obligation of the property owner.

5. FHFA Question 13: *What, if any, protections or disclosures do first-lien PACE programs provide to homeowner-borrowers concerning the possibility that subsequent purchasers of the subject property will reduce the amount they would pay to purchase the property by some or all of the amount of any outstanding PACE obligation? What is the effect on the financial risk borne by the holder of any mortgage interest in a subject property if first-lien PACE programs do not provide any such protections or disclosures?*

Energy efficiency and renewable energy improvements result in a purchase price premium on residential property.⁵⁷ As demonstrated by the studies cited in Section II(B) above, PACE will enable homeowners to make improvements to their homes that are highly likely to increase property values. If FHFA is concerned that the presence of PACE liens will reduce the purchase prices of homes, it must base any element of its Proposed Rule on

⁵⁷ See sources cited *supra* notes 20-22.

evidence on the record. If such evidence supports FHFA's concern that a decrease in home sales prices caused by the presence of PACE liens is likely, it can incorporate disclosure guidelines into its Proposed Rule.

E. PACE and Underwriting Standards

1. FHFA Question 14: *How do the credit underwriting standards and processes of PACE programs compare to that of other providers of home-improvement financing, such as banks? Do they consider, for example: (i) borrower creditworthiness, including an assessment of total indebtedness in relation to borrower income, consistent with national standards; (ii) total loan-to-value ratio of all secured loans on the property combined, consistent with national standards; and (iii) appraisals of property value, consistent with national standards?*

As discussed above, the DOE Guidelines, meant to apply to all PACE programs, require the following property-based underwriting standards:

- Estimated property value in excess of property owner's public and private debt on the property (including mortgages and home equity lines of credit);
- No outstanding taxes or involuntary liens on the property in excess of \$1000;
- Property owner has not been late on property taxes more than once in past 3 years;
- Property is not in foreclosure;
- Reviews of the assessed value of the property; and
- Property owner has not filed for bankruptcy in past 7 years.

According to the Department of Energy, these guidelines "are significantly more rigorous than the underwriting standards currently applied to land-secured financing districts."⁵⁸

2. FHFA Question 15: *What factors do first-lien PACE programs consider in determining whether to provide PACE financing to a particular homeowner-borrower seeking funding for a particular project eligible for PACE financing? What analytic tools presently exist to make that determination? How, if at all, have the methodologies, metrics, and assumptions incorporated into such tools been tested and validated?*

The extensive guidelines and factors meant to guide local government approvals of PACE financing, developed pursuant to a public process which included all interested stakeholders contained in the DOE Guidelines, are set forth in Section II(E) above.

⁵⁸ DOE Guidelines at 1.

3. Question 16: *What factors and information do first-lien PACE programs gather and consider in determining whether a homeowner-borrower will have sufficient income or cash flow to service the PACE obligation in addition to the homeowner-borrower's pre-existing financial obligation? What analytic tools presently exist to make that determination? How, if at all, have the methodologies, metrics, and assumptions incorporated into such tools been tested and validated?*

The comprehensive guidelines and factors contained in the DOE Guidelines are set forth in Section II(E) above. According to the Department of Energy, these guidelines “are significantly more rigorous than the underwriting standards currently applied to land-secured financing districts.”⁵⁹

F. RIN 2590-AA53 EIS Scoping Comments

1. Proposed Action

FHFA’s Proposed Action would “direct the Enterprises not to purchase any mortgage that is subject to a first-lien PACE obligation or that could become subject to first-lien PACE obligations without the consent of the mortgage holder.”⁶⁰ The Proposed Action in FHFA’s EIS should be changed to provide that the Enterprises *may* purchase mortgages subject to a first-lien PACE obligation or that could become subject to first-lien PACE obligations, so long as the applicable PACE program conforms to standards established by FHFA through this rulemaking, such as those set forth in H.R. 2599 or the DOE Guidelines. This revised Proposed Action would address the safety and soundness concerns raised in the ANPR and mitigate financial risks to the Enterprises, while respecting the well-established rights of local governments to place liens on property to secure assessments and to protect public health and safety.

2. No Action Alternative

Vote Solar also supports the No Action Alternative: to withdraw the July 6, 2010 Statement and the February 28, 2011 Directive, thereby allowing the Enterprises to purchase mortgages secured by properties with outstanding first-lien PACE obligations. In addition, FHFA should direct the Enterprises to rescind their May 5, 2010 Advisories. If FHFA analyzes and determines to take the No Action Alternative, it can still address the safety and soundness concerns raised in the ANPR by working collaboratively with other agencies and state and local governments to shape guidelines such as those established in H.R. 2599 or the DOE Guidelines.

3. Other Alternatives/FHFA Question 17

If FHFA does not alter the Proposed Action, one of the alternatives analyzed in the EIS should be rescinding the FHFA’s Statement and Directive, and issuing a Proposed Rule that

⁵⁹ *Id.*

⁶⁰ ANPR at 3963.

provides that the Enterprises are permitted to purchase mortgages subject to a first-lien PACE obligation or that could become subject to first-lien PACE obligations so long as the applicable PACE program conforms to standards and guidelines such as those established in HR 2599 or the DOE Guidelines. In addition, this alternative should include directing the Enterprises to rescind their May 5, 2010 Advisories. This reasonable alternative would reduce or avoid known or potential adverse environmental impacts associated with the proposed action while ensuring that the Enterprises operate in a safe and sound manner. In addition, this alternative would permit local governments to move forward with the adoption of PACE programs and implementation of previously-approved PACE programs. This alternative would also enable residential energy efficiency upgrades and the installation of renewable energy systems around the country, thereby conserving precious non-renewable sources of energy and reducing the many negative environmental impacts of traditional energy production (such as greenhouse gas emissions, air and water pollution, takings of endangered species, ecosystem modification and aesthetic impacts). Finally, this alternative would include safeguards to address the financial risks to the Enterprises about which FHFA has articulated concerns, through controls that result from due process and respect state police powers.

IV. SUMMARY OF VOTE SOLAR RECOMMENDATIONS FOR PROPOSED RULE

Vote Solar urges FHFA to adopt a rule that rescinds the Statement and the Directive and requires the Enterprises to rescind their May 5, 2010 Advisories. The Proposed Rule should provide that the Enterprises are permitted to buy residential mortgage loans on properties subject to PACE obligations originated by programs that conform to standards established via this rulemaking proceeding, such as those set forth in the DOE Guidelines and H.R. 2599.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Browning". The signature is fluid and cursive, with a large, stylized "B" and "g".

Adam Browning
Executive Director
Vote Solar Initiative