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September 13, 2012

Mr. Alfred M. Pollard  
General Counsel  
Federal Housing Finance Agency  
400 7th Street, SW  
Washington, DC 20024

Re: Notice of Proposed Rulemaking; Request for Comments  
Enterprise Underwriting Standards  
RIN 2590-AA53

Submitted via Electronic Delivery to:  
[RegComments@fhfa.gov](mailto:RegComments@fhfa.gov)

Dear Mr. Pollard,

On behalf of the National Association of Home Builders (NAHB), I appreciate the opportunity to respond to the Federal Housing Finance Agency's (FHFA) request for comments on the Notice of Proposed Rulemaking (Proposed Rule), *Enterprise Underwriting Standards*. FHFA's Proposed Rule concerns underwriting standards for Fannie Mae and Freddie Mac (the "Enterprises") relating to mortgage assets affected by Property Assessed Clean Energy (PACE) programs.

NAHB is a Washington-based trade association representing more than 140,000 members involved in all aspects of single family and multifamily residential construction. NAHB and its members have a strong interest in supporting a housing finance system that offers access to home buyers for affordable mortgage financing in all geographic areas in all economic conditions.

### **FHFA's Proposed Rule**

The Proposed Rule includes a very detailed review of comments received in response to FHFA's Advance Notice of Proposed Rulemaking (ANPR) which also requested input related to PACE programs but, more specifically, asked whether previous restrictions and conditions placed on PACE programs by FHFA in July 2010 and February 28, 2011 should be maintained, changed or eliminated and whether other restrictions or conditions should be imposed. FHFA's previous actions effectively prohibit the Enterprises from purchasing mortgage loans if the mortgages are subject to first-lien PACE obligations and further prohibit the Enterprises from purchasing mortgage loans in any jurisdictions that had passed legislation authorizing PACE programs that required a PACE lien to have first-lien status over the mortgage loan.

FHFA's Proposed Rule recommends three restrictions to protect the Enterprises from first-lien PACE obligations. The Proposed Rule is more detailed than the ANPR in laying out the constraints it would impose on the Enterprises. The Proposed Rule states:

- 1) The Enterprises shall immediately take such actions as are necessary to secure and/or preserve their right to make immediately due the full amount of any obligation secured by a mortgage that becomes, without the consent of the mortgage holder, subject to a first-lien PACE obligation. Such actions may include, to the extent necessary, interpreting or amending the Enterprises' Uniform Security Instruments.
- 2) The Enterprises shall not purchase any mortgage that is subject to a first-lien PACE obligation.
- 3) The Enterprises shall not consent to the imposition of a first-lien PACE obligation on any mortgage.

The Proposed Rule does not include language from the ANPR that recommended the Enterprises should not be allowed to purchase any mortgage that *could become* subject to a first-lien PACE obligation without the consent of the mortgage holder, i.e. purchasing mortgages in any jurisdictions that had passed legislation authorizing PACE programs that required a PACE lien to have first-lien status over the mortgage loan.

#### Alternatives to the Proposed Rule

FHFA states it is considering three alternatives to the Proposed Rule that would possibly provide the Enterprises with the equivalent protection from financial risk as the Proposed Rule.

Each alternative includes components (1) and (2) above of the Proposed Rule. Specifically, each alternative would require the Enterprises to immediately take necessary actions to secure and/or preserve their right to immediately call a mortgage due and payable in full if the mortgage becomes subject to a first-lien PACE obligation without the consent of the mortgage holder and the Enterprises would be prohibited from purchasing any mortgage that is subject to a first-lien PACE obligation.

However, each alternative includes a variation of component (3) above that would provide for the Enterprises to allow a first-lien PACE obligation to be imposed on a mortgage if the mortgage is already owned by the Enterprise and specific conditions or underwriting requirements are met. Each alternative is designed to mitigate risk posed by first-lien PACE programs by meeting specific conditions on: Guarantee/Insurance (Alternative 1); Protective Standards (Alternative 2); and, H.R. 2599 Underwriting Standards (Alternative 3).

FHFA is seeking comments "supported by reliable data and rigorous analysis" as to whether any of the alternatives would provide mortgage holders with the

equivalent protection from financial risk as the Proposed Rule. FHFA raises concerns with each proposed alternative and clearly states that the Proposed Rule is its preferred method of protecting the Enterprises from the financial risks it believes are posed by first-lien PACE programs.

### **NAHB Comments**

NAHB submitted comments on the ANPR on March 26, 2012. As stated in our comments, NAHB believes it is important to support initiatives, such as PACE, that seek to finance energy efficient and renewable retrofits for residential and commercial properties. However, NAHB remains concerned that PACE obligations structured as first liens ahead of a pre-existing mortgage or ahead of a new mortgage originated on a property with an outstanding PACE obligation pose financial risks to the safety and soundness of the Enterprises and may impact the valuation and liquidity of MBS containing mortgages with first-lien PACE financing.

NAHB applauds FHFA's willingness to consider risk-mitigation alternatives to the Proposed Rule. Each risk-mitigation alternative offers a different form of protection for the Enterprises. Alternative 1, Guarantee/Insurance, proposes the creative suggestion of insuring or guaranteeing the Enterprises against losses due to the PACE obligation through an insurer or a reserve fund maintained by the PACE program itself for the benefit of senior lien holders in the event of default or foreclosure. Alternative 2, Protective Standards, provides for significant underwriting of the home owner seeking PACE financing and requires a substantial amount of equity in the property. Alternative 3, H.R. 2599 Underwriting Standards, would adopt extensive underwriting and documentation standards for the PACE financing to insure all parties involved in the transaction are informed and protected from the consequences of the PACE lien.

NAHB has not conducted rigorous analysis nor does the Association have access to reliable data that would allow us to offer either significant support or opposition to any of the risk-mitigation alternatives to the Proposed Rule outlined by FHFA. Although each of the alternatives mitigates some of the concerns regarding PACE financing expressed by NAHB in our comments on the ANPR, none mitigates all of the concerns regarding the impact on the secondary mortgage market and the MBS market.

Further, FHFA does not provide any details within the descriptions of the risk-mitigation alternatives to explain how the alternatives would be incorporated or monitored by the Enterprises. While the absence of specific details may be understandable, the lack of this information makes it more difficult to fully assess and comment on the potential efficacy of the alternatives.

Regardless of whether one or more of the alternatives is adopted, a home buyer who wants to purchase a home with a PACE first lien remains at a disadvantage. A mortgage loan with a first-lien PACE obligation still would not be saleable to Fannie Mae or Freddie Mac so a home buyer may not be able to find a lender

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willing to make that loan. Potentially, the home cannot be sold or the sales price might be reduced by the amount necessary to pay off the PACE lien. In either instance one party is disadvantaged by the existence of the PACE lien and the value of the home may be negatively impacted.

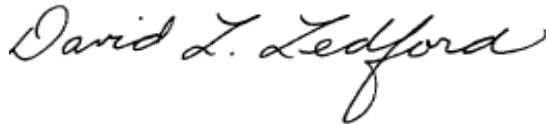
In response to the Proposed Rule, should FHFA receive evidence that is convincing to the Agency that neither the safety and soundness of the Enterprises nor that of the secondary market would be harmed by substituting one or more of the risk mitigation alternatives in place of the Proposed Rule, NAHB would be willing to consider supporting FHFA's position. NAHB is confident that FHFA is committed to maintaining a robust and viable secondary mortgage market that insures affordable and widely available mortgage credit.

### **Conclusion**

NAHB would be happy to work with FHFA, the Enterprises and other stakeholders in the housing and mortgage lending industries to seek other alternatives to the Proposed Rule or resolve the current impediments to the effective use of PACE programs as a means to finance energy retrofits in a manner that does not impair the functioning of the housing finance system.

Thank you for your consideration of NAHB's comments. If you have questions, please contact Becky Froass, Director, Financial Institutions and Capital Markets at 202.266.8529 or email at [rfroass@nahb.org](mailto:rfroass@nahb.org).

Sincerely,

A handwritten signature in cursive script that reads "David L. Ledford". The signature is written in black ink and is positioned below the "Sincerely," text.

David L. Ledford  
Senior Vice President  
Housing Finance and  
Regulatory Affairs