

PACENow

March 25, 2012

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

Sent via Federal eRulemaking Portal <http://www.regulations.gov> and E-mail to FHFA RegComments@fhfa.gov.

RE: RIN 2590-AA53 Mortgage Assets Affected by PACE Programs; Comments on Advanced Notice of Proposed Rulemaking and EIS Scoping Comments

PACENow submits this comment and guidance to the FHFA in response to the U.S. District Court ordered Advance Notice of Public Rulemaking (ANPR). 77 Fed. Reg. 3958 (January 26, 2012).

Property Assessed Clean Energy (PACE) programs promote a clear government policy goal to reduce energy use in buildings. They rely on a municipal assessment mechanism that has been used by state and local governments for decades to efficiently finance improvements to private property that further clear public policy objectives. Since its inception in 2008, PACE has been adopted (or was already authorized) in 28 states. On July 6, 2010, the Federal Housing Finance Agency (FHFA) issued a statement (the July 6th statement) prohibiting Fannie Mae and Freddie Mac (the Enterprises) from buying mortgages with senior lien PACE assessments, asserting that they are unlike other municipal assessments (and therefore undeserving of their senior assessment lien status), pose a “significant safety and soundness concern” to the mortgage industry, and lack adequate program standards and consumer protections. This has had the effect of almost entirely stopping the development of PACE programs authorized by state and local laws.

We believe the FHFA acted imprudently, without conducting adequate analysis, and to the detriment of the public good. Under 12 U.S.C. section 451(a)(1)(B)(v), a “principal duty of the Director” [of the FHFA] is to “ensure that . . . the activities of each regulated entity are consistent with the public interest.” PACE programs serve the public good in myriad ways and provide a valid means of promoting state, and local policy objectives. There is no evidence that they pose a “significant” risk to mortgage lenders. PACENow, and other PACE advocates, working with the White House and U.S. Department of Energy, developed and supported standards and guidelines that ensure that the interests of local governments, consumers, and mortgage lenders are protected.

PACENow urges the FHFA to rescind its July 6th statement and allow Fannie Mae and Freddie Mac to resume underwriting mortgages with PACE assessments, treating them no differently than other municipal taxes and assessments.

Public Policy Goals and PACE

Property Assessed Clean Energy (PACE) programs respond to a growing national consensus that state and local governments have a direct and legitimate public policy interest in promoting, facilitating, and financing energy efficiency (EE) and renewable energy (RE) projects for buildings, which use almost half the energy consumed in the United States and about three-quarters of the electricity¹. Energy conservation and development of on-site renewable energy systems clearly promote the public good by:

- Making the United States less reliant on imported fuels,
- Improving energy security for states and local communities by reducing their reliance on inter-state imports and strain on an already overloaded and outmoded grid system,
- Avoiding the costs of building new power plants and transmission systems,
- Saving money for property owners while enhancing the value of their buildings,
- Hedging property owners from rising and/or spiking fuel costs,
- Reducing air pollution caused by burning fossil fuels, which safeguards the environment, and
- Protecting the public's health and welfare by reducing air pollutants known to cause death and disease and the attendant costs that burden us all.

Economic Objectives Furthered by PACE

The enormous potential for economic output gains and job creation resulting from EE/RE projects is an equally important state and local government policy consideration. An economic study performed by ECONorthwest in 2011 predicts that every \$1 million of EE/RE project spending results in \$2.5 million in total economic output, roughly \$250 thousand in state and local taxes, and approximately 15 new jobs nationwide.² Another study conducted in 2011 by the United States Department of Energy on the economic impacts of the Boulder County (CO) Climate Smart (PACE) Loan Program found that \$9 million spent on EE/RE projects on 598 homes contributed, statewide, to more than \$7 million in personal income gains, just under \$30 million of total economic activity, and the creation of roughly 125 short-term jobs (that would have been sustainable on a longer term basis if the program had remained operational).³ Larger scale adoption of EE/RE measures nationwide could have enormous economic impact. A March 2012 report by Deutsche Bank and The Rockefeller Foundation finds that improving EE 30% in our

¹ Deutsche Bank Climate Change Advisors & the Rockefeller Foundation, "United States Building Energy Efficiency Retrofits: Market Sizing and Financing Models," March 2012, accessed March 2012. http://www.dbcca.com/dbcca/EN/investment_research.jsp.

² ECONorthwest, "Economic Impact Analysis of Property Assessed Clean Energy Programs (PACE)," April 2011, accessed March 2012. <http://pacenow.org/blog/wp-content/uploads/PACE-Econometric-Study-by-ECONorthwest-for-PACENow-5-4-11.pdf>.

³ U.S. Department of Energy, National Renewable Energy Laboratory, "Economic Impacts from the Boulder County, Colorado, ClimateSmart Loan Program: Using Property-Assessed Clean Energy Financing," July 2011, accessed March 2012. <http://www.nrel.gov/docs/fy11osti/52231.pdf>.

nation's homes built before 1980 would result in total investment of \$144 billion and over 1.7 billion total jobs.⁴

Establishment of Public Purpose and PACE

The nexus between public purpose and PACE has been clearly established in law by PACE enabling statutes, enacted by our elected legislatures, governors, and local municipal representatives, examples of which are provided below.

Florida Statutes – Section 163.08, Florida Statutes - Supplemental Authority for Improvements to Real Property, Excerpts 1(a) – 1(c)⁵:

“In chapter 2008-227, Laws of Florida, the Legislature amended the energy goal of the state comprehensive plan to provide, in part, that the state shall reduce its energy requirements through enhanced conservation and efficiency measures in all end-use sectors and reduce atmospheric carbon dioxide by promoting an increased use of renewable energy resources. That act also declared it the public policy of the state to play a leading role in developing and instituting energy management programs that promote energy conservation, energy security, and the reduction of greenhouse gases . . . Further, the installation and operation of qualifying improvements not only benefit the affected properties for which the improvements are made, but also assist in fulfilling the goals of the state's energy . . . policies. In order to make qualifying improvements more affordable and assist property owners who wish to undertake such improvements, the Legislature finds that there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance . . . The Legislature determines that the actions authorized under this section, including, but not limited to, the financing of qualifying improvements through the execution of financing agreements and the related imposition of voluntary assessments are reasonable and necessary to serve and achieve a compelling state interest and are necessary for the prosperity and welfare of the state and its property owners and inhabitants.”

New York State General Municipal Law Article 5-L, Section 119-ee, Legislative findings and declarations⁶:

⁴ Deutsche Bank Climate Change Advisors & The Rockefeller Foundation, “United States Building Energy Efficiency Retrofits: Market Sizing and Financing Models,” March 2012, accessed March 2012. http://www.dbcca.com/dbcca/EN/investment_research.jsp.

⁵ Florida House of Representatives, CS/HB 7179, 2010 Legislature, accessed March 2012. <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h7179er.docx&DocumentType=Bill&BillNumber=7179&Session=2010>.

⁶New York State General Municipal Law Article 5-L, Section 119-ee, accessed March 2012. [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$G MU119-EE\\$\\$@TXGMU0119-EE+&LIST=LAW+&BROWSER=BROWSER+&TOKEN%20=12896925+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$G MU119-EE$$@TXGMU0119-EE+&LIST=LAW+&BROWSER=BROWSER+&TOKEN%20=12896925+&TARGET=VIEW).

“The Legislature finds and declares that it is the policy of the state to achieve statewide energy efficiency and renewable energy goals, reduce greenhouse gas emissions and mitigate the effect of global climate change, and advance a clean energy economy; and that to achieve such policy and goals the state must promote the deployment of renewable energy systems and energy efficiency measures throughout the state; and that municipalities would fulfill an important public purpose by providing loans to property owners for the installation of renewable energy systems and energy efficiency measures.”

California Streets and Highways Code Sections 5898.10 – 5898.15, Section 5898.14⁷:

“(a) The Legislature finds all of the following: (1) Energy and water conservation efforts, including the promotion of energy efficiency improvements to residential, commercial, industrial, agricultural, or other real property are necessary to address the issue of global climate change. (2) The upfront cost of making residential, commercial, industrial, agricultural, or other real property more energy and water efficient prevents many property owners from making those improvements. To make those improvements more affordable and to promote the installation of those improvements, it is necessary to authorize an alternative procedure for authorizing assessments to finance the cost of energy and water efficiency improvements.

(b) The Legislature declares that a public purpose will be served by a voluntary contractual assessment program that provides the legislative body of any public agency with the authority to finance the installation of distributed generation renewable energy sources and energy or water efficiency improvements that are permanently fixed to residential, commercial, industrial, agricultural, or other real property.”

PACE Removes Barriers

A range of barriers hamper public policy goals to promote EE/RE projects in homes. In its September 2011 report on Energy Efficiency Financing programs, for example, the American Council for an Energy Efficient Economy found that “most [loan] programs are not penetrating the market of potential consumers.” More than half of the 24 programs ACEEE studied from 13 states had a participation rate of less than .5% of potential customers. The report flags a number of problems inherent to existing programs that make scaling of energy efficiency unlikely with existing models, including: a lack of available funding from private sector capital providers, the need for government or utility imposed public service charges to fund interest rate buy-downs, an inability to package small individual loans to create broader market liquidity, and a lack of public awareness

⁷ Streets and Highways Code Sections 5898.10 – 5898.15.15, accessed March 2012.
<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=shc&group=05001-06000&file=5898.10-5898.15>.

or understanding of the opportunities to benefit from EE⁸. The failure of other programs and a multitude of alternative financing mechanisms has directly led to the adoption of PACE by state and local governments. PACE programs have many features that remove barriers that impede the success of other EE/RE financing programs and models:

1. **Local Focus:** Perhaps most importantly, PACE is a local government initiative that supports focused education and marketing efforts, which are proven to be more effective in motivating homeowners to act than those directed by states or the federal government. Statewide programs tend to be remote and are inadequately staffed and/or marketed to reach homeowners effectively. They are also unable to mobilize local trusted source or peer based marketing efforts. PACE programs create a critical nexus between a local government and its homeowner community. There are proven benefits of local initiatives, such as improved service delivery, strengthened democratic participation, and ameliorated skills and resource utilization.⁹
2. **Capital Availability:** PACE can provide access to almost unlimited amounts of private capital using an assessment mechanism and credit structure that is broadly understood and accepted in the fixed income capital markets.
3. **Quick Payback:** Relatively long-term assessment financing can make projects immediately cash flow positive (which saves homeowners money, makes it easier for them to pay their mortgages, and increases the value of their homes, all to the benefit of their mortgage lender).
4. **Transferability:** Owners who are unsure how long they will own a home are reluctant to take on projects if they fear they will need to pay off a loan balance before a breakeven point. Like all municipal taxes and levies, PACE assessments remain with the property and are assumed by a subsequent buyer (who continues to benefit from the financed measures).

⁸ Sara Hayes, Steven Nadel, Chris Granda, and Kathryn Hottel, "What Have We Learned From Energy Efficiency Financing Programs?" September 2011, accessed March 2012. <http://aceee.org/research-report/u115>.

⁹ Several studies and white papers ascertained the benefits of local initiatives, by pointing out service delivery improvements, positive impacts on democratization, and opportunities for efficient partnership-building among the local actors. The following studies support our assertions:

Derick W. Brinkerhoff & Omar Azfar, "Decentralization and Community Empowerment: Does community empowerment deepen democracy and improve service delivery?" U.S. Agency for International Development Office of Democracy and Governance, October 2006, accessed March 2012. http://pdf.usaid.gov/pdf_docs/PNADH325.pdf.

Eric Mackres, Elena Alschuler, Amy Stitely, & Erin Brandt, "The Role of Local Governments and Community Organization as Energy Efficiency Implementation Partners: Case Studies and a Review of Trends," American Council for an Energy-Efficient Economy, February 2012, accessed March 2012. <http://www.aceee.org/white-paper/the-role-of-local-actors>.

5. **No Subsidies:** PACE can access private capital at the same attractive interest rates as other municipal assessment projects for existing homes, which means interest rates need not be subsidized at the expense of others.
6. **Aggregation:** PACE assessments based on standard financing mechanisms and protocols can be aggregated and securitized, providing scalability and a liquid secondary market that will further reduce borrowing costs and, as the ACEEE report notes, is non-existent for alternative funding measures.

FHFA Objections to PACE – Validity of PACE Assessments

The FHFA made assertions regarding the character and validity of PACE assessments in its July 6th statement that are unsupported and incorrect. FHFA asserts that “PACE loans are unlike routine tax assessment . . . [that] The size and duration of PACE loans exceed typical tax programs and do not have the traditional community benefits associated with taxing initiatives.”

Similarity to Other Assessments

To the contrary, PACE assessments are like other “routine” tax assessments. As noted above, the municipal assessment process has been used for decades by state and local governments to finance a broad range of projects that benefit real property owners. There are over 37,000 special districts in the United States today that are used to finance parks, streetlights, water and sewer systems, sidewalks, septic tank upgrades, seismic strengthening, and neighborhood beautification projects, among others.¹⁰ The common feature of these otherwise disparate endeavors is the finding, by our elected governmental representatives, that they each further the health, safety, and/or welfare of the public. Reducing demand for energy in buildings, for all of the reasons noted above, clearly promotes the public’s health, safety, and welfare.

FHFA’s claims that PACE assessments exceed the size and duration of “typical tax programs” is factually incorrect. Municipalities finance projects using taxes and assessments for periods linked to the average life of the asset. PACE financing is similarly constrained. A water and sewer plant might be financed over 30 years (and in some jurisdictions, up to 40 years). Based on the measures adopted, PACE assessments could finance projects for a period of from 10 to 20 years. For expensive municipal projects (like water and sewer facilities), costs per home can far exceed a typical PACE project. Furthermore, assessments for parks, water and sewer systems, and countless other projects remain on the tax rolls in perpetuity, and unlike PACE assessments, rise over time as the cost of maintaining them increases with inflation.

¹⁰ U.S Census Bureau, “Local Governments and Public School Systems by Type and State: 2007,” accessed March 12. <http://www.census.gov/govs/cog/GovOrgTab03ss.html>.

Voluntary versus Mandatory

FHFA's October 14, 2010 filing of a motion to dismiss the lawsuit in the United States District Court in the Northern District of California (Motion to Dismiss) that has led to this ANPR procedure, notes that "[u]nlike traditional assessments, PACE programs are voluntary."

While PACE is voluntary, that fact is also irrelevant. Most municipal projects financed with assessments begin with public information sessions, followed by a public hearing, and then some form of referendum that give property owners the right to approve or disapprove the measure. When assessments are imposed on all properties after most property owners have approved, two conditions will generally apply: (1) the measure will provide a benefit that all property owners have the ability to enjoy in the same manner and to a like degree, and (2) the failure to assess all property owners would likely make the measure impossible to finance. The "free rider" problem must necessarily be avoided if economies of scale are required to implement the project. For example, a new sewer system could result in substantial annual assessments. Each individual property owner might recognize the collective need for the proposed system, to protect the environment and drinking water supplies, for example, but each property owner, given the opportunity to opt-out, might choose to remain instead with a functioning individual septic system.

There is no system-wide solution to making buildings more energy efficient. There is clearly no way to encase a community in some sort of shield or bubble that would maintain a constant temperature or trap and remove greenhouse gas emissions or other pollutants. And, there is no rationale for making a homeowner whose dwelling is already efficient, pay an assessment to make his neighbor's equally so. While paying for my neighbor's improvements might benefit me to an extent, by contributing to a cleaner environment, I cannot benefit in a like manner, since only my neighbor's home will realize added cost savings, have enhanced comfort, and achieve a higher market value.

While less common than mandatory assessments, there are examples of other opt-in assessment programs that recognize the lack of a free rider problem and allow individual property owners to receive benefits and pay an assessment in return. Examples include geologic hazard abatement districts in California¹¹, and septic tank improvement programs in Massachusetts.¹² Ironically, FHFA uses against PACE, the voluntary opt-in feature that protects homeowners and lenders by allowing only those homeowners who would benefit from a project to incur the cost associated with it.

¹¹ Daniel J. Curtin Jr. and Bryan W. Wenter, "Areas Prone to Landslides Can Use Abatement Districts Land Use Law," California Association of Geological Hazard Abatement Districts, Daily Journal - July 05, 2005, accessed March 2012. <http://ghad.org/dailyjournal.html>.

¹² Massachusetts Department of Environmental Protection, "The Community Septic Management Program," accessed March 2012. <http://www.mass.gov/dep/water/wastewater/csmphl.htm>.

Semantic Distinction Between Loans and Assessments

FHFA insists that PACE assessments are loans instead of assessments,¹³ noting use of the word “loan” in some (but not all) enabling legislation, on various program websites, and in common parlance to buttress its assertions that PACE is meaningfully different from other assessments and undeserving of its senior lien status. Whenever a municipal government funds a project on behalf of property owners, typically by borrowing at some rate of interest, it is “lending” money to its residents, who repay that capital, with interest, in the form of a tax or assessment, but semantic arguments miss the over-riding point. Whether referred to as a loan, or a “benefit financing”, the underlying government objective to use lawfully established benefit district financing to achieve a public policy objective is what matters.

FHFA cites a number of factors that it believes distinguish loans from assessments. In its ANPR, for example, it notes that a homeowner “selects the contractor who will perform the energy retrofit”, but fails to note that programs, like Babylon’s, require homeowners to use contractors from a government approved list. FHFA also notes in the ANPR, that “[e]ach participating property owner . . . owns the energy retrofit fixtures and must repair the fixtures should they become inoperable, including during the time the PACE loan remains outstanding.” Other municipally assessed improvements, such as sidewalks, may be owned by a resident or are the responsibility of the resident to repair and maintain. FHFA states, regarding PACE, that “no uniform national standards exist.”, but fails to note that no such “uniform national standards” exist for any other type of municipal assessment project and ignores the extensive efforts among PACE proponents, the White House, and U.S. Department of Energy (among others) to do exactly that.

Request for Further Analysis

PACENow is not aware of any authority vested in the FHFA to pick and choose among assessment programs that have their basis in valid state and local laws. We request that the FHFA provide evidence of its statutory right to do so and legal justification for any decision it makes in this rulemaking process to ignore what are certainly validly imposed laws in states that have enabled PACE.

FHFA Objections to PACE – Safety and Soundness Concerns

FHFA’s July 6th Statement, Motion to Dismiss, and ANPR are replete with references to risk, such as: “PACE loans . . . pose unusual and difficult risk management challenges for lenders, servicers and mortgage securities investors”, “PACE liens present significant risks to certain assets and property of the Enterprises . . . and pose unusual and difficult risk management challenges”, “[i]n all its statutory capacities, FHFA is empowered to act decisively to avoid risk to the Enterprises,” and “FHFA has determined that...[PACE] programs present significant safety and soundness concerns.”

¹³ Federal Housing Finance Agency, “RE: Property Assessed Clean Energy (PACE) Programs,” June 10, 2011, accessed March 2012. <http://pacenow.org/blog/wp-content/uploads/FHFA-Letter-to-Lungren-Thompson-and-Hayworth-re-PACE-programs-6.10.2011.pdf>.

Risk Management

All mortgage underwriting entails risk management. There is always the risk, for example, that a homeowner will face changing circumstances that could result in an inability to pay. For decades, lenders have managed the risks associated with property taxes and assessments. Municipal governments often respond to reductions in non-property tax revenues by raising taxes substantially. School districts regularly expand and improve facilities with resultant increases, often substantial in both dollar and percentage terms, to homeowners. Municipal water and sewer districts create and upgrade facilities at costs that result in substantial increases to assessments. The Enterprises and other mortgage lenders have long demonstrated their ability to manage all of these risks that are fundamentally no different than those resulting from PACE assessments, with one key difference. To our knowledge, PACE assessments are the only example of a municipal assessment that can reduce net costs to a homeowner and protect against energy cost increases and spikes.

PACE Program Experience to Date

In his June 10, 2011 response¹⁴ to an April 20, 2011 letter from Congresswoman Nan Hayworth, Congressman Dan Lungren, and Congressman Mike Thompson to FHFA's Acting Director Edward DeMarco seeking clarification on "what data or financial modeling serves as the basis for FHFA's claim that PACE programs pose significant safety and soundness concerns?", Alfred Pollard, FHFA's General Counsel, replied that, "FHFA's analysis was based on its investigation of PACE legislation and programs ... no econometric modeling was involved."

Clearly, investigation of PACE programs was inadequate or premature to support the view that PACE poses significant safety and soundness concerns. Actual program data shows this is simply untrue. Sonoma County (CA), Boulder County (CO) and Babylon (NY) conducted a thorough review of all properties financed to date by their PACE programs. Their results, as provided to *PACENow*, are summarized in the table below.

Program	Homes	\$ (Mil)	# Def	% Def
Babylon	652	6.53	1	0.15%
Boulder	612	9.78	7	1.14%
Sonoma County	1,459	45.50	16	1.10%
	2,723	61.81	24	0.88%

Source: Program Administrators
Note: Palm Dessert (CA) is still compiling data

It is not known, based on the information available to program administrators, whether any of the defaults actually resulted in a loss to the Enterprises, or for that matter, a loss of any magnitude to any mortgage lender. Homes in default on their mortgages may have had positive equity, and some may have been current on their taxes and assessments.

¹⁴ Federal Housing Finance Agency, "RE: Property Assessed Clean Energy (PACE) Programs," June 10, 2011, accessed March 2012. <http://pacenow.org/blog/wp-content/uploads/FHFA-Letter-to-Lungren-Thompson-and-Hayworth-re-PACE-programs-6.10.2011.pdf>.

While there may have been defaulted homes with negative equity and assessments in arrears, it is equally possible that the sale price of the home in foreclosure was higher than it would have been, absent the improvements.

It is entirely reasonable to conclude, however, that the magnitude of defaults in this sample does not constitute a significant concern to the safety and soundness of the mortgage industry. Indeed, from 2008 to the present, during one of the worst housing markets in history, PACE program homes clearly defaulted at significantly lower rates than non-PACE improved homes in their communities.

Protections to Lenders that Result from PACE

PACE programs and the assessment mechanism protect the Enterprises, other mortgage lenders, and the financial sector at large in a number of ways.

1. **Non-Acceleration:** Like any municipal tax or assessment, PACE assessments remain with a property upon sale, whether voluntary or as the result of a foreclosure. A lender's exposure is limited, therefore, only to assessments in arrears. Non-acceleration ensures that an unpaid future balance will be assumed by a subsequent buyer and not netted from proceeds of the sale. In its Motion to Dismiss, FHFA asserts that "any rational purchaser will treat his "assum[ption] [of]... the remaining PACE obligation ... as a cost, and will reduce his cash bid accordingly." FHFA belies its own argument when it refers to rational behavior. No rational buyer of a home would fail to factor the lower costs of operating a home with EE/RE improvements in a pricing decision. A rational buyer will pay more for a home when savings exceed assessment costs. By the FHFA's logic, no rational person would ever undertake an EE/RE project, or for that matter, vote for a sewer project, if doing so would immediately devalue the property by the present value of all future assessments.
2. **Value from Improvements:** A number of studies demonstrate that EE/RE projects increase the market value of homes.¹⁵ Homes that require less energy, or generate energy on-site, are less expensive to operate. Buyers are also increasingly aware that such homes are healthier and more comfortable.

¹⁵ Several studies showed an increase in property values due to EE/RE projects: Ben Hoen, Ryan Wiser, Peter Cappers, and Mark Thayer & Ernest Orlando Lawrence Berkley National Laboratory. "An Analysis of the Effects of Residential Photovoltaic Energy Systems on Home Sales Prices in California," April 2011, accessed March 2012. <http://eetd.lbl.gov/ea/emp/reports/lbnl-4476e.pdf>.
Bryan Bloom, Mary Ellen C. Nobe, and Michael D. Nobe, "Valuing Green Home Designs: A Study of ENERGY STAR Homes," *JOSRE*, 3 no. 1 (2011), accessed March 2012. http://www.costar.com/uploadedFiles/JOSRE/JournalPdfs/06.109_126.pdf.
Rick Nevin & Gregory, "Watson Evidence of Rational Market Valuations for Home Energy Efficiency," *The Appraisal Journal*, October 1998, accessed March 2012. http://mpr.ub.uni-muenchen.de/35343/1/Nevin-Watson_1998_APJ_Market_Value_of_Home_Energy_Efficiency.pdf.

3. **Savings to Owners:** PACE assessments fund EE/RE projects that produce savings to homeowners, often immediately. Improved cash flow for a property owner enhances his or her ability to make mortgage payments and lowers default risk to lenders.
4. **Hedge Against Cost Increases:** Reducing the energy needs of a home with PACE creates a permanent hedge against rising (or spiking) fuel costs in the future.¹⁶
5. **Economic Activity:** FHFA, in admitting that it has conducted no econometric modeling, has failed to factor the risk mitigating impact of increased economic activity and job creation that results from PACE.

PACE Standards and Guidelines that Protect Lenders and Homeowners

The risks of lenders and homeowners are clearly intertwined, and PACE programs have and can be designed to mitigate them. As noted above, PACENow and many other PACE advocates worked closely with the White House and U.S. Department of Energy on PACE program best practices and guidelines for implementation (DOE Guidelines).¹⁷ Many of these were incorporated and/or expanded upon in the “PACE Assessment Protection Act of 2011” (HR 2599), which is currently in the U.S. House of Representatives.¹⁸ They include the following features:

1. **Equity Test:** To qualify for a PACE assessment, homes would need to meet a loan to value test. HR 2599 would require there be at least 15% positive equity in a participating home.
2. **Limit on Project Size:** Projects are limited in size relative to the current market value of a home.
3. **Past Performance Criteria:** Homeowners need to be current in their tax and mortgage payments, and demonstrate a history of on-time payments.
4. **Absence of Problems:** Homes need to be free of outstanding involuntary liens.
5. **Audit/Evaluation Requirements:** A home must be evaluated with specific, proven measures to determine the appropriateness and effectiveness of EE/RE measures.
6. **Contractor Qualifications:** Work must be performed by contractors that meet specific accreditation standards.
7. **Demonstration of Savings:** Projects must demonstrate a positive savings to investment ratio.

Request for Further Analysis

FHFA cites its statutory mandate to “avoid risk to the Enterprises” to justify its ban on PACE. Clearly, the total avoidance of risk is not its sole mandate; FHFA must regularly weigh risk against benefit. FHFA, in the statutorily required analysis that must precede

¹⁶ Dan Barry, “In Fuel Oil Country, Cold That Cuts to the Heart,” The New York Times, February 3, 2012, accessed March 2012. http://www.nytimes.com/2012/02/04/us/maine-resident-struggles-to-heat-his-home.html?_r=3&hp.

¹⁷ U.S. Department of Energy, “Guidelines to Pilot PACE Financing Programs,” May 7, 2010, accessed March 2012. http://pacenow.org/documents/arra_guidelines_for_pilot_pace_programs.pdf.

¹⁸ H. R. 2599, 112th Congress, 1st Session, July 20, 2011, accessed March 2012. <http://pacenow.org/blog/wp-content/uploads/HR-2599-PACE-Protection-Act-of-2011.pdf>.

establishment of a rule for PACE programs must develop analysis that takes the following into account, to avoid acting capriciously:

1. The extent to which increased home value that results from EE/RE projects outweighs the risk of loss associated with a year or two of assessments in arrears.
2. The extent to which increased economic activity and job creation resulting from PACE serves the public interest and reduces the risk of default on all homes, to the benefit of the Enterprises and other mortgage lenders.
3. The extent to which hedging homeowners from rising energy costs and/or energy price spikes safeguards them and reduces the risk of defaults to the Enterprises.
4. The extent to which the non-acceleration feature of assessments protects the financial sector broadly, many lending institutions directly, and the Enterprises by extension, from total losses resulting from the complete extinguishment of alternative loan products in the event of mortgage defaults.
5. Under its requirement to perform an Environmental Impact Study (EIS), the costs to the public of continued degradation of the environment that result from a failure to make homes more energy efficient and less reliant on fossil fuels.

RIN 2590-AA53 EIS Scoping Comments

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."¹⁹ 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.

No Action Alternative

PACENow also supports the No Action Alternative: to withdraw the July 6th statement and subsequent directives, allowing the Enterprises to purchase mortgages secured by properties with outstanding first-lien PACE obligations. If FHFA adopts 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.

Other Alternatives/FHFA Question 17

If FHFA does not alter the Proposed Action, one of the alternatives analyzed in the EIS should be revisions to the FHFA's July 6th statement to provide that the Enterprises are permitted to purchase mortgages subject to a first-lien PACE obligation or that could

¹⁹ ANPR at 3963.

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.

Summary of PACENow's Proposed Rule

PACENow urges FHFA to adopt a rule that rescinds the July 6th statement. 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.

Conclusion

PACENow appreciates this opportunity to comment on FHFA's ANPR. We respectfully request that the Agency give PACE the full and objective consideration that the law requires.

Sincerely,



David Gabrielson
Executive Director