
**FLORIDA PACE FUNDING AGENCY**
**Submitted: September 12, 2012**

VIA UPS OVERNIGHT DELIVERY

Alfred M. Pollard, General Counsel
Attn: Comments/RIN 2590-AA53
Federal Housing Finance Agency
Eighth Floor
400 Seventh Street S.W.
Washington, DC 20024

Re: RIN 2590-AA53 Notice of Proposed Rulemaking Underwriting Standards Relating to Mortgage Assets Affected by Property Assessed Clean Energy ("PACE") Programs

Dear Mr. Pollard:

On behalf of the Florida PACE Funding Agency ("Agency"), the undersigned submits the Agency's comments on the Notice of Proposed Rulemaking ("Proposed Rulemaking") or "NPR") issued by the Federal Housing Finance Agency ("FHFA") in the June 15, 2012 Federal Register (77 Fed. Reg. 36,086). FHFA is the exclusive supervisory regulator of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac)( together, the "Enterprises"). The Agency is a governmental body created in Florida to implement the Florida PACE Program created by Fla. Stat. §163.08 (2011) and statutorily authorized to be implemented by interlocal agreement among local governments in Florida.

The Agency previously submitted comments to FHFA in response to the Advanced Notice of Proposed Rulemaking ("ANPR") submitted March 26, 2012 arguing that the elimination of restrictions and conditions established by FHFA, at least with respect to the Florida PACE program administered by the Agency, is warranted because the Florida PACE Program does not in any way reduce the value of the Enterprises' assets.

To facilitate incorporation of its previous comments into this response, the Agency is attaching its comments to the ANPR as Exhibit A to this letter. The Agency's March 26, 2012 submittal has been numbered FPA001-[page number] to facilitate cross referencing.

## I. General Comments

The Agency is perplexed that FHFA remains generally hostile toward PACE programs in spite of roughly 400 substantive comments on the ANPR where FHFA itself states that "most but not all" comments expressed support for PACE programs. 77 Fed. Reg. 36,089. These supportive comments, including the Agency's comments, come from a variety of sources across the political spectrum and the nation in response to the ANPR. 77 Fed. Reg. 36,088-098. The FHFA's attitude toward outside input can be gleaned most pointedly from its statement in the preamble of the Proposed Rulemaking:

> FHFA will withdraw this NPR should FHFA prevail on its appeal (of the California District Court Order) and will, in that situation, continue to address the financial risks FHFA believes PACE programs pose to safety and soundness as it deems appropriate. (emphasis added.) 77 Fed. Reg. 36, 087.

So the Agency concludes that the California District Court and a majority of 400 commenters apparently have little influence on the FHFA's viewpoint or its attitude toward the broad based support for PACE demonstrated by the comments to the ANPR. The Agency believes that the anti-PACE attitude of the FHFA that is reflected in the prior quote permeates the Proposed Rulemaking and renders the FHFA rulemaking arbitrary and capricious because it impinges on the Agency's ability to undertake fair, reasoned and unbiased decision making on issues of critical importance – energy efficiency and job creation - to the Agency and the State of Florida.

This attitude is also illustrated by three themes of the Proposed Rulemaking: (1) persistence in the FHFA's apparently deliberate use of incorrect and biased terminology that was shown to be erroneous by the Agency's (and others') comments on the ANPR; (2) failure to discuss the specifics of the Florida PACE Program in the FHFA's review of comments to ANPR; and (3) failure by FHFA to acknowledge the uniqueness of the Florida PACE Program and provide in its rulemaking an option for the Agency to implement its PACE program within its borders unfettered by any applicable limitations of the Proposed Rule.

The following are examples of FHFA's repetition of incorrect and erroneous terminology used in the ANPR. These terms were discussed and corrected by the Agency (and other commenters) in comments to the ANPR, but which nonetheless consistently reappear in the Proposed Rule drafted by FHFA:

- Referring pejoratively to PACE investments as "home improvement projects", as if the project was the equivalent of installing new flooring or light fixtures – 77 Fed. Reg. 36,088 – corrected by the Agency at FPA00-38.
- Referring to PACE's "lien priming feature" – 77 Fed. Reg. 36,038 – corrected by the Agency at FPA00-24-31 (Agency's Response to Questions No. 3 and No. 4)[1].
- Referring to PACE investments as "loans," not land secured assessments under Florida law – FPA00-18 (Agency's Response to General Comment No. 4 and the responses of Leon County, FL (77 Fed. Reg. 36,097)

But most importantly, the Agency was disappointed that FHFA chose not to discuss the unique attributes and structure of the Florida PACE Program nor did it comment upon how the enabling legislation of the Florida PACE Program and the creation of the Agency addresses many, if not all of the concerns raised generally by FHFA to PACE programs. FHFA fundamentally ignored the Agency's comments to the ANPR[2] and never specifically discussed the unique and significant advantages Florida law provided that eliminates many, if not most, of FHFA's concerns that are at the root of FHFA's anti-PACE attitude.

## II. The Agency's Specific Comments on the Proposed Rule and Risk Mitigation Alternatives

### A. Comments on Proposed Rule

The Proposed Rule starts with same premise expressed by FHFA in the July 6, 2010 Statement concerning PACE Programs (the "Statement") and the February 28, 2011 Directive (the "Directive") that in effect ordered the Enterprises not to purchase mortgages affected by PACE Obligations. The Proposed Rule, however, goes one step beyond those severe decrees by mandating that the Enterprises take steps to interpret or amend the Enterprises' Uniform

[1] The Agency again asserts that the predicate for the question is erroneous, arbitrary and capricious, as it assumes the 'lien priming feature of the first lien PACE obligations' are somehow distinguishable from all other governmental assessments. Just the contrary, in Florida, PACE assessments are indistinguishable from and fully equivalent to all other non-ad valorem assessments. See Paragraph Twelfth in the Final Judgment. (Exhibit C to the Agency's Response) The term 'lien priming' occurs in a bankruptcy setting where cash injections during reorganization are given priority or parity with prior secured lenders. The use of the term by FHFA in this context is pejorative, misleading and improper. In a bankruptcy circumstance there can be a priority struggle between contract lenders where debtor in possession financing is necessary. In a contest between a contract lender and a property tax or non-ad valorem or special assessment outside of the very narrow circumstance where 'lien priming' might occur, every mortgagor knows that its mortgage, regardless of first in time considerations, is simply not on par with the tax or assessment.

[2] Florida PACE Program was mentioned implicitly by the following statement: "Such [state] legislation generally leaves most program implementation and standards to local governmental bodies and, but for a few instances, [i.e., Florida PACE program] provide no uniform requirements, standards or enforcement mechanisms." 77 Fed. Reg. 36, 088.

Security Instruments to preclude the property owner from even incurring PACE obligations. FHFA's weapon of choice in this assault on PACE Programs is what the Agency has titled the Immediate Full Amount Due Initiative.

The Immediate Full Amount Due Initiative would require the Enterprises to immediately secure and or preserve any 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 PACE obligation.

Agency Response: Please be advised, in no uncertain terms, that any attempt by the Enterprises under this rule to secure or preserve rights to essentially call in the mortgage on real property the moment it incurs a PACE obligation will not be enforceable under Florida law. See FPFA000-21 and Exhibit C to the Response for an in-depth discussion of the Florida PACE Program and the impact of the bond validation provision in the Florida PACE law.

The inability of the Enterprises to enforce the Full Amount Due Initiative is the direct result of both Section 163.08(13), Fla. Stat. and the Florida Circuit Court's Final Judgment in Florida PACE Funding Agency v. State of Florida, Case No. 20110CA-1824 (August 25, 2011) which became final and non-appealable on September 27, 2011. The decision addressed the very proposal being contemplated by FHFA in the Proposed Rulemaking. The findings of fact and law in the court's decision have been deemed to be binding on all participants in the Agency's program, including most importantly, mortgage lenders who hold a mortgage on property subject to, or which may become subject to, the non-ad valorem assessment levied pursuant to the Agency's Florida PACE Program. (*emphasis added*) The Final Judgment confirmed the validity of the law creating the Florida PACE Program and by its terms the Final Judgment rendered unenforceable any provision in any agreement between a mortgagee or other lienholder and a property owner which allows for the acceleration of payment of a mortgage, note, lien or other unilateral modification solely as a result of the property owner entering into a financing agreement pursuant to the Agency's PACE program.

Fla. Stat. §163.08 (13) states in relevant part:

> A provision in any agreement between a mortgagee or other lienholder and a property owner, or otherwise now or hereafter binding upon a property owner, which allows for acceleration of payment of the mortgage, note, or lien or other unilateral modification solely as a result of entering into a financing agreement as provided for in this section in not enforceable. (*emphasis added*)

Florida's Legislature clearly anticipated FHFA or any other mortgagee or mortgage holder or guarantor could, consistent with FHFA's Directive and the Statement, attempt to undermine PACE. As a result, the Florida Legislature has decreed that neither existing nor future mortgages can be effectively "called" when a PACE obligation is incurred.

The second element of the Proposed Rule is the requirement that the Enterprises are forbidden from buying mortgages where the real property has incurred a PACE Program assessment.

Agency's Response: If finalized, this provision means that FHFA will be removing itself from the secondary residential mortgage market in Florida as the Florida PACE Program continues to grow through subscriptions of additional local governments, and Florida's property owners enter into financing agreements under the auspices of the Agency and its management team[3]. See FPFA00-42 - FPFA00-44 (Agency's Response to Question No. 17).

The Florida PACE Program is a single uniform program that is reaching across Florida[4] and provides underwriting certainty and consistency to the lending or mortgage investing entity. This certainty will bring investing entities regardless of FHFA's prohibition. The Agency and the Florida PACE Program stakeholders believe that this market has the potential to develop in such a way as to leave the Enterprises on the sidelines in Florida. Reasonable flexibility in the rulemaking process, while not seen to date, could negate that unwanted effect of removing the Enterprises from one of the largest housing markets in the United States. Indeed, since special assessments levied under the Agency's PACE Program are not distinguishable from any other governmental assessments in Florida, the FHFA will need to determine what statutory authority it may have under its enabling legislation and that of the Enterprises to completely ignore and refuse to serve the country's fourth largest state. Such arbitrary and capricious actions cannot be justified under existing law.

This is ultimately a business decision by FHFA, but is one that can only be made in the legal framework under which the FHFA and the Enterprises operate. In other words, do the

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[3] The Agency has chosen Science Applications International Corporation (SAIC) [NYSE: SAI] as its program administrator in a competitive bidding procedure. SAIC is one of the largest administrators of government programs in the country. Services will be delivered through SAIC's wholly owned subsidiary, SAIC Energy, Environment & Infrastructure, LLC.

[4] The Agency maintains that its unique platform will allow local governments in Florida of varying size and resources to access capital markets without having to implement or deploy individual programs or individually seek capital for their constituents. Through the delivery of a single, statewide, uniform program, certainty is provided to local governments, property owners, vendors and mortgage lenders. In addition, the statewide platform the Agency offers is designed to take advantage of efficiencies and economies of scale in order to deliver the most cost effective program possible. The Agency also believes that its centralized administration provides efficiencies and cost savings, while fostering partnerships with commercial and industrial groups, educators, energy auditors, contractors, suppliers and installers. In a nutshell, the Agency's implementation of the Florida PACE Program facilitates the creation of local, private sector job engines while at the same time providing a uniform approach to financing that will address any concerns voiced by the Enterprises about adverse impact on mortgage assets as well as the concerns of the Legislature articulated in the Florida PACE Act.

Enterprises have the legal authority to not operate in one or more states under uniform guidelines?

The third element of the Proposed Rule puts the proverbial nails in the coffins of non-Florida PACE Programs where mortgages are owned by the Enterprises. Under this element, the Proposed Rule mandates that the Enterprises shall not consent to the imposition of a first-lien PACE obligation on any mortgage owned by them. So PACE Programs which require lender consent will be not be able to proceed with PACE assessments under this Proposed Rule.

Agency's Response: In contrast to this element, Florida's PACE Program does not require the holder of the mortgage to consent to the financing agreement because Florida recognizes that the mortgage holder is often very difficult to locate or determine. In contrast to consent of mortgage holder, Fla. Stat. §163.08(13) requires 30 day notice to the holders or loan servicers of existing mortgages when a property owner enters into a financing agreement. Consent is only required from the holders or the loan servicers when the total amount of the assessment exceeds twenty (20%) of the "just value" of the property as determined by the county property appraiser within the strictures of applicable Florida law. Fla. Stat. §163.08(12)(a).

The Agency finds the three major elements in the Proposed Rulemaking, when taken as a whole, reflect exactly the same position by FHFA that was expressed in the Directive, in the Statement and in the ANPR. So as far as the fundamental structure of the Proposed Rule is concerned, comments from stakeholders fell on deaf ears at FHFA. The Agency's view is confirmed by its strident conclusion of the Proposed Rule whereby FHFA states:

> In light of the comments received in response to the ANPR and FHFA's responses to those comments, FHFA believes that the Proposed Rule is reasonable and necessary to limit, in the interest of safety and soundness, the financial risks that first-lien PACE programs would otherwise cause the Enterprise to bear. 77 Fed.Reg. 36, 107.

The Florida Mortgage Bankers Association and other market stakeholders participated in the passage of the Florida PACE legislation (§163.08, Fla. Stat.). Contrary to FHFA, these experienced and knowledgeable entities felt very strongly that the statutory underwriting guidelines, in particular the thirty (30) day prior written notice to loan servicers, the ability to adjust the required mortgage escrow deposit amounts to reflect PACE assessments, the requirement that the only means to collect the assessment was on the annual tax bill, and that, in order to be valid, the financing agreement evidencing the assessment must be recorded to provide uniformly located and constructive notice to all stakeholders, gave them the protection they needed to support and encourage the development of PACE in Florida.

In addition, the underwriting criteria of the Agency under its Florida PACE Program, namely a determination that all property taxes and any other assessments levied on the tax bill

are paid and have not been delinquent for the preceding three (3) years or the property owner's period of ownership, whichever is less, a determination that that there are no involuntary liens on the property including construction liens, no notices of default or other property-based delinquency have been recorded during the preceding three (3) years or the property owners' period of ownership, whichever is less and that the property owner is current on all mortgage debt, provide additional security to the mortgage lender.

B. Discussion of Risk Mitigation Alternatives to the Proposed Rule

In an attempt to throw a rare bone to the proponents of PACE, FHFA says it is considering three alternatives to the Proposed Rule, each of which must provide mortgage holders with "equivalent protection from financial risk as the Proposed Rule and could be implemented as readily and enforced as reliably as the Proposed Rule." 77 Fed. Reg. 36,107. Upon closer scrutiny, however, these alternatives provide very little room for PACE programs to grow or flourish because the alternatives are built upon the same flawed foundation as the Proposed Rule.

1. First Risk-Mitigation Alternative

This First Risk Alternative ("First Alternative") incorporates, as its foundation, the requirement of the Proposed Rule that the Enterprises immediately secure and/or preserve rights to make outstanding mortgages immediately due when the real property becomes subject to a PACE obligation without holder consent. The Agency's comments above in Subsection A apply equally to this flawed foundation.

The First Alternative does make a meager attempt to mitigate the absolute prohibition on the Enterprises' purchase of mortgages subject to PACE obligations by crafting a procedure for the Enterprises to consent to PACE obligations. The three alternative conditions for approval, however, are individually too speculative and onerous to realistically allow PACE obligations on real property. And for Florida, the First Alternative could not apply as a matter of state law because consent by the mortgage holder is not required.

For example, pursuant to the first of the three methods within the First Alternative for the Enterprises to consent to a PACE obligation, the repayment of the PACE obligation must be "irrevocably guaranteed" by a qualified insurer, whose qualifications are to be determined solely by the Enterprises. In a similar vein, under the second mechanism for consent, the PACE obligation would be required to be insured by a qualified insurer for 100% of the risk. Finally, the third method is the establishment by the PACE program of a reserve fund that is at least equivalent to a qualified insurer.

FHFA's own comments discussing the First Alternative speak for themselves about the lack of feasibility of these methods because even FHFA is uncertain whether these guarantees or insurance alternatives are available in the marketplace. That statement alone guarantees that

these methods could not be enacted as a valid rule because the methods are speculative and lack sufficient evidence in the record to support them. And even if the insurance option was available, FHFA is still worried that the insurance provider may fail even despite the fact that the Enterprises would be setting the criteria to determine if the insurer would be a "qualified insurer!" In the absence of a guarantee, insurer market or a viable way to establish and maintain a reserve fund, First Alternative is clearly not a workable alternative to the Proposed Rule's blanket prohibitions.

2. Second Risk Mitigation Alternative – Protective Standards

This Second Risk Alternative ("Second Alternative"), like the First Alternative, incorporates as its foundation the requirement of the Proposed Rule that the Enterprises immediately secure and/or preserve rights to make outstanding mortgages immediately due when the real property becomes subject to a PACE obligation without holder consent. The Agency's comments above in Subsection A apply equally to this flawed foundation.

Like the First Alternative, the Second Alternative delineates a method for the Enterprises to consent to PACE obligation, in this case when five stringent underwriting conditions are met. Two of the five conditions look to the property holder's credit rating and the documented back-end debt-to-income ratio. These conditions are based on FHFA's erroneous belief that PACE assessments are really bank loans, a position which is clearly contradicted by the Final Judgment in the Florida bond validation case which held that the PACE assessments are constitutionally indistinguishable from other non-ad valorem assessments that operate independently from the creditworthiness of the property owner. See Exhibit C to the Agency's Comments and the discussion in the Agency's Response to General Comment No. 4 commencing on page FPA00-18. In other words, mortgage loans represent personal obligations of the debtor, while PACE assessments are obligations which run with the land like all other governmental assessments, making property holders credit scores and debt-to-income ratios irrelevant.

To the contrary, the severe underwriting guidelines proposed by FHFA will, in the Agency's view, doom PACE programs to failure by severely limiting the applicant pool and restricting the scope of many projects that could be undertaken pursuant to PACE programs, thereby reducing the energy (and cost) benefits to the real property owner. For example, Criteria (c)(i) that limits the PACE obligation to a maximum of $25,000 can reduce or eliminate the large square foot or high value properties ($1 million+) from undertaking comprehensive PACE improvements that are more likely to exceed $25,000. Likewise, the credit score requirements of not lower than 720 eliminate an estimated fifty-one percent (51%) of consumers

(not all of which may be homeowners)[5]. A far better underwriting approach is incorporated into the Florida PACE Program and discussed in the Agency's Response commencing on Page FPA00-5.

3. Third Risk Mitigation Alternative – H.R. 2599

The Third Risk Alternative ("Third Alternative") once again incorporates, as its foundation, the requirement that the Enterprises immediately secure and/or preserve rights to make outstanding mortgages immediately due when the real property becomes subject to a PACE obligation without holder consent. The Agency's comments above in Subsection A apply equally to this flawed foundation.

Like the First and Second Alternatives, the Third Alternative also proposes underwriting standards, but here those standards are taken from proposed Congressional Legislation relating to PACE contained in H.R. 2599. This Alternative has a number of elements in common with the Agency's Florida PACE Program, but contains a number of significant differences as well. The clearest way to compare the two is the following table:

| THIRD ALTERNATIVE | | FLORIDA PACE PROGRAM |
|---|---|---|
| **(i)** | **Written Agreement** | YES |
| **(ii)** | **Written Notice of Satisfaction** | YES. Release of Lien will be recorded. |
| **(iii)** | **Property Taxes Current and Current for three (3) years** | YES |
| **(iv)** | **No involuntary liens in excess of $1000** | YES. However, Florida law says no involuntary liens of any amount. |
| **(v)** | **No default and only one instance of property based debt delinquency for last three years** | No default and no debt delinquency required. |
| **(vi)** | **No bankruptcy for 7 years** | Not a statutory requirement, but under consideration to add. |
| **(vii)** | **Current on mortgage debt** | YES |
| **(viii)** | **Property owners are holders of record** | YES. All property owners must agree. |
| **(ix)** | **Unencumbered title** | YES. Property owners must have ability to agree to lien. |
| **(x)** | **Geographic Eligibility Requirements** | YES |
| **(xi)** | **Audit or Feasibility Study** | Not required, but is encouraged. |
| **(xii)** | **Local government approval based on DOE approved clean energy measures** | NO, but state law restricts to certain improvements |
| **(xiii)** | **Qualified Contractors** | YES |

[5] 40% of FICO Scores are above 750. 18% of FICO Scores are between 700 and 749. www.creditscoring.com. If one assumes an even distribution across the 700-749 category, then approximately 9% of FICO Scores are 724 or below. Based on those figures and assumptions, approximately 49% of FICO scores are above 724 and 51% are below.

| THIRD ALTERNATIVE | | FLORIDA PACE PROGRAM |
|---|---|---|
| (xiv) | **Criteria for disbursement of funds** | YES |
| (xv) | **Energy savings must exceed the cost of the assessment during the useful life of the improvement** | NO. Cost savings is not required as a condition to improvement, especially for wind resistance improvements. |
| (xvi) | **Improvement cannot exceed 10% of current appraisal** | MAYBE. Florida uses 'just value" determined under statutory process by Property Appraiser (elected constitutional officer) which is a lower value than FMU appraisals, and is not subject to manipulation by property owner. |
| (xvii) | **Owner has 15% equity before PACE improvements** | No. Not a relevant concept. |
| (xviii) | **20 year term or weighted average expected life consistent with DOE approved measures** | NO. State law limit, but as a matter of practice, longest assessment will be twenty (20) years or average economic life of improvements, whichever is less. |

It is clear that many of the differences between the Florida PACE Program and the Third Alternative are explained by the difference between FHFA's misconception that PACE assessments are personal obligations of the debtor (i.e., 15% owner equity) as opposed to both the Agency's view and the Florida law that the assessment is a governmental obligation that runs with the land, like all taxes and assessments. Notwithstanding the differences, the Agency believes that the Third Alternative concept, once adapted to conform to Florida law and the Agency's Program, will not only foster the PACE Program, but result in concrete and valuable improvements to Enterprise financed properties.

Continued Invitation to FHFA from the Florida PACE Funding Agency to Establish an Immediate and Meaningful Dialogue – The Agency has not sought to engage in the various on-going federal legislation aimed at changing the business or policy decisions in the Statement or Directive. The Agency also recognizes that FHFA likely would not be involved in rulemaking but for directions to do so from a federal court. Nevertheless these comments are made in good faith.

The Agency and the local government community in Florida have developed in good faith one of the most, if not the most, thoughtful real-life and comprehensive approach to implementation. The Agency's approach is not a replication of other programs, but structured by a Legislature, public finance and local government administrators and professionals that well understand Florida. The Agency is poised to begin the process of funding, financing and delivery of qualified improvements. At stake is the ability to immediately unleash billions of dollars in economic activity in Florida alone, the achievement of many laudable environmental activities, the careful protection of owners and mortgage lenders within a long accepted framework of governmental liens and lien law and an enormous number of private sector jobs potentially attributable to this endeavor.

The Agency is not a concept. The Agency has worked hard to create a real and discernable implementation program that is uniform, scalable and statewide in scope. Its participants and advisors are not dealing in the theoretical - the Florida PACE Funding Agency is real; its authority to enter the financing market and stature have been judicially validated; it has engaged counsel, financial advisory professionals, and importantly has a clear mission that is authorized and well controlled by general law in Florida.

Mr. Pollard, as a specific alternative to FHFA's existing Statement and Directive, the Agency respectfully invites you to engage in earnest and meaningful informal dialogue with representatives of the Agency. This dialogue will allow you to better evaluate the Agency's approach, and for Agency representatives to listen to you and FHFA's concerns, with a mutual objective of creating a workable business and policy approach with the Agency in Florida under the Florida PACE Program. The Agency's preparation and research have been extensive, and the Agency's objective is to keep the process simple, advance the Agency's Florida PACE Program on a uniform basis, and to do so in a manner that reasonably protects ALL mortgage lenders and servicers. Our constituency is local governments in Florida, and the positive results of a series of discussions as it relates to the Enterprises as an alternative the FHFA current Statement and Directive should not be underestimated. We ask for your thoughtful and positive response separate and apart from this rulemaking exercise; and, a commitment to promptly set an initial meeting to consider fashioning a mutually agreeable alternative in Florida.

Thank you for the opportunity to submit comments on the FHFA's Notice of Proposed Rulemaking. Please do not hesitate to contact me, Messrs. Steigerwald, Reid or Lawson if you have further questions or comments.

Sincerely,

Barbara S. Revels

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