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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SONOMA, Plaintiff, vs. FEDERAL HOUSING FINANCE AGENCY; EDWARD DeMARCO, in his capacity as Acting Director of FEDERAL HOUSING FINANCE AGENCY; FEDERAL HOME LOAN MORTGAGE CORPORATION; CHARLES E. HALDEMAN, JR., in his capacity as Chief Executive Officer of FEDERAL HOME LOAN MORTGAGE CORPORATION; FEDERAL NATIONAL MORTGAGE ASSOCIATION; MICHAEL J. WILLIAMS, in his capacity as Chief Executive Officer of FEDERAL NATIONAL MORTGAGE ASSOCIATION; Defendants.	**Case No. 4:10-cv-03270 CW** **COMPLAINT IN INTERVENTION**

<u>INTRODUCTION</u>

1. Pursuant to its taxing authority, the County of Placer operates a property assessment program which provides financing for property owners that wish to affix distributed

generation renewable energy, energy efficiency, and water efficiency improvements to real property throughout the County of Placer, and imposes an assessment on such property in the amount of the cost of the improvement as a source of repayment for the financing.

2. Despite long-standing and well settled legal principles regarding assessments and lien priority, the support for and investment in these types of programs by Congress and the Obama Administration, and the thoughtful criteria the County of Placer has applied to its program elements, defendants Federal Housing Finance Agency and its director **(hereinafter "FHFA")**, the Federal National Mortgage Association and its chief executive officer **(hereinafter "Fannie Mae")**, and the Federal Home Loan Mortgage Corporation and its chief executive officer **(hereinafter "Freddie Mac")** are singling out the County's and similar assessment programs and taking adverse actions against them citing to a risk to the home mortgage industry.

3. Defendants have taken coordinated action to place significant obstacles in the path of energy efficiency assessment programs, but not other local government assessment programs. Defendants' actions paint with a broad brush stroke, thwarting assessment programs created under California law that are different in kind than programs created in other jurisdictions. In particular, the County of Placer's PACE assessment program includes conservative program elements and program best practices not included in some other programs. Defendants' actions have effectively shut down the County's energy efficiency assessment residential program and have caused damage to the County in the form of impingement on its governance prerogatives and monies lost.

4. Defendants are attempting to accomplish indirectly what they could not legally accomplish directly, that is, they are attempting to prevent assessment liens from taking a lien priority over mortgage liens. By this action, plaintiff County of Placer seeks judicial intervention to prevent this arbitrary, unconstitutional, tortuous, and otherwise unlawful attack against its taxing authority.

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JURISDICTION AND VENUE

5. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 (FHFA- action arising under the laws of the United States), 5.U.S.C. §§ 701-706 (FHFA- Administrative Procedure Act), 12 U.S.C. § 1452(f) (Freddie Mac- original jurisdiction in federal district court for actions), 28 U.S.C. § 1367 (Fannie Mae- supplemental jurisdiction), and 28 U.S.C. § 1332 (Fannie Mae- diversity jurisdiction).

6. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 220l(a). This Court may grant declaratory relief, injunctive relief, and any additional relief pursuant to 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 705, 706 and under any relevant state laws pursuant to its supplemental jurisdiction.

7. The FHFA has made a final administrative determination that is subject to review under the Administrative Procedure Act ("FAPA"). 5 U.S.C. § 702.

8. The County of Placer and real property home owners in Placer County have suffered an injury in fact, and face imminent risk of suffering irreparable injury in the future, as described in the causes of action that follow.

9. Venue lies in this judicial district under the main action by virtue of 28 U.S.C. § 1391(e) and Civil Local Rule 3-2(d), because no real property is involved in this action, and a substantial part of the events or omissions giving rise to the claims occurred in this district.

PARTIES

10. Intervener- Plaintiff County of Placer ("County") is a charter county duly organized and validly existing under and pursuant to the Constitution and laws of the State of California and its County Charter. The County brings this action in its own capacity as a Charter County with the power to sue and be sued and on behalf of those citizens of Placer County who are impacted by defendants' actions. The County has a significant interest in preserving its tax and assessment power. The County has an interest in not being coerced to forego reasonable legislative responses to water and energy issues. The County has an interest in not being subject to unconstitutional conditions in connection with its application for or receipt of federal monies.

The County seat and principal office and place of business is in Auburn, County of Placer, State of California. A five-member, independently elected Board of Supervisors governs the County.

11. Defendant Fannie Mae is a federally chartered, private corporation, of a type commonly referred to as a government-sponsored enterprise ("GSE"). Fannie Mae facilitates the secondary market in residential mortgages. Together with Freddie Mac, another GSE, Fannie Mae owns or guarantees roughly half the home loans in the United States, California, and Placer County. Fannie Mae is publicly traded, has a Board of Directors, and is required to report to the Securities and Exchange Commission. By statute, Fannie Mae has the power to sue and be sued in both state and federal court. (12 U.S.C. § 1723(a).)

12. Defendant Michael J. Williams is the Chief Executive Officer of Fannie Mae and is sued in that capacity.

13. Defendant Freddie Mac is a federally chartered, private corporation, and is also a GSE. Freddie Mac facilitates the secondary market in residential mortgages. Together with Fannie Mae, another GSE, Freddie Mac owns or guarantees roughly half the home loans in the United States, California, and Placer County. Freddie Mac is publicly traded, has a Board of Directors, and is required to report to the Securities and Exchange Commission. By statute, Freddie Mac has the power to sue and be sued in both state and federal court. (12 U.S.C. § 1452(c).)

14. Defendant Charles E. Haldeman, Jr. is the Chief Executive Officer of Freddie Mac and is sued in that capacity.

15. Defendant Federal Housing Finance Agency is a federal government agency created on July 30, 2008, by the Federal Housing Finance Regulatory Reform Act of 2008. FHFA oversees and regulates Fannie Mae, Freddie Mac, and the Federal Home Loan Banks (collectively referred to as the "regulated entities"). On September 7, 2008, FHFA was also appointed Conservator of Fannie Mae and Freddie Mac. FHFA is being sued in its capacity as a federal regulatory agency. FHFA is also being sued in its capacity as the conservator of Fannie Mae and Freddie Mac.

16. Defendant Edward DeMarco is the Acting Director of the Federal Housing Finance Agency and is sued in that capacity.

GENERAL ALLEGATIONS

PACE.

17. In Property Assessed Clean Energy financing programs **(PACE)** state and local governments, where permitted by state law, utilize traditional assessment financing techniques to fund cost effective energy efficiency, water efficiency, and renewable energy improvements to private property. PACE programs, as with any assessment program, levy an assessment equal to the cost of the improvement and attach the obligation to repay the cost of the improvements to the property and not to the individual borrower. Placer County's PACE program is entitled the "money for Property Owner Water & Energy Efficiency Retrofitting" program, or the Placer mPOWER Program **(mPOWER)**.

18. On February 7, 2009, the President of the United States signed the American Recovery and Reinvestment Act (ARRA). ARRA was enacted by Congress for a number of specified purposes. ARRA allocated $16,800,000,000 in federal funds to the United States Department of Energy **(DOE)** energy programs, including Energy Efficiency and Conservation Block Grants, the Weatherization Assistance Program, and the State Energy Program. On May 7, 2010 the DOE issued Guidelines for Pilot PACE Programs. DOE allocated ARRA monies to California, California local public entities, and to the California Energy Commission (CEC) for further distribution. The CEC had already allocated ARRA monies to local PACE programs before defendants' actions caused CEC to cancel that allocation. Prior to defendants' conduct both the DOE and the CEC made PACE programs one of the hallmarks of ARRA stimulus energy funds. The CEC is again looking to distribute ARRA dollars to California PACE programs. Placer County's PACE program is an applicant for these ARRA dollars.

California's PACE Legislation.

19. Chapter 29 of Part 3 of Division 7 of the Streets & Highways Code of the State of California (”Chapter 29”) authorizes the County to enter into contractual assessments to finance

the installation of distributed generation renewable energy sources and energy efficiency and water efficiency improvements that are permanently fixed to residential, commercial, industrial, agricultural, or other real property. In section 5898.14 the legislature declared that:

> "(a) … (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) … 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."

Regarding the contractual assessments authorized under Chapter 29 and related California state statutes, including the Lien Priority Law (California Government Code 53930 et. seq.), the Legislature provided that the assessments levied "shall" constitute a lien against the lots and parcels of land on which they are made, until they are paid; that assessments would be collected in the same manner and at the same time as the general taxes of the city or county on real property; and that the lien of assessments is coequal to and independent of the lien for general taxes.

Assessments.

20. The State of California grants cities and counties taxing authority, including the power to levy assessments for a public purpose. Both taxes and assessments are levied under the sovereign power of the state. Assessments can be imposed after constitutional and statutory procedures are satisfied where the assessment furthers a public purpose, and there is a special benefit to the assessed property. The power of states and political subdivisions to levy taxes and assessments to achieve public purposes is a fundamental and long-standing principle of law in the United States. Levying special assessments for public improvements is a valid exercise of a

state or municipality's police power. The United States Supreme Court has long recognized a broad range of permissible public purposes that fall within the state taxing power.

21. The public purposes for which assessments may be levied have historically included but are not limited to paving of roads, sidewalk improvements, the undergrounding of utilities, and privately owned improvements. The levy of assessments to finance privately-owned improvements for public purposes is not unique to Chapter 29. The California Legislature has previously authorized the levy of assessments and special taxes to finance privately-owned improvements for public purposes in the Improvement Act of 1911 (of which Chapter 29 is a part), the Municipal Improvement Act of 1913, the Mello-Roos Community Facilities Act of 1982, and California Public Resources Code section 26500 *et seq.* relating to Geologic Hazard Abatement Districts. The authorized private improvements have included seismic improvements, fire-related improvements, and improvements related to soil deterioration. Defendants have accepted the validity of these other assessment programs in the past. The size of PACE assessments is typical of the size of non-PACE assessments levied for other public purposes.

22. Pursuant to the California Government Code (which authorizes joint exercise of powers authorities to finance "public capital improvements," including facilities for the generation of electrical energy for public or private uses and all necessary related improvements and programs, and programs, facilities and improvements for the "management, conservation, reuse, or recycling of electric capacity or energy, natural gas, water, waste water, or recycled water, including demand side or load management and other programs and facilities designed to reduce the demand for, or permit or promote the efficient use of, those resources") and Chapter 29 improvements of the type financed by the mPOWER program may be made on residential, commercial, industrial, agricultural, or other real property in the County, including private property.

23. The County of Placer is legally obligated to take steps to address water and energy conservation (see for instance, Article X, section 2 of the California Constitution [water

conservation]; California Health & Safety Code §38500 et seq., also known as AB 32 or the "California Global Warming Solutions Act of 2006"; The Placer County General Plan (August 1994) sections 1.A.1, 2.G.1, 4.C.6, 4.D.4, and 7.D.2.; Government Code section 65595, The Model Water Efficient Landscape Ordinance, etc.) The mPOWER program is a significant component in meeting those obligations.

24. The improvements anticipated by the mPOWER program serve a civic purpose, i.e., they are not being financed for the purpose of achieving a benefit for private property owners (although the benefit derived by private property owners provides the incentives for them to participate in the mPOWER program and, therefore, contributes to widespread public benefit), and are for the general good of all the inhabitants of the County of Placer. Federal and California case law have upheld as valid public purposes reduction of polluting emissions and reduction of water use.

25. The contractual assessments under Chapter 29 have senior lien status over mortgages pursuant to the California Government Code and Chapter 29. The fact that taxes and assessments are secured by a senior lien is a fundamental and long-standing principle of law in the United States. Such later-in-time, senior liens have been upheld under federal and state law in the face of constitutional challenges, including challenges by pre-existing mortgage holders. Under California state law, these liens need not be satisfied in full (i.e., they do not "accelerate") when the property is transferred, sold, or foreclosed upon; in the transfer/sale context, the assessment remains an obligation of the property under its new ownership and, in the case of foreclosure, only the amount of the assessment that is delinquent is subject to foreclosure. The remainder of the assessment remains a lien on the property, and it is payable in semi-annual installments on the property tax bill until the assessment is paid in full. The senior lien securing the mPOWER contractual assessments does not eliminate a pre-existing lender's security interest and it does not impair the lender's ability to enforce its security interest. The mPOWER contractual assessments are legally valid assessments.

Placer County's PACE Program.

26. Beginning December 8, 2009, and culminating May 18, 2010, the Placer County Board of Supervisors, in conjunction with the incorporated cities within the County (Auburn, Colfax, Lincoln, Loomis, Rocklin, and Roseville), took a number of legislative steps to put in place a valid and complying Chapter 29 contractual assessment program and financing to that program pursuant to the State's grant of authority. The action by the Board of Supervisors was supported with significant expenditures of staff resources and time. The County followed the procedures mandated by Chapter 29 for establishment of a contractual assessment program.

27. In creating mPOWER the County Board of Supervisors made findings similar to the State Legislature's and additionally found that: such energy conservation efforts are necessary to address issues involving climate change including compliance with California Assembly Bill 32 and related laws and regulations and that such water conservation efforts are necessary to address the issue of chronic water shortages in California. Providing affordable financing to private property owners or saving property owners money on their utility bills were not identified by the California Legislature nor the Board of Supervisors as part of the public purpose for mPOWER. Rather, the focus of the Legislature and the Board was on the benefit to air and water.

28. As part of the program elements the Board of Supervisors established criteria pursuant to which the County would determine whether properties are eligible to participate in mPOWER. The criteria governs, among other matters, how much money a property participating in mPOWER may obtain for the installation of authorized improvements, the relationship of the contractual assessment levied by the County on a property and the value of the property, and the total tax burden on the property. The Board established this criteria to help ensure the adequacy of the security for the contractual assessments and its obligations payable from the contractual assessments; to protect the owners of the properties participating in mPOWER from overburdening their properties with debt; and, to protect the interests of any pre-existing private lien holders.

29. The Placer County Public Financing Authority is a joint exercise of powers authority created in 2006 by a joint exercise of powers agreement between the County of Placer and the Placer County Redevelopment Agency, pursuant to California Government Code section 6500 et. seq. The County's mPOWER financing plan is to have the Financing Authority issue bonds for the purpose of making a loan to the County. The County will use the proceeds of the loan to provide financing to property owners in the County for the installation of authorized improvements. The Treasurer-Tax Collector would purchase the Financing Authority's bonds on behalf of the Treasury Pool and would remarket the bonds to third-party investors at a later date. The Financing Authority is authorized by Article 4 of the California Marks-Roos Local Bond Pooling Act to issue bonds for the purpose of making loans to appropriate local agencies when the loan proceeds will be used by the local agencies to pay for public capital improvements. The improvements authorized under mPOWER constitute "public capital improvements" pursuant to section 6585(h) of the Marks-Roos Local Bond Pooling Act. The County and the Authority complied with the provisions of the Marks-Roos Local Bond Pooling Act for issuance of the Financing Authority Revenue Bonds

30. Pursuant to this financing structure or any authorized alternate similar financing structure the County expected to be able to provide the owners of the properties participating in the Placer mPOWER Program with more advantageous financing terms than might otherwise be available, which, in turn, will more effectively encourage and facilitate the installation of authorized improvements.

31. A property owner wishing to participate in mPOWER must enter into an assessment contract with the County. Upon execution of the assessment contract and completion of other applicable requirements, a contractual assessment would be levied on the participating property in the amount necessary to finance the installation of the authorized improvement(s) over a 5 to 20 year period, depending on the useful life of the improvement(s), and to pay corresponding financing and administration costs related to the Placer mPOWER Program. Each year, the contractual assessment installments will be collected by the County on the

participating property's property tax bill. Although not required by Chapter 29 or any other applicable law, the County additionally required that applicants for a contractual assessment provide written notice of the proposed contractual assessments to existing lenders with an opportunity to object, and, in the case of non-residential properties, obtain lender consent.

32. In the mPOWER program because the principal amount of the contractual assessment levied on any particular property will be much smaller than the value of the benefited property, and because the levy of the contractual assessment will not cause a property to have a negative equity value, (i.e., the amount of "debt", including the mPOWER assessment and other bonded tax and assessment liens on the property will not exceed the property value) the imposition of the mPOWER senior lien contractual assessment will not have a significant diminishment of any pre-existing mortgage. Additionally, unlike some publicly-owned improvements financed with taxes and assessments- such as streets, roads, and the undergrounding of utilities- the installation of mPOWER improvements is expected to decrease the costs of operating the property by making the property more efficient with respect to water and/or energy use and, in the case of renewable energy improvements, by allowing the property to generate its own energy.

33. Placer County's mPOWER program elements are more conservative and provide greater protections than required by Chapter 29 and the May 7, 2010, DOE issued Guidelines, address the concerns expressed by defendants, and support a legally valid assessment program.

34. Due to Defendants' wrongful conduct, on July 27, 2010, Placer County through its Board of Supervisors, was forced to take steps to indefinitely suspend its residential mPOWER program. During the time that the mPOWER residential program was in effect Placer County committed to 11 contractual assessments.

35. The Placer County mPOWER program has been validated, in its entirety, by the Placer County Superior Court pursuant to California Code of Civil Procedure section 860 and California Government Code section 53511. The default judgment against all interested persons includes but is not limited to final resolution of the following issues: That it is a valid public

purpose for the County to levy contractual assessments pursuant to the mPOWER assessment contract to finance installation of the improvements on private property. That the incurring of the loan by the County and the purchase of the bonds by the County Treasurer-Tax Collector do not constitute a gift of public funds or the lending of public credit in violation of the California Constitution. That the contractual assessments are valid assessments under California law. That the contractual assessments are assessments for purposes of Chapter 29 and section 53938 et. seq. of the California Government Code and have senior lien status. That the imposition of the contractual assessments do not constitute an unconstitutional impairment of pre-existing loan contracts. That the contractual assessments do not constitute a taking of private property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Section 19 of the California Constitution.

Defendants' Wrongful Conduct.

36. Combined, Fannie Mae and Freddie Mac own or guarantee roughly half the home loans in the United States, California and Placer County. Accordingly these two entities acting in unison effectively control the mortgage resale market. By their long standing practices and documents, Fannie Mae and Freddie Mac have accepted that in California assessments can and do attain lien priority over mortgages, and that a mortgage holder subject to assessments that can attain priority is not in violation of their Uniform Security Instruments (including the California Deed of Trust).

37. Since its inception and both in its capacity as Conservator of Fannie Mae and Freddie Mac and as a regulatory agency, FHFA has also accepted that in California assessments can and do attain lien priority over mortgages, and that a mortgage holder subject to assessments that can attain priority is not in violation of any Uniform Security Instruments (including the California Deed of Trust).

38. By this acceptance of local taxes and assessments and their priority lien status, defendants have acknowledged and accepted the police power of local government to impose taxes and assessments for the common good, and have acknowledged and accepted that such

assessments do not pose unusual or difficult risk management challenges for lenders, servicers and mortgage investors. Regardless of defendants' historical acceptance of the legitimate priority lien status of assessments, federal and state law also provides for this legitimacy.

39. Defendants' wrongful conduct is summarized and evidenced in a series of written directives that have been made public by defendants. The apparent intent of these directives is two-fold. First, the defendants acknowledge that local government entities are entitled to a senior lien status with respect to taxes and assessments. However, they are attempting to work around this fact by refusing to acknowledge PACE assessments as assessments and instead referring to and treating them as mere "loans", or in the alternative, to discourage PACE programs from utilizing the traditional senior lien status afforded local government assessments. Secondly, defendants are forcing property owners with PACE assessments to retire the assessments early using private financing. These written directives are attached as exhibits to this Complaint, which attached exhibits are incorporated as if set forth fully herein. They are identified as follows:

Exhibit A- May 5, 2010, Fannie Mae Lender Letter, directed to the home mortgage industry including that part of the industry providing services to Placer County residents, home owners, and potential home owners. The Lender Letter contains misrepresentations including but not limited to that PACE assessments are "loans" and that these assessments are prohibited by the terms of the Fannie Mae Uniform Security Instruments. The proposed action set forth in the Lender Letter would make borrowing more difficult for all Placer County residents and created the risk that Placer County home owners or borrowers with Fannie Mae loans and an mPOWER assessment would be accused of breach or default of their mortgage loan.

This Lender Letter was an unexpected about-face by Fannie Mae, which on September 18, 2009, issued a Lender Letter directing lenders to treat PACE assessments, "as any other tax or assessment". This despite the fact that the September Lender Letter incorrectly identified all PACE assessments as more like loans then assessments. While the September 18, 2009, Lender Letter also indicated that Fannie Mae would be reviewing its underwriting guidelines in PACE jurisdictions, there was nothing in the Lender Letter, past practice, or the applicable legal landscape to indicate that Fannie Mae contemplated taking future actions that were legally and factually unsupportable. At the time of the September 18, 2009, Lender Letter Placer County was still finalizing the elements of its mPOWER program. In formulating mPOWER Placer County ensured that its program elements addressed and did not create the potential issues identified in the September Lender Letter. Placer County relied on the September Lender Letter to its detriment.

Exhibit B- May 5, 2010, Freddie Mac Lender Letter, directed to the home mortgage industry including that part of the industry providing services to Placer County. The Lender Letter is similar to and contains essentially the same misrepresentations and consequences of the Fannie Mae letter attached as Exhibit A.

Exhibit C- July 6, 2010, FHFA Statement on PACE Programs. The FHFA Statement contains misrepresentations that include but are not limited to a determination that PACE assessments are "loans", that PACE assessments are unlike routine tax assessments in terms of size, duration and the traditional community benefit, and that accepting the PACE assessment lien status as senior was an alteration of traditional mortgage lending practices. The FHFA directed its regulated entities to undertake certain actions in jurisdictions in which a PACE program was in place. These actions included that the regulated entities were to adjust loan-to-value ratios to reflect the maximum permissible PACE "loan" amount available to borrowers in PACE jurisdictions, and to tighten borrower debt-to-income ratios to account for additional obligations associated with possible future PACE "loans". These actions would make borrowing more difficult for all Placer County residents or borrowers and created the risk that Placer County residents or borrowers with Fannie Mae or Freddie Mac loans and an mPOWER assessment would be accused of breach or default of their mortgage loan.

This FHFA Statement was an unexpected about-face by FHFA, which on June 18, 2009, issued an informational letter to certain industry addressees regarding PACE programs. The FHFA June 18, 2009, letter was distributed as an attachment to the September 18, 2009, Fannie

Mae Lender Letter. In its June letter, FHFA itemized a series of specific concerns regarding certain PACE programs that it had reviewed and made a series of suggestions that legislators should consider in enacting PACE programs. While the June letter incorrectly identified all PACE assessments as loans, there was nothing in the letter, past practice, or the applicable legal landscape to indicate that FHFA contemplated taking future actions that were legally and factually unsupportable. At the time of the September 18, 2009, Fannie Mae Lender Letter with the June FHFA letter attached, Placer County was still finalizing the elements of its mPOWER program. In formulating mPOWER Placer County ensured that its program elements addressed and did not create the potential issues identified in the FHFA June letter. The County relied on the June letter to its detriment.

Exhibit D- August 31, 2010, Fannie Mae Selling Guide.   This Selling Guide restates some of the misrepresentations included in earlier Fannie Mae statements. This Selling Guide would force borrowers in Placer County who entered into an mPOWER contractual assessment prior to July 6, 2010, and who are interested in refinancing their mortgages to pay off the mPOWER assessment prior to refinancing with new financing to be secured by any existing equity in their home. This action would essentially force the refinancing borrow to transfer financing of the mPOWER improvements from the assessment that runs with the property to private financing that would run with the borrower. This action would have negative short and long term consequences on the mPOWER program and on the borrowers' financial picture, would be an economic boom to Fannie Mae lenders who would hold the new private financing, and would bring into play some of the very financing concerns that defendants have articulated in the past as the reason they oppose PACE assessments. This Selling Guide definitively announces that for loans originated on or after July 6, 2010, Fannie Mae will not purchase mortgage loans secured by properties with an outstanding PACE assessment as a first senior lien on the property. However, apparently Fannie Mae will continue to purchase mortgage loans secured by properties with an outstanding senior assessment or tax lien of any other type.

Exhibit E- August 31, 2010, Freddie Mac Bulletin to Sellers and Servicers. This Freddie Mac Bulletin is similar to and contains essentially the same misrepresentations and directives and has the same consequences as the Fannie Mae Selling Guide attached as Exhibit D.

40. In treating mPOWER assessments differently then other local taxes and assessments, these continuing and apparently coordinated actions by defendants are a direct attack on and interference with the County's historical and well established tax and assessment authority. Defendants' actions severely hamper the County's ability to tax its residents for a legitimate public purpose. Defendants' efforts appear to be an attempt to parlay legitimate concerns over lending practices that contributed to the recent economic downturn into an opportunity to make inroads against the historical legally established senior lien status of governmental entities in tax and assessment matters. Once that door is wedged open the mortgage industry will then be free to attempt further inroads into a local government's assessment and taxation authority.

41. Defendants' actions have the affect of creating a two class system for lending purposes- those living or borrowing in a PACE jurisdiction and those not living or borrowing in a PACE jurisdiction. Those borrowers and potential borrowers living in a PACE jurisdiction are penalized with additional borrowing burdens regardless of whether they participate in a PACE program or not. Defendants' statements threaten borrowers with mPOWER assessments with the possibility of legal action on the basis that they are in default of the mortgage contract.

42. Defendants' actions put the County of Placer in the position of having to choose between (a) maintaining an appropriate but now handicapped assessment program that could have negative contractual and borrowing consequences on its citizens and leave Placer County open to allegations of abridging contractual rights, and (b) cancelling that assessment program to the detriment of its governance prerogatives in determining how best to meet its conservation and other obligations.

43. Defendants are severely hampering County's efforts to assist homeowners and businesses within the County in reducing their energy and water use and thus preventing the

County from meeting its own conservation obligations. Defendants' actions have the affect of discouraging participation in the mPOWER program to the detriment of the program. Defendants' coercive conduct has forced the Placer County Board of Supervisors to indefinitely suspend the residential mPOWER program. This has caused economic damages consisting of loss of out-of-pocket expenses of approximately $750,000 in program start up costs, as well as loss of other future revenues.

1st Count- Federal Law

Violation of the 10th Amendment of the United States Constitution

<u>and Constitutional Principles of Federalism</u>

(FHFA)

44. The allegations contained in the preceding paragraphs are re-alleged and incorporated into this count as though fully set forth herein.

45. The Tenth Amendment to the United States Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment expressly reserves to the states all powers except those limited powers granted to the federal government. The Tenth Amendment ensures the division of powers between the states and federal government that is necessary for the dual sovereignty of the federal system. A federal agency has no power to preempt the validly enacted legislation of a state unless Congress properly confers the power upon it to do so. Congress may confer such a power upon a federal agency through a federal statute in which Congress has itself properly exercised preemptive power, and in which Congress has expressly and properly delegated preemptive authority to the agency.

46. The Tenth Amendment preserves for the states and their subdivisions the authority to regulate and define local taxation and assessment matters including the authority to obtain a senior tax or assessment lien on property. Congress has not positively required by direct enactment that federal law override state law on the issues of local taxation and assessment or the related lien seniority in the areas of the FHFA's directions and pronouncements, and FHFA may

not do so by rulemaking. FHFA's directions and pronouncements conflict with California statutes regarding the local tax and assessment power and the related senior lien priority. FHFA's directions and pronouncements are not consistent with Congressional statutory authorization. FHFA is not acting within the scope of its congressionally delegated authority.

47. FHFA's directions and pronouncements are not authorized pursuant to an express grant of power to Congress under Article 1 of the Constitution and are presumptively an unconstitutional interference under the Tenth Amendment.

48. Alternatively, the object of the FHFA's directions and pronouncements as set forth above are not properly within the scope of an express grant of power to Congress under Article I and is presumptively an unconstitutional interference under the Tenth Amendment.

49. Alternatively, FHFA's directions and pronouncements as set forth above occur within an area in which Congress has expressly legislated to grant or preserve regulatory authority for the states and thus is presumptively an unconstitutional interference under the Tenth Amendment.

50. Alternatively, FHFA's directions and pronouncements as set forth above have the effect of invalidating state laws in the areas of taxation, assessment, and contract. The alleged grounds for the invalidation do not include the vindication of individual rights and liberties guaranteed under the Bill of Rights as made applicable to the states under the 14^{th} Amendment to the Constitution. Thus the directions and pronouncements are presumptively an unconstitutional interference under the Tenth Amendment.

51. The County has suffered harm because of FHFA's action and is entitled to judicial review.

2nd Count- Federal Law

<u>Violation of the Spending Clause, U.S. Const. Art. I, § 8</u>

(FHFA)

52. The allegations contained in the preceding paragraphs are re-alleged and incorporated into this count as though fully set forth herein.

53. Article I, § 8, clause 1, of the United States Constitution encompasses what has been termed the "Spending Clause" or "Spending Power". Generally, Congress may fix the terms upon which it disburses money to the states. However, the Spending Clause also places limits on the power of Congress to attach conditions to the receipt of federal funds. FHFA is not empowered to do what Congress may not. Congress may not attach post-acceptance or retroactive conditions to the receipt of federal funds by the states or local governmental entities. If Congress conditions the receipt of federal funds it must do so unambiguously such that the states or local governmental entities are cognizant of the consequences of their participation in receipt of those funds. Congress may not exercise its spending power in a manner that induces a state to engage in unconstitutional conduct. Congress may not attach conditions to the receipt of federal funds that lack a sufficient nexus to the purpose advanced by the program's implementation. The financial inducement offered by Congress must not be so coercive as to pass the point at which pressure is turned into compulsion.

54. Congress authorized the dispersal of federal ARRA monies to the states and other local governmental entities for use in energy programs and did not fix or authorize the terms or conditions on the receipt and use of these monies that the FHFA has since undertaken with its directions and pronouncements. Congress did not delegate to the FHFA the power to fix terms regarding the dispersal of these ARRA funds and doing so would have been an improper delegation of authority. FHFA's directions and pronouncements are not consistent with Congressional statutory authorization. FHFA's directions and pronouncements conflict with California statutes regarding local tax and assessment authority and the senior lien priority.

55. FHFA's directions and pronouncements are a post-acceptance or retroactive condition placed upon the receipt of ARRA energy project funds and as a result FHFA's directions and pronouncements as applied to mPOWER is a violation of the Spending Clause.

56. Alternatively, if Congress is alleged to have conditioned receipt of ARRA funds for energy projects on the condition that governmental entities waive their right to obtain a senior

tax or assessment lien on property, Congress did not do so unambiguously in violation of the Spending Clause.

57. Alternatively, if Congress is alleged to have conditioned receipt of ARRA funds for energy projects on the condition that governmental entities waive their right to obtain a senior tax or assessment lien on property doing so induces the County of Placer to engage in unconstitutional conduct in impairing assessment and other contracts that the County had previously entered into.

58. The County has suffered harm because of FHFA's action and is entitled to judicial review.

3rd Count- Federal Law

Violation of U.S.C. § 4501 et. seq. and

the Federal Administrative Procedure Act, 5 U.S.C. §§ 551 et. seq. & 706

(FHFA)

59. County re-alleges and incorporates by reference the allegations of the preceding paragraphs.

60. The directives and pronouncements issued by the FHFA and as described above amount to regulations, guidelines, orders, or rules under the applicable law (hereinafter "rules"). That is, they are agency statements "of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy". The FHFA rules violated both the procedural and substantive requirements of FAPA.

61. The FHFA rules violated procedural requirements of the FAPA in that the rules were issued without notice and an opportunity to be heard. There was no publication in the Federal Register. There was no opportunity for the public and Placer County representatives to submit written data, views, or arguments regarding the potential rule. The FHFA did not provide a sufficient statement of the basis and purpose of the rules.

62. The FHFA rules violated substantive standards in that they contained information and findings that were unsupported, inaccurate, and in excess of the FHFA's statutory authority.

There is no nexus between PACE programs or mPOWER and the economic soundness of Fannie Mae or Freddie Mac. The FHFA has failed to examine relevant data and articulate a satisfactory explanation for its action, including but not limited to, articulating a rational connection between the facts and its determination that mPOWER assessments, unlike other assessments, are loans and/or affect the safety and soundness of Fannie Mae and Freddie Mac. Fannie Mae and Freddie Mac's actions as described above are not in the public interest in that they are adverse to the governmental entity taxation and assessment power, adverse to PACE programs, and adverse to the public and economic issues PACE programs are designed to address. The rules violate the 10th Amendment and the Spending Clause. The rules put the County of Placer in the position of potentially abridging contracts. FHFA has effectively deprived the County from levying assessments for a public purpose. The rules are arbitrary and capricious, and an abuse of discretion.

63. Residents of Placer County, debtor-mortgagors of real property in Placer County, others who desire to buy property in Placer County, and the County have all suffered legal wrong because of FHFA's action, have been adversely affected or aggrieved by agency action, and are entitled to judicial review of FHFA's action.

4th Count- State Law

<u>Negligent Interference with Prospective Economic Advantage</u>

(Fannie Mae and Freddie Mac)

64. County re-alleges and incorporates by reference the allegations of the preceding paragraphs.

65. As part of the mPOWER program, the County of Placer and owners of real property located in Placer County who are interested in entering into an mPOWER assessment contract with the County are in an economic relationship that probably would have resulted in economic and other benefits to the County. Defendants Fannie Mae and Freddie Mac had actual or constructive notice of the existence of the relationships. Defendants Fannie Mae and Freddie Mac, acting alone and together, knew or should have known that these relationships would be

disrupted if they failed to act with reasonable care. Fannie Mae and Freddie Mac failed to act with reasonable care. Defendants Fannie Mae and Freddie Mac each engaged in wrongful conduct as described above, which conduct amounted to misrepresentation, an unlawful business practice under California law, a violation of the established standards in the mortgage lending and secondary market industry, and/or violation of California statutes regulating mortgage finance loans. The relationship between the County and the owners of real property located in Placer County was disrupted and the County as well as Placer County property owners were harmed by that disruption. Fannie Mae and Freddie Mac, acting alone and together, were a substantial factor in causing the County's harm.

66. As part of the mPOWER program, the County of Placer and the Placer County Public Financing Authority were in an economic relationship that probably would have resulted in economic and other benefits to the County. Defendants Fannie Mae and Freddie Mac had actual or constructive notice of the existence of the relationship. Defendants Fannie Mae and Freddie Mac, acting alone and together, knew or should have known that the relationship would be disrupted if they failed to act with reasonable care. Fannie Mae and Freddie Mac failed to act with reasonable care. Defendants Fannie Mae and Freddie Mac each engaged in wrongful conduct as described above, which conduct amounted to misrepresentation, an unlawful business practice under California law, a violation of the established standards in the mortgage lending and secondary market industry, and/or violation of California statutes regulating mortgage finance loans. The relationship between the County and the Placer County Public Financing Authority was disrupted and the County was harmed by that disruption. Fannie Mae and Freddie Mac, acting alone and together, were a substantial factor in causing the County's harm.

67. As part of the mPOWER program, the County of Placer and third-party investor bond purchasers were in an economic relationship that probably would have resulted in economic and other benefits to the County. Defendants Fannie Mae and Freddie Mac had actual or constructive notice of the existence of the relationship. Defendants Fannie Mae and Freddie Mac, acting alone and together, knew or should have known that the relationship would be

disrupted if they failed to act with reasonable care. Fannie Mae and Freddie Mac failed to act with reasonable care. Defendants Fannie Mae and Freddie Mac each engaged in wrongful conduct as described above, which conduct amounted to misrepresentation, an unlawful business practice under California law, a violation of the established standards in the mortgage lending and secondary market industry, and/or violation of California statutes regulating mortgage finance loans. The relationship between the County and the third-party investor bond purchasers was disrupted and the County was harmed by that disruption. Fannie Mae and Freddie Mac, acting alone and together, were a substantial factor in causing the County's harm.

68. The county seeks recovery of compensatory damages and equitable relief against defendants.

5th Count-State Law Claim

Intentional Interference with Prospective Economic Advantage

(Fannie Mae and Freddie Mac)

69. County re-alleges and incorporates by reference the allegations of the preceding paragraphs.

70. As part of the mPOWER program, the County of Placer and owners of real property located in Placer County who are interested in entering into an mPOWER assessment contract with the County are in an economic relationship that probably would have resulted in economic and other benefits to the County. Defendants Fannie Mae and Freddie Mac had actual or constructive notice of the existence of the relationship. Defendants Fannie Mae and Freddie Mac, acting alone and together, intended to disrupt that relationship or knew that interference with the relationship was substantially certain to occur due to their conduct. Defendants Fannie Mae and Freddie Mac each engaged in wrongful conduct as described above, which conduct amounted to misrepresentation, an unlawful business practice under California law, a violation of the established standards in the mortgage lending and secondary market industry, and/or violation of California statutes regulating mortgage finance loans. The relationship between the County and owners of real property located in Placer County was disrupted and the County as

well Placer County property owners were harmed by that disruption. Fannie Mae and Freddie Mac, acting alone and together, were a substantial factor in causing the County's harm.

71. As part of the mPOWER program, the County of Placer and the Placer County Public Financing Authority were in an economic relationship that probably would have resulted in economic and other benefits to the County. Defendants Fannie Mae and Freddie Mac had actual or constructive notice of the existence of the relationship. Defendants Fannie Mae and Freddie Mac, acting alone and together, intended to disrupt that relationship or knew that interference with the relationship was substantially certain to occur due to their conduct. Defendants Fannie Mae and Freddie Mac each engaged in wrongful conduct as described above, which conduct amounted to misrepresentation, an unlawful business practice under California law, a violation of the established standards in the mortgage lending and secondary market industry, and/or violation of California statutes regulating mortgage finance loans. The relationship between the County and the Placer County Public Financing Authority was disrupted and the County was harmed by that disruption. Fannie Mae and Freddie Mac, acting along and together, were a substantial factor in causing the County's harm.

72. As part of the mPOWER program, the County of Placer and third-party investor bond purchasers were in an economic relationship that probably would have resulted in economic and other benefits to the County. Defendants Fannie Mae and Freddie Mac had actual or constructive notice of the existence of the relationship. Defendants Fannie Mae and Freddie Mac, acting alone and together, intended to disrupt that relationship or knew that interference with the relationship was substantially certain to occur due to their conduct. Defendants Fannie Mae and Freddie Mac each engaged in wrongful conduct as described above, which conduct amounted to misrepresentation, an unlawful business practice under California law, a violation of the established standards in the mortgage lending and secondary market industry, and/or violation of California statutes regulating mortgage finance loans. The relationship between the County and the third-party investor bond purchasers was disrupted and the County was harmed

by that disruption. Fannie Mae and Freddie Mac, acting alone and together, were a substantial factor in causing the County's harm.

73. The aforementioned conduct of Fannie Mae and Freddie Mac was willful and was intended to cause harm to plaintiff County. Plaintiff County is therefore entitled to an award of punitive damages.

74. The county seeks recovery of compensatory damages, equitable relief, and punitive damages against defendants Fannie Mae and Freddie Mac.

6th Count-State Law

<u>Intentional Interference with Contractual Relations</u>

(Fannie Mae and Freddie Mac)

75. County re-alleges and incorporates by reference the allegations of the preceding paragraphs.

76. Defendants Fannie Mae and Freddie Mac, acting alone and together, intentionally interfered with the contracts between the County and other third parties. There exists certain valid contracts between Placer County and certain third parties as follows:

<u>The Finance Authority Bond Purchase Agreement</u>. Prior to and at the time of defendants' wrongful conduct, the Placer County Board of Supervisors approved a Purchase Agreement between the County of Placer, the Placer County Public Financing Authority, and the Placer County Treasurer-Tax Collector. Defendants had actual or constructive notice of the existence of the Purchase Agreement. Defendants intended to disrupt the performance of the Purchase Agreement. Defendants' conduct prevented performance of the Purchase Agreement, and/ or made performance more expensive or difficult. This caused the County of Placer harm, and defendants' conduct was a substantial factor in causing the County's harm.

<u>Limited Obligation Loan Agreement</u>. Prior to and at the time of defendants' wrongful conduct, the Placer County Board of Supervisors approved a Limited Obligation Loan Agreement between the County of Placer, the Placer County Public Financing Authority, and the Placer County Treasurer-Tax Collector. Defendants had actual or constructive notice of the

existence of the Limited Obligation Loan Agreement. Defendants intended to disrupt the performance of the Limited Obligation Loan Agreement. Defendants' conduct prevented performance of the Limited Obligation Loan Agreement, and/ or made performance more expensive or difficult. This caused the County of Placer harm, and defendants' conduct was a substantial factor in causing the County's harm.

Assessment Contracts. There were in place prior to and at the time of defendants' wrongful conduct valid and enforceable Assessment Contracts entered into between the County of Placer and certain identified owners of record of real property in Placer County. Defendants had actual or constructive notice of the existence of the Assessment Contracts. Defendants intended to disrupt the performance of these Assessment Contracts. Defendants' conduct prevented performance of the Assessment Contracts, and/ or made performance more expensive or difficult. This caused the County of Placer as well as the property owners harm, and defendants' conduct was a substantial factor in causing this harm.

77. The aforementioned conduct of Fannie Mae and Freddie Mac was willful and was intended to cause harm to plaintiff County. Plaintiff County is therefore entitled to an award of punitive damages.

78. The county seeks recovery of compensatory damages, equitable relief, and punitive damages against defendants Fannie Mae and Freddie Mac.

7th Count-Federal & State Law

Declaratory Relief

(All Defendants)

79. County re-alleges and incorporates by reference the allegations of the preceding paragraphs.

80. Under 28 U.S.C. § 2201 and Cal. Code of Civ. Proc. § 1060, County seeks a declaration of legal rights and duties with respect to Defendants' relationship to the mPOWER program, including but not limited to: that mPOWER operates through legally valid assessments and not loans; that these assessments properly receive senior lien status; that the

County's lien priority for these assessments does not violate and does not run contrary to Fannie Mae's or Freddie Mac's Uniform Security Instruments; that the levy of the contractual assessment does not constitute an event of default or trigger the exercise of any remedies under the loan documents between the property owner and the lender.

81. There is an actual controversy of sufficient immediacy and concreteness relating to the legal rights, duties and relations, to warrant declaratory relief. The harm to the County as a direct result of the actions of defendants goes beyond the monetary damages, and is sufficiently real and present to warrant the issuance of a conclusive declaratory judgment usefully clarifying the legal relations of the parties.

82. Without prompt judicial declaration, the mPOWER residential program will continue to be eliminated, the County will continue to lose the ability to achieve greenhouse gas reduction and water conservation goals, and the County will continue to be otherwise harmed.

PRAYER

For the foregoing reasons, County prays for judgment as follows:

1. That the Court issue a judgment, declaratory or otherwise as to the following: (a) That the mPOWER program operates through legally valid assessments and not loans. (b) That these assessments properly receive senior lien status. (c) That the County's lien priority for these assessments does not violate and does not run contrary to Fannie Mae's or Freddie Mac's Uniform Security Instruments. (d) That the levy of the contractual assessment does not constitute an event of default or trigger the exercise of any remedies under the loan documents between the property owner and the lender. (e) That the FHFA violated the FAPA by failing to follow proper procedures required by the FAPA. (f) That the FHFA violated the FAPA by acting arbitrarily, capriciously, in an abuse of discretion, and not in accordance with law. (g) That the rules issued by the FHFA be set aside as void. (h) That the FHFA violated the 10th Amendment to the U.S. Constitution in taking the actions it has against the mPOWER program. (i) That the FHFA violated the Spending Clause of Article I, § 8, clause 1, of the U. S. Constitution in taking the actions it has against the mPOWER program.

2. That the Court issue a temporary restraining order, preliminary injunction, and permanent injunction restraining and enjoining Fannie Mae or Freddie Mac from taking any adverse action against any mortgagee who is participating, or may participate, in mPOWER or other action that has the effect of chilling participation in mPOWER.

3. That the Court issue a temporary restraining order, preliminary injunction, and permanent injunction restraining and enjoining FHFA, Fannie Mae or Freddie Mac from interfering with the County's mPOWER program, from interfering with the right of Placer County to secure mPOWER assessments through a senior lien, and from any action that has a chilling effect on either the mPOWER program or the senior lien position associated with mPOWER assessments.

4. An award of consequential damages against Fannie Mae and Freddie Mac for the loss of past and future revenue from the mPOWER program.

5. An award of punitive damages against Fannie Mae and Freddie Mac.

6. An award of the County's costs of suit incurred; and

7. Such other and further relief as it may deem proper.

Dated: ____________, 2010

PLACER COUNTY COUNSEL'S OFFICE

By: ______________________________________
VALERIE D. FLOOD
Attorneys for Intervener-Plaintiff
COUNTY OF PLACER

EXHIBIT A

FannieMae LENDER LETTER

Lender Letter LL-2010-06 **May 5, 2010**

TO: All Fannie Mae Single-Family Sellers and Servicers

Property Assessed Clean Energy Loans

Fannie Mae has received a number of questions from seller-servicers regarding government-sponsored energy loans, sometimes referred to as Property Assessed Clean Energy (PACE) loans. PACE loans generally have automatic first lien priority over previously recorded mortgages. The terms of the Fannie Mae/Freddie Mac Uniform Security Instruments prohibit loans that have senior lien status to a mortgage. As PACE programs progress through the experimental phase and beyond, Fannie Mae will issue additional guidance to lenders as may be needed from time to time.

Fannie Mae supports energy-efficiency initiatives, and is willing to engage with federal and state agencies as they consider sustainable programs to facilitate lending for energy-efficiency home retrofits, while preserving the status of mortgage loans originated as first liens.

Questions should be directed to Resource Center@fanniemae.com with the subject line "PACE." Lenders may also wish to consult with their federal regulators, who share concerns about PACE programs.

*****

Marianne E. Sullivan
Senior Vice President
Single-Family Chief Risk Officer

EXHIBIT B

EXHIBIT B

Freddie Mac
We make home possible®

Industry Letter

TO: Freddie Mac Seller/Servicers May 5, 2010

SUBJECT: First Lien Mortgages and Energy Efficient Loans

Several states have recently enacted laws that authorize localities to create new energy efficient loan programs that generally rely on the placement of a first priority lien to secure energy efficient home improvements. Programs under these laws are sometimes referred to as Energy Loan Tax Assessment Programs or Property Assessed Clean Energy programs. Freddie Mac has begun to receive questions about these new energy loan programs.

The purpose of this Industry Letter is to remind Seller/Servicers that an energy-related lien may not be senior to any Mortgage delivered to Freddie Mac. Seller/Servicers should determine whether a state or locality in which they originate mortgages has an energy loan program, and whether a first priority lien is permitted. Freddie Mac will provide additional guidance in the event that these energy loan programs move beyond the experimental stage.

Freddie Mac supports the goal of encouraging responsible financing of energy efficient and renewable energy home improvements. We continue to work with federal and state agencies and with Seller/Servicers on initiatives for developing workable energy retrofit programs.

CONCLUSION

Please contact your Freddie Mac representative or call (800) FREDDIE if you have any questions. Seller/Servicers may also wish to contact their federal regulators, who share concerns about energy liens.

Sincerely,

Patricia J. McClung
Vice President
Offerings Management

EXHIBIT C

EXHIBIT C

FEDERAL HOUSING FINANCE AGENCY

STATEMENT

For Immediate Release
July 6, 2010

Contact: Corinne Russell (202) 414-6921
Stefanie Mullin (202) 414-6376

FHFA Statement on Certain Energy Retrofit Loan Programs

After careful review and over a year of working with federal and state government agencies, the Federal Housing Finance Agency (FHFA) has determined that certain energy retrofit lending programs present significant safety and soundness concerns that must be addressed by Fannie Mae, Freddie Mac and the Federal Home Loan Banks. Specifically, programs denominated as Property Assessed Clean Energy (PACE) seek to foster lending for retrofits of residential or commercial properties through a county or city's tax assessment regime. Under most of these programs, such loans acquire a priority lien over existing mortgages, though certain states have chosen not to adopt such priority positions for their loans.

First 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. The size and duration of PACE loans exceed typical local tax programs and do not have the traditional community benefits associated with taxing initiatives.

FHFA urged state and local governments to reconsider these programs and continues to call for a pause in such programs so concerns can be addressed. First liens for such loans represent a key alteration of traditional mortgage lending practice. They present significant risk to lenders and secondary market entities, may alter valuations for mortgage-backed securities and are not essential for successful programs to spur energy conservation.

While the first lien position offered in most PACE programs minimizes credit risk for investors funding the programs, it alters traditional lending priorities. Underwriting for PACE programs results in collateral-based lending rather than lending based upon ability-to-pay, the absence of Truth-in-Lending Act and other consumer protections, and uncertainty as to whether the home improvements actually produce meaningful reductions in energy consumption.

Efforts are just underway to develop underwriting and consumer protection standards as well as energy retrofit standards that are critical for homeowners and lenders to understand the risks and rewards of any energy retrofit lending program. However, first liens that disrupt a fragile housing finance market and long-standing lending priorities, the absence of robust underwriting standards to protect homeowners and the lack of energy retrofit standards to assist homeowners, appraisers, inspectors and lenders determine the value of retrofit products combine to raise safety and soundness concerns.

On May 5, 2010, Fannie Mae and Freddie Mac alerted their seller-servicers to gain an understanding of whether there are existing or prospective PACE or PACE-like programs in jurisdictions where they do business, to be aware that programs with first liens run contrary to the Fannie Mae-Freddie Mac Uniform Security Instrument and that the Enterprises would provide additional guidance should the programs move beyond the experimental stage. Those lender letters remain in effect.

Today, FHFA is directing Fannie Mae, Freddie Mac and the Federal Home Loan Banks to undertake the following prudential actions:

1. For any homeowner who obtained a PACE or PACE-like loan with a priority first lien prior to this date, FHFA is directing Fannie Mae and Freddie Mac to waive their Uniform Security Instrument prohibitions against such senior liens.

2. In addressing PACE programs with first liens, Fannie Mae and Freddie Mac should undertake actions that protect their safe and sound operations. These include, but are not limited to:

   - Adjusting loan-to-value ratios to reflect the maximum permissible PACE loan amount available to borrowers in PACE jurisdictions;

   - Ensuring that loan covenants require approval/consent for any PACE loan;

   - Tightening borrower debt-to-income ratios to account for additional obligations associated with possible future PACE loans;

   - Ensuring that mortgages on properties in a jurisdiction offering PACE-like programs satisfy all applicable federal and state lending regulations and guidance.

   Fannie Mae and Freddie Mac should issue additional guidance as needed.

3. The Federal Home Loan Banks are directed to review their collateral policies in order to assure that pledged collateral is not adversely affected by energy retrofit programs that include first liens.

Nothing in this Statement affects the normal underwriting programs of the regulated entities or their dealings with PACE programs that do not have a senior lien priority. Further, nothing in these directions to the regulated entities affects in any way underwriting related to traditional tax programs, but is focused solely on senior lien PACE lending initiatives.

FHFA recognizes that PACE and PACE-like programs pose additional lending challenges, but also represent serious efforts to reduce energy consumption. FHFA remains committed to working with federal, state, and local government agencies to develop and implement energy retrofit lending programs with appropriate underwriting guidelines and consumer protection standards. FHFA will also continue to encourage the establishment of energy efficiency standards to support such programs.

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The Federal Housing Finance Agency regulates Fannie Mae, Freddie Mac and the 12 Federal Home Loan Banks. These government-sponsored enterprises provide more than $5.9 trillion in funding for the U.S. mortgage markets and financial institutions.

EXHIBIT D

Announcement SEL-2010-12 — August 31, 2010

Options for Borrowers with a PACE Loan

On July 6, 2010, the Federal Housing Finance Agency (FHFA) issued a statement regarding Property Assessed Clean Energy (PACE) loan programs. PACE loans are made by localities to finance residential energy improvements and are generally repaid through the homeowner's real estate tax bill. In its July 6 statement, FHFA advised that PACE programs that provide for automatic lien priority over mortgage loans pose safety and soundness risk to mortgage investors.

The purpose of this Announcement is to issue additional lender requirements to address these risks, and to issue special instructions regarding Fannie Mae borrowers who obtained PACE loans prior to July 6, 2010. The *Selling Guide* will be updated to incorporate these policy changes at a future date.

Requirements for PACE loans originated prior to July 6, 2010

Fannie Mae is implementing specific requirements for lenders regarding borrowers who obtained PACE loans prior to July 6, 2010. These requirements are intended to address safety and soundness concerns caused by PACE loans originated prior to the issuance of statements by FHFA and other banking regulators.

Fannie Mae is waiving the uniform security instrument prohibition against PACE loans with lien priority for whole loans purchased before July 6, 2010 and for loans in an MBS pool with an issue date on or before July 1, 2010.

Additionally, the following requirements apply to borrowers with loans that are owned or securitized by Fannie Mae who seek to refinance and who obtained a PACE loan prior to July 6, 2010. To mitigate the risk posed by PACE obligations that take lien priority over the mortgage, Fannie Mae is requiring that borrowers with sufficient equity pay off the existing PACE obligation as a condition to obtaining a new mortgage loan. If a lender determines that a borrower does not have sufficient equity to pay off the existing PACE obligation, the lender may underwrite the loan as described in the second bullet below. This "waterfall" approach is designed to mitigate Fannie Mae's exposure, while avoiding borrower hardship.

- Lender must first attempt to qualify the borrower for either a cash-out or limited cash-out refinance option, with the PACE loan being paid off as part of the refinance. The prohibition against using the proceeds of a limited cash-out refinance to pay off a loan not used to purchase the property will not apply. (See the *Selling Guide*, B2-1.2-02, Limited Cash-Out Refinance Transactions, for structure and eligibility requirements.)
- If the borrower is unable to qualify for a cash-out or limited cash-out refinance with sufficient proceeds to pay off the PACE loan, the lender may underwrite the loan as a limited cash-out refinance, DU Refi Plus™, or Refi Plus™ loan, as applicable, with the PACE loan remaining in place. In these cases, it will not be necessary to include the PACE loan in the calculation of the combined loan-to-value ratio, however the PACE loan payment must be included in the monthly housing expense calculation.

Note: The PACE loan must be included on the Uniform Residential Loan Application (Form 1003) as an installment debt with the balance and payment reflected. If the PACE loan will not be paid off with the transaction, the payment must be included in the total expense ratio.

Due to the complexity of data entry options for limited cash-out refinance transactions in which the PACE loan is being paid off with mortgage proceeds, these transactions must be manually underwritten.

Requirements for PACE loans originated on or after July 6, 2010

Fannie Mae will not purchase mortgage loans secured by properties with an outstanding PACE obligation unless the terms of the PACE program do not permit priority over first mortgage liens.

Lenders are responsible for monitoring state and local law to determine whether a jurisdiction has a PACE program that provides for lien priority.

Fannie Mae supports the need for programs to help homeowners fund energy efficiency improvements, and believes it may be accomplished without altering the lien status of first mortgages. In the event that PACE or similar programs with automatic lien priority proliferate, Fannie Mae will consider further limitations as necessary to address safety and soundness concerns posed by PACE programs, in line with the July 6 FHFA statement. These restrictions may include tightening borrower debt-to-income ratios or loan-to-value ratios in jurisdictions offering such programs.

Effective Date

This Announcement is effective immediately.

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Lenders who have questions about this Announcement should contact their Customer Account Team.

John S. Forlines
Vice President
Single-Family Chief Risk Officer

EXHIBIT E

Bulletin

NUMBER: 2010-20

TO: Freddie Mac Sellers and Servicers August 31, 2010

SUBJECT: MORTGAGES SECURED BY PROPERTIES WITH AN OUTSTANDING PROPERTY ASSESSED CLEAN ENERGY (PACE) OBLIGATION

This *Single-Family Seller/Servicer Guide* ("Guide") Bulletin provides guidance to our Seller/Servicers regarding Freddie Mac's purchase of Mortgages secured by properties with a Property Assessed Clean Energy (PACE) or PACE-like obligation.

BACKGROUND

In our Industry Letter dated May 5, 2010, *First Lien Mortgages and Energy Efficient Loans*, Freddie Mac reminded Seller/Servicers that an energy-related lien may not be senior to any Mortgage delivered to Freddie Mac. We also indicated that we would provide additional guidance regarding our requirements on energy retrofit lending programs in the future, should they move beyond the experimental stage.

On July 6, 2010, the Federal Housing Finance Agency (FHFA) issued a Statement on Certain Energy Retrofit Loan programs, such as PACE programs ("the FHFA Statement"). The FHFA Statement advised that First Liens offered by most PACE programs "pose unusual and difficult risk management challenges for lenders, servicers and mortgage securities investors," and change customary lending priorities.

The FHFA Statement further provides that First Liens created by PACE programs raise safety and soundness concerns. Other regulators share these concerns. For example, a Bulletin issued July 6, 2010 by the Office of the Comptroller of the Currency (OCC 2010-25) states, "This lien infringement raises significant safety and soundness concerns that mortgage lenders and investors must consider."

Freddie Mac supports the goal of encouraging responsible financing of energy efficient and renewable energy home improvements, and we believe this goal may be achieved without altering the lien priority status of first Mortgages or other underwriting requirements. To the extent necessary to mitigate greater risks associated with PACE and PACE-like programs, Freddie Mac will take additional actions. These actions could include adjusting loan-to-value and debt-to-income ratios for Mortgages secured by properties located in jurisdictions that permit such programs.

REQUIREMENTS

The requirements of this Bulletin apply to PACE obligations that provide for First Lien priority.

Mortgages secured by properties subject to PACE obligations that provide for First Lien priority

Freddie Mac will not purchase Mortgages secured by properties subject to PACE obligations that provide for First Lien priority. Seller/Servicers are responsible for monitoring State and local laws to determine whether a jurisdiction has a PACE program that provides for First Lien priority.

Mortgages secured by properties subject to PACE obligations originated before July 6, 2010 that provide for First Lien priority

For Mortgages with Freddie Mac Settlement Dates before **July 6, 2010** that are secured by properties subject to PACE obligations originated before **July 6, 2010** that provide for First Lien priority, Freddie Mac will waive the Uniform Security Instrument requirement that these obligations be subordinate to the First Lien. Otherwise, our requirements regarding Mortgages secured by properties subject to PACE obligations that provide for First Lien priority remain unchanged.

Refinance of Mortgages secured by properties subject to PACE obligations originated before July 6, 2010 that provide for First Lien priority

To mitigate the risk posed by PACE obligations that provide for First Lien priority over the Mortgage, we are implementing additional requirements with respect to the refinance of Mortgages with Freddie Mac Settlement Dates before July 6, 2010 that are secured by properties subject to PACE obligations originated before July 6, 2010 that provide for First Lien priority.

For such Mortgages (except when refinanced under Freddie Mac's Relief Refinance Mortgages^{SM} offering as described below), Freddie Mac will require that Borrowers who have sufficient equity pay off the existing PACE obligation in full as a condition to obtaining a new Mortgage. In addition, Sellers must qualify the Borrower using the steps below that are designed to mitigate Freddie Mac's exposure and minimize Borrower hardship:

- Sellers must first attempt to refinance the Mortgage either as:
  - A cash-out refinance Mortgage under the requirements of Guide Section 24.6, *Requirements for Cash-Out Refinance Mortgages,* or
  - A "no cash-out" refinance Mortgage under the requirements of Guide Section 24.5, *Requirements for "no cash-out" refinance Mortgages*, except that pay-off of the PACE obligation will be permitted in the same manner that secondary financing that is used in its entirety to purchase the subject property may be paid off

  Proceeds from the cash-out refinance Mortgage or the "no cash-out" refinance Mortgage must be used to pay off the PACE obligation in full.

- If the Mortgage does not meet the requirements for a cash-out refinance Mortgage or a "no cash-out" refinance Mortgage, as described above, with sufficient proceeds to pay off the PACE obligation in full, the Seller may then underwrite the Mortgage under Freddie Mac's Relief Refinance Mortgage^{SM} – Open Access offering under the requirements of Guide Chapter B24, *Freddie Mac Relief Refinance Mortgages^{SM} – Open Access*, with the PACE obligation remaining in place. In underwriting under such offering, it will not be necessary to include the PACE obligation in the calculation of the total loan-to-value ratio; however, the PACE obligation must be included in the monthly debt payment-to-income ratio.

  Special delivery requirements

  For Relief Refinance Mortgages - Open Access when the PACE obligation remains in place, in addition to complying with the special delivery requirements provided in Chapter B24, the Seller must deliver special characteristics code "H28."

GUIDE REVISIONS

Applicable Guide sections will be updated in a future Bulletin to reflect these changes.

CONCLUSION

If you have any questions, please contact your Freddie Mac representative or call (800) FREDDIE.

Sincerely,

Patricia J. McClung
Vice President
Offerings Management