

(DISCUSSION DRAFT)

H. R. _____

To prevent Fannie Mae, Freddie Mac, and other Federal residential and commercial mortgage lending regulators from adopting policies that contravene established State and local property assessed clean energy laws.

IN THE HOUSE OF REPRESENTATIVES

Mr. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To prevent Fannie Mae, Freddie Mac, and other Federal residential and commercial lending regulators from adopting policies that contravene established State and local property assessed clean energy laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “The PACE Assessment Protection Act of 2011”.

SECTION 2. FINDINGS AND PURPOSE.

(a) FINDINGS. -- The Congress finds that

(1) More than 20 States have enacted laws enabling their local government jurisdictions to create and manage property assessed clean energy (PACE) districts. By asserting the PACE liens are loans, Federal regulators and the government-sponsored enterprises (GSEs) have contravened established State and local law, resulting in many lawsuits by State and local governments.

(DISCUSSION DRAFT)

(2) Promoting energy and water efficiency and renewable energy has clear public benefits. Implementing efficiency and renewable energy opportunities in existing buildings presents significant opportunities for job creation and economic recovery. Energy and water efficiency (collectively referred to as “efficiency”) and renewable energy in buildings is an efficient and effective way to decrease strain on the electric grid, move toward energy independence as a hedge against volatility in world energy markets, reduce pollution, and conserve scarce water sources.

(3) Many property owners have difficulty obtaining affordable financing for efficiency and renewable energy improvements.

(4) Property Assessed Clean Energy (PACE) Programs represent an innovative and effective mechanism for providing property owners with access to financing for efficiency and renewable energy improvements, where the obligation to pay the PACE assessment passes seamlessly to the new owner upon sale of the property. Such programs create local jobs and allow municipalities to facilitate efficiency and renewable energy improvements in an innovative manner, enabling the many public benefits associated with such efficiency and renewable energy retrofits to accrue to the public.

(5) Energy and water efficient buildings are generally cheaper to operate and have greater asset value than less efficient buildings. These benefits can substantially offset, and exceed, the costs associated with repaying the financing for efficiency improvements. The residual risk, if any, posed by PACE programs to mortgage lenders is fully controllable through proper program design.

(6) The Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Finance Agency, and the Office of the Comptroller of the Currency have taken affirmative steps to stifle State and municipal efforts to implement and expand PACE programs without reasonable regard for programmatic features and economic impacts of particular PACE programs which may minimize or eliminate risk to mortgage lenders.

(b) PURPOSE. -- It is the purpose of this Act to ensure that, at this critical juncture in this Nation's efforts to develop a prudent and sustainable energy policy, PACE programs, which incorporate prudent programmatic safeguards to protect the interest of mortgage holders and property owners, remain viable as a potential avenue for States and political subdivisions of

(DISCUSSION DRAFT)

States to achieve the many public benefits associated with energy efficiency, water efficiency and renewable energy retrofits. In addition, it is essential that the power and authority of State and local governments to exercise their longstanding and traditional powers to assess not be impeded.

SEC. 3. DEFINITIONS.—For purposes of this Act,

- (a) The term “municipality” includes counties, cities, towns, villages and districts authorized under State laws to establish PACE programs.
- (b) The term “PACE lien” means a lien securing financing entered into pursuant to a PACE program.
- (c) “Clean energy improvements” means any system on the property for producing electricity for, or meeting heating, cooling, or water heating needs of the property, using either renewable energy sources, combined heat and power systems, or district energy systems using wood biomass (but not construction and demolition waste) or natural gas. Such improvements include but are not limited to solar photovoltaic, solar thermal, wood biomass, wind, and geothermal systems. “Clean energy improvements” means, in addition, the reasonable costs of an audit to identify the previously listed improvements.
- (d) “Energy conservation and efficiency improvements” means measures to reduce consumption, through conservation or more efficient use, of electricity, fuel oil, natural gas, propane, or other forms of energy on the property, including but not limited to air sealing, installation of insulation, installation of heating, cooling, or ventilation systems meeting or exceeding ENERGY STAR standards, building modification to increase the use of daylighting, replacement of windows with units meeting or exceeding ENERGY STAR standards, installation of energy controls or energy recovery systems, and installation of efficient lighting equipment, provided that such improvements are permanently affixed to the property. “Energy conservation and efficiency improvements” means, in addition, the reasonable costs of an audit to identify the previously listed improvements.
- (e) “Property owner” means the owner of record of real property within the boundaries of the district, whether zoned or used for residential, commercial, industrial, or other uses.

(DISCUSSION DRAFT)

SEC. 4. TREATMENT OF PACE PROGRAMS BY FNMA AND FHLMC.

(a) **LENDER GUIDANCE.** The Director of the Federal Housing Finance Agency, acting in its general supervisory capacity, shall direct the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation to—

(1) issue guidance within 30 days after the date of enactment of this Act, providing that a PACE lien does not constitute a default on any mortgage secured by a uniform instrument of Federal National Mortgage Association or Federal Home Loan Mortgage Corporation and does not violate any prohibition in the uniform security instrument;

(2) rescind any prior issued guidance inconsistent with the provisions of paragraph 1; and

(3) take all such other actions necessary to effect the purposes of this Act.

(b) **PROHIBITION OF DISCRIMINATION.**—The Director of the Federal Housing Finance Agency, the Comptroller of the Currency, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Deposit Insurance Corporation and the National Credit Union Administration and all Federal agencies and entities chartered or otherwise established under Federal law shall not discriminate in any manner against states or political subdivisions of states implementing or participating in a PACE program, or against any property included in a PACE program, including, without limitation, by:

(1) prohibiting lending within such jurisdiction or requiring more restrictive underwriting criteria for properties within such jurisdiction,

(2) requiring payment of non-delinquent assessment amounts on any property included in a PACE program in any circumstances, or

(3) applying more restrictive underwriting criteria to any property that has received an assessment under a PACE program than such financial institution would apply to that property in the event that it was subject to a

(DISCUSSION DRAFT)

State or municipal tax assessment that was not imposed under a PACE program.

SEC. 5. PROPERTY ASSESSED CLEAN ENERGY (PACE) DISTRICTS

A PACE program, and any lien resulting from such program, is entitled to the protections of this statute only where the following additional requirements are met:

(a) AGREEMENTS WITH RESIDENTIAL PROPERTY OWNERS

(1) (A) The municipality and the owner of the property to which the PACE assessment applies at the time of commencement of assessment shall enter into an agreement addressing the terms of the PACE improvement (“PACE agreement”). In the case of any property with multiple owners, the PACE agreement shall be signed by all owners.

(B) The PACE agreement shall provide that the owner shall contract for qualifying improvements with one or more qualified contractors, purchase materials to be used in making qualified improvements, or both, and that, upon submission of documentation required by the municipality, the municipality shall disburse funds to the property owner in payment for the qualifying improvements or materials used in making qualified improvements.

(C) The PACE agreement shall be in writing and shall include a payment schedule showing the term over which payments will be due on the assessment, the frequency with which payments will be billed and amount of each payment, and the annual amount due on the assessment. Upon full payment of the amount of the assessment, including all outstanding interest and charges and any penalties that may become due, the municipality shall provide the participating property owner with a written statement certifying that the assessment has been paid in full.

(2) The municipality shall disclose to the participating property owners the costs and risks associated with participating in the program, including risks related to their failure to make payments and the risk of enforcement of property tax or special assessment liens. The municipality

(DISCUSSION DRAFT)

shall clearly and conspicuously provide the property owner the right to rescind his decision to enter into a PACE assessment, within 3 days of the original transaction.

(3) At least 30 days prior to entering into a PACE agreement with a municipality under this statute, the property owner shall provide to the holders of any existing mortgages on the property notice of his or her intent to enter into the PACE agreement.

(b) AGREEMENTS WITH COMMERCIAL AND INDUSTRIAL PROPERTY OWNERS

(1) Prior to entering into an agreement with a municipality under this statute, the property owner shall obtain written consent of the holders of the first mortgage on the property.

(2) (A) The municipality and the owner of the property to which the PACE assessment applies at the time of commencement of assessment shall enter into an agreement addressing the terms of the PACE improvement (“PACE agreement”). In the case of any property with multiple owners, the PACE agreement shall be signed by all owners.

(B) The PACE agreement shall provide that the owner shall contract for qualifying improvements with one or more qualified contractors, purchase materials to be used in making qualified improvements, or both, and that, upon submission of documentation required by the municipality, the municipality shall disburse funds to the property owner in payment for the qualifying improvements or materials used in making qualified improvements.

(C) The PACE agreement shall be in writing and shall include a payment schedule showing the term over which payments will be due on the assessment, the frequency with which payments will be billed and amount of each payment, and the annual amount due on the assessment. Upon full payment of the amount of the assessment, including all outstanding interest and charges and any penalties that may become due, the municipality shall provide the participating property owner with a written statement certifying that the assessment has been paid in full.

(3) The municipality shall disclose to the participating property owners the costs and risks associated with participating in the program, including risks related to their failure to make payments and the risk of enforcement of property tax or special assessment liens.

(c) PUBLIC NOTICE OF PACE ASSESSMENT

(1) The municipality shall file a public notice of the assessment. The notice shall consist of the following statement or its substantial equivalent: “This property is subject to a special assessment related to the installation of qualifying cost-effective energy conservation and efficiency improvements or clean energy improvements.”

(d) CONFIDENTIALITY

(1) Any personal financial information provided by a property owner to a municipality or an entity administering a program on behalf of a governmental entity shall be confidential and shall not be disclosed to any person except as required to administer the program and only on a need-to-know basis.

(e) ELIGIBILITY OF PROPERTY OWNERS

(1) Prior to entering into an agreement with a property owner, the municipality shall determine that all property taxes and any other assessments levied with property taxes are current and have been current for 3 years or the property owner’s period of ownership, whichever is less; that there are no involuntary liens such as mechanic’s liens on the property; and that no notices of default or other evidence of property-based debt delinquency have been recorded during the past 3 years or the property owner’s period of ownership, whichever is less; and that the property owner is current on all mortgage debt on the property. The municipality may adopt additional criteria, appropriate to property-assessed clean energy finance programs, for determining the creditworthiness of property owners.

(f) QUALIFYING IMPROVEMENTS

(1) Improvements shall be based on an audit performed by a person who has been certified as a building analyst by the Building Performance Institute or who has obtained other appropriate certification as determined by the Department of Housing and Urban Development. The audit shall

identify recommended energy conservation and efficiency and clean energy improvements; provide the estimated cost savings, useful life, benefit-cost ratio, and simple payback or return on investment for each improvement; and provide the estimated overall difference in annual energy costs with and without recommended improvements. Financed improvements shall be consistent with the audit recommendations. The cost of the audit may be included in the total amount financed under this statute.

(2) Improvements shall be permanently affixed to an existing building or facility that is part of the property. An agreement between a municipality and a qualifying property owner may not cover projects in building or facilities under new construction.

(3) Improvements shall be made by a contractor or contractors, determined by the municipality to be qualified to make the energy efficiency or clean energy improvements in the agreement. A municipality may accept a designation of contractors as qualified made by an electric or gas utility or another appropriate entity. Any work requiring a license under applicable law shall be performed by an individual holding such license. A municipality may elect to permit the financing pursuant to an agreement of improvements made by the owner of the property, but shall not permit the value of the owner's labor to be included in the amount financed.

(4) A municipality shall require, prior to disbursement of final payments for qualifying improvements, submission by the property owner in a form acceptable to the municipality of:

(A) A post-installation report, based on an inspection acceptable to the municipality, certifying that improvements have been installed properly and verifying that they are performing satisfactorily; and

(B) Documentation of all costs to be financed and copies of any required permits.

(g) FINANCING TERMS

(1) Improvements shall be financed on terms such that the total energy cost savings realized by the property owner and the property owner's successors during the useful lives of the improvements are expected to exceed the total cost to the property owner and the property owner's successors of the improvements. In determining the amount that may be

financed pursuant to an agreement, the total amount of all rebates, tax credits, grants and other financial assistance received by the owner on account of the improvements shall be deducted from the cost of the improvements.

(2) The municipality that provides financing to participating property owners shall establish or have access to a loss reserve account and maintain funds in such account at a level that meets generally accepted standards for property-assessed clean energy finance programs.

(3) The total amount of PACE assessments for a property shall not exceed 10% of the estimated value of the property. A property owner who escrows property taxes with the holder of a mortgage on a property subject to an agreement under this chapter may be required by the holder to escrow amounts due on the assessment under this statute and the mortgage holder shall remit such amounts to the municipality in the manner that property taxes are escrowed and remitted.

(4) The property owner shall have equity in the property of not less than 15 percent.

(5) The maximum term of finance provided for a PACE improvement shall be 20 years. The term shall in no case exceed 85 percent of the average expected useful life of the improvement. Expected useful lives used for all calculations under this chapter shall be consistent with the expected useful lives of energy conservation and efficiency and clean energy measures approved by the Department of Energy.

(h) COLLECTION AND ENFORCEMENT

Collection of assessments shall be made by the tax collector or other official responsible for property tax or municipal service charge collection.

Notwithstanding any other provision of law, in the event of a transfer of property ownership through foreclosure, collection by the municipality shall be limited to any past due balances and future payments shall neither be accelerated nor extinguished by foreclosure. Payment of a past due balance from the loss reserve established shall not relieve a participating property owner from the obligation to pay that amount.