



July 23, 2010

Mr. Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
1700 G Street, NW
Washington, DC 20552

Dear Mr. Pollard:

I write today on behalf of the more than 3,700 member companies of the American Land Title Association (ALTA). Founded in 1907, ALTA is the national trade association and voice of the real estate settlement services, abstract and title insurance industry. With more than 8,000 offices throughout the country, ALTA members operate in every county in the United States to search, review and insure land titles to protect home buyers and mortgage lenders who invest in real estate. ALTA members include title insurance companies, title agents, independent abstracters, title searchers and attorneys, ranging from small, one-county operations, to large national title insurers.

Real property is the greatest source of wealth in the United States, and access to that wealth is only possible because of a strong set of property rights that determine how property is used and owned. By establishing legal rights to property, economies have the surety necessary to be used as collateral to create additional capital.

American law bundles property rights into a title that describes the asset and its owner. Titles are tracked by a recording system that gives the public notice of who possess what property rights. As economist Hernando De Soto argues, “Ensuring that the relationship between those documents and each of the independent assets they represent is never debased requires a formidable system of legal property rights. That system produces the trust that allows credit and capital to flow and markets to work.”

There are two hallmarks of our property rights system: liens and lien priority. A lien is a claim against a property for the payment of a debt. A lien gives a creditor the security to know that a debt will be satisfied. Lien priority is the legal structure that determines which creditor has the right to be paid in which order when a property must be sold to satisfy a debt. This structure assures creditors of their rights when property is used to secure a debt.

ALTA has been following the recent press reports regarding the Federal Housing Finance Agency (FHFA) July 6, 2010, “Statement on Certain Energy Retrofit Loan Programs.” We recognize the value in lowering energy costs for consumers, creating jobs for the economy and

reducing buildings' carbon footprint for the environment, and we ask for your guidance in resolving uncertainty surrounding these programs on the following questions:

What is the process by which a PACE lien is created? How is the lien administered and satisfied to repay the obligation? State statutes we have reviewed are unclear as to when a PACE lien is deemed to arise, when the assessment or loan is given or when the assessment for periodic repayment is certified to the current year's taxes. ALTA members review liens to determine the size of the debt the lien secures, when the lien arose and how it operates in order to properly advise consumers and creditors about the rights the lien conveys. This information allows them to make an informed decision about purchasing a property or providing mortgage financing. Without additional information and clarity regarding PACE liens, ALTA members will not be able to properly assure and insure consumers that they have title to their property or creditors of their lien priority. This risks delaying or cancelling real estate transactions.

Must PACE liens be recorded in the local property records in order to provide the public proper notice of the lien to all current and future owners of an interest in the property as required by real property law? If so, when must the lien be recorded? PACE statutes are unclear about the recording obligations associated with these liens. Without ensuring that PACE liens are properly recorded in local property records, ALTA members cannot properly identify risks in order to protect the interests of consumers and creditors.

How do localities determine whether PACE applicants have clear title to property and that the property is located in the financing district? The U.S. Department of Energy, May 7, 2010, "Guidelines for Pilot PACE Financing Programs" is unclear as to the method by which PACE programs that applicant has clear title to property and that the property is located in the financing district. A property owner must have title in order to grant a lien against the property. In most parts of the country, this is accomplished by land title professionals who search local property records to determine title. Without establishing standards for determining title to property, PACE loans run the risk of significant losses due to fraud. In addition to harming PACE participants, it also damages local property records, and results in increased costs of underwriting, claims, escrow services and compliance for the land title industry.

Is PACE financing defined as a loan or a tax assessment? If PACE transactions are secured loans, then would the issuance of a Good Faith Estimate (GFE) and HUD-1 Settlement Statement be legally required under the Real Estate Settlement and Procedures Act (RESPA)? RESPA requires a GFE and HUD-1 for all transactions, "which involve federally related mortgage loans." 12 USC § 2603. Further RESPA defines a federally related mortgage loan as any loan which, "is secured by a first or subordinate lien on residential real property." 12 USC § 2602(1)(A). A loan is generally defined as an agreement between parties in which a lender gives money or property to a borrower who agrees to repay the money or return the property with interest. This definition would suggest that PACE financing is a loan, which would fall under the purview of RESPA.

According to www.PACENow.org, PACE programs appear to have all the hallmarks of a loan: agreement by a local government (or lender) to give money to a property owner's (the borrower) and to then repay that money with interest as an additional line on their tax

assessment.¹ The repayment of a PACE loan is secured by a tax lien against the property. RESPA requires that all loans secured by a lien against real property must be conducted in accordance with RESPA, including the issuance of a GFE and HUD-1.

If the a PACE loan is not considered to be secured by a first or subordinate lien it may still be defined as a federally related mortgage because it, “is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government” 12 USC § 2602(1)(B)(ii). Thus the assistance of any Federal Government official or agency in the funding or operations of a PACE program, including granting of Federal tax benefits for the interest paid by borrower or for the interest earned by any investor in a bond backed by PACE loans, may require that the requirements of RESPA be followed for each PACE transaction.

While there may be additional questions requiring guidance to resolve uncertainty surrounding PACE programs, we thank you for your guidance in resolving these issues.

Sincerely,

A handwritten signature in blue ink that reads "Kurt Pfothauer" followed by a horizontal line.

Kurt Pfothauer
Chief Executive Officer

¹ See [PACE Finance Summary Sheet](http://pacenow.org/documents/PACE%20Leg-Cong%20Letter%207.12.10%20-%20PACE%20Summary%20Only.pdf), published July 12, 2010. Available at <http://pacenow.org/documents/PACE%20Leg-Cong%20Letter%207.12.10%20-%20PACE%20Summary%20Only.pdf>. Last Accessed July 22, 2010.