

It has been a long road for supporters of Property-Assessed Clean Energy (PACE) programs. With the recent release of the Federal Housing Finance Agency's [Proposed Rule](#) on enterprise underwriting standards and mortgage assets affected by PACE programs, some residential PACE supporters may be reasonably fatigued. But while the agency's Proposed Rule maintains its position that Fannie Mae and Freddie Mac (the "Enterprises") should not purchase any mortgages subject to a first-lien PACE obligation, PACE supporters have one more chance to submit their most compelling case for reviving residential PACE programs nationwide.



The deadline for submitting comments on the proposed PACE rule has been [extended](#) to September 13, so there is still time to prepare responses to the Proposed Rule and the three alternatives FHFA articulates. For a brief review of the ongoing PACE controversy, see past *Legal Planet* posts [here](#), [here](#) and [here](#).

More than 400 unique response [letters](#) were submitted by the solar and construction industries, environmental groups, policymakers and other stakeholders in response to the agency's [Advanced Notice of Proposed Rulemaking](#). The Proposed Rule acknowledges many of these informed comments yet still concludes that residential PACE programs present "significant safety and soundness concerns" to the Enterprises.

There are a host of legal issues in this controversy, but let's start with FHFA's claim that residential PACE programs pose an "unacceptable incremental financial risk" to the Enterprises. First, it's not clear where this standard derives from, and what level of risk, if any, would be "acceptable" according to FHFA. The agency appears to be taking the position that pursuant to its role as conservator over the Enterprises, it can act to eliminate *any* degree of risk that it perceives. This cannot be the case, as routine tax assessments have created first-lien obligations for decades, enabling home improvements like seismic retrofits and septic upgrades to be financed.

Further, let's look at the data. Under the Administrative Procedure Act's narrow scope of review, the agency must be able to explain the evidence that is available and provide a rational explanation for its action. Several empirical studies cited by commenters found a sales premium for certified energy efficient homes. Relevant studies include:

- A [2011 Lawrence Berkeley National Laboratory](#) assessment of 72,000 homes showing an average \$17,000 sales price premium for homes with photovoltaic systems;
- A [2011 study published in the *Journal of Sustainable Real Estate*](#) finding that homes with ENERGY STAR ratings sell for \$8.66 more per square foot than comparable homes without this rating; and
- A [study by non-profit Earth Advantage Institute](#) concluding that during the time period May 2010-April 2011, existing homes with energy certification sold for 30% more, on average, than non-certified homes.

And just days ago, fellow blogger [Matthew Kahn released his own new report](#) finding an estimated a 9% price premium for ENERGY STAR certified California homes relative to similar homes that are not certified.

By contrast, there is no hard data cited in the notice of proposed rulemaking supporting the position that PACE projects may decrease home values. Therefore, while we may need more data to assess the effect of energy efficiency upgrades across wide markets and different residential price points, the data we currently have on home values appears quite promising. The APA's arbitrary and capricious standard won't have any teeth until after a final rule is published, but it does require a rational explanation based on existing evidence.

Of the three "risk-mitigation alternatives" articulated by FHFA in its Proposed Rule, the third alternative would adopt the key provisions of the [PACE Assessment Protection Act of 2011](#), H.R. 2599. This appears to be the most palatable solution from a policy perspective. H.R. 2599 has garnered strong bipartisan support and incorporates safeguards to protect the interests of mortgage holders and property owners, while upholding the longstanding power that local governments have over property assessments such as PACE.

Berkeley Law's Center for Law, Energy & the Environment will be submitting our own comments in the final stage of this rulemaking.