July 2013

MEMO

RE: INCREASED LENDING STANDARDS FOR PACE JURISDICTIONS

BACKGROUND

The FHFA has issued several directives over the past 3 years to the Government Sponsored Enterprises (GSEs) that it is both regulator of and conservator for, including Fannie Mae, Freddie Mac and the Federal Home Loan Banks (FHLBs). In these directives concerning so-called "PACE obligations" that, according to the respective state laws under which they were placed, take a senior lien position on a property, the FHFA has advised that the GSEs carry out a series of actions to discourage the use PACE financing and punish all residents of PACE Districts (even on properties not participating in the PACE District).

CURRENT STATUS

There is no legal basis for enforcing the punitive measures included in the July 6, 2010 Statement from FHFA. The Statement says that FHFA is "directing" the Enterprises and the Federal Home Loan Banks to undertake a series of actions:

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

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

In its ruling, the Ninth Circuit US Court of Appeals, the Court examined closely the distinction between Conservator vs. Regulator in the operation of FHFA. As Conservator, FHFA "has all the rights, titles, powers, and privileges "of the Enterprises. The court limited its examination to the prohibition for the Enterprises buying mortgages with first position PACE liens. The Court did not examine any of the other issues in the FHFA July 6 Statement. The Court also noted "FHFA cannot evade judicial review and the APA's requirements for rule making…"

The Court did not examine the other issues reflected in the July 10 Statement, nor which items were properly treated as Conservator and which were properly under the FHFA regulatory authority. Prior to the Appellate ruling, but during review, FHFA released a "guidance" on February 28 of 2011 that again called for the Enterprises to not purchase PACE mortgages, and did so be expressly stating that it was acting as "Conservator" pursuant to 12 USC 4617" and in furtherance of the Conservator's duty. This letter only call restated the prohibition on purchasing PACE mortgages. None of the other specific restrictions were addressed in the July 10 letter.

CONCLUSION

The lending restriction directives from FHFA in July of 2010 are unenforceable; the ability to carry out the credit restriction was never completed and no substantial evidence exists as to how the these items were meant to proceed. They were clearly deliberately excluded from the February 28 letter, which only directed the mortgage prohibition. The only enforceable order from FHFA is the letter of February 28 2011 that cited the legal basis for the act and released under the authority of the Conservator. Even if FHFA could credibly argue that the blanket credit restrictions would fall into the role of Conservator, the explicit citation would have been needed to proceed, as was done on February 8 of 2011.