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8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION

12 PEOPLE OF THE STATE OF
13 CALIFORNIA, *ex rel.* EDMUND G. BROWN,
14 JR., ATTORNEY GENERAL,

15 Plaintiff,

v.

16 FEDERAL HOUSING FINANCE AGENCY;
17 EDWARD DeMARCO, in his capacity as Acting
Director of FEDERAL HOUSING FINANCE
18 AGENCY; FEDERAL HOME LOAN
MORTGAGE CORPORATION; FEDERAL
19 NATIONAL MORTGAGE ASSOCIATION,

20 Defendants.

No. 10-cv-03084 CW

STATEMENT OF INTEREST
BY THE UNITED STATES

21 SONOMA COUNTY and PLACER COUNTY,

22 Plaintiffs,

v.

23 FEDERAL HOUSING FINANCE AGENCY;
24 EDWARD DeMARCO, in his capacity as Acting
Director of FEDERAL HOUSING FINANCE
25 AGENCY; FEDERAL HOME LOAN
MORTGAGE CORPORATION; FEDERAL
26 NATIONAL MORTGAGE ASSOCIATION,

27 Defendants.

No. 10-cv-03270 CW

28 STATEMENT OF INTEREST BY THE UNITED STATES

Case Nos. 10-cv-03084 CW, 10-cv-03270 CW, 10-cv-03317 CW, 10-cv-04482 CW

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SIERRA CLUB,

Plaintiff,

v.

FEDERAL HOUSING FINANCE AGENCY;
EDWARD DeMARCO, in his capacity as Acting
Director of FEDERAL HOUSING FINANCE
AGENCY,

Defendants.

No. 10-cv-03317 CW

CITY OF PALM DESERT,

Plaintiff,

v.

FEDERAL HOUSING FINANCE AGENCY;
FEDERAL NATIONAL MORTGAGE
ASSOCIATION; FEDERAL HOME LOAN
MORTGAGE CORPORATION,

Defendants.

No. 10-cv-04482 CW

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2 **STATEMENT OF INTEREST BY THE UNITED STATES**

3 **INTRODUCTION**

4 Plaintiffs filed the above-captioned lawsuits after the Federal Housing Finance Agency
5 (“FHFA”) issued a statement (the “Statement”), and the Federal National Mortgage Association
6 (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”) published
7 announcements, which addressed the potential impact of Property Assessed Clean Energy
8 (“PACE”) programs on mortgages held by Fannie Mae and Freddie Mac. Plaintiffs seek
9 declaratory and injunctive relief, alleging violations of the Administrative Procedures Act
10 (“APA”), the National Environmental Policy Act (“NEPA”), various state laws, and the United
11 States Constitution. The Court currently is considering Defendants’ Motion to Dismiss and
12 Sonoma County’s Motion for a Preliminary Injunction. On December 17, 2010, the Court
13 requested the views of the United States regarding the issues raised in these actions, to be
14 conveyed in the form of a letter or brief from the Department of Justice. Pursuant to 28
15 U.S.C. §517¹ and the Court’s request, the United States of America respectfully submits this
16 statement.

17 At the outset, the United States wishes to emphasize the limited role of the Department of
18 Justice in this matter. Although the Department of Justice has exclusive authority to conduct
19 litigation on behalf of most agencies of the United States, Congress may authorize a particular
20 agency to litigate on its own behalf with its own lawyers. See 28 U.S.C. § 516. FHFA and its
21 Director have such independent litigation authority, see 12 U.S.C. § 4513(c), and are represented
22 in this case by FHFA’s general counsel and private lawyers. When an agency exercises its
23 independent litigation authority, it is unnecessary, and could be viewed as contrary to that
24 authority, for the United States, acting through the Department of Justice, to intervene for the
25 purpose of commenting on issues that are specific to that agency. Accordingly, this Statement

26
27 ¹ Under 28 U.S.C. § 517, the United States may appear in any court in the United
28 States “to attend to the interests of the United States in a suit pending in a court of the United
States, or in a court of a State, or to attend to any other interest of the United States.”

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1 will address only those issues that the United States believes implicate broader governmental
2 interests. The decision not to comment on other issues in the case (including the other arguments
3 made by FHFA in support of its motion to dismiss and in opposition to the motion for
4 preliminary injunction) does not reflect in any way upon the United States government's views
5 regarding those issues, but is simply an acknowledgment that Congress has authorized FHFA to
6 represent itself in lawsuits such as this one.²

7 In this matter, the issue that appears at this time to implicate broader governmental interests
8 is Plaintiffs' claim that FHFA violated the APA by failing to follow notice and comment
9 procedures before it issued its July 6, 2010 Statement raising safety and soundness concerns with
10 PACE programs. Three other agencies, the Office of the Comptroller of the Currency ("OCC"),
11 the Federal Deposit Insurance Corporation ("FDIC"), and the National Credit Union
12 Administration ("NCUA"), also issued statements concerning PACE programs without first
13 going through notice and comment.³ Complaints filed in the Eastern District of New York and
14 the Southern District of New York allege that OCC violated the APA in issuing its guidance.
15 See The Town of Babylon v. FHFA et. al., 2:10-cv-04916 (E.D.N.Y.); Natural Resource Defense
16 Council, Inc. v. FHFA et. al., 1:10-cv-07647 (S.D.N.Y.).⁴ More generally, this issue implicates
17 agencies' ability to provide informal guidance to regulated entities.

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19
20 ² Likewise, the respective substantive merits of and concerns about PACE programs are
21 beyond the scope of this submission.

22 ³ The OCC guidance is available at [http://www.occ.gov/news-issuances/bulletins/2010/](http://www.occ.gov/news-issuances/bulletins/2010/bulletin-2010-25.html)
23 [bulletin-2010-25.html](http://www.fdic.gov/news/news/financial/2010/fil10037.html). The FDIC letter is available at [http://www.fdic.gov/news/news/financial/](http://www.fdic.gov/news/news/financial/2010/fil10037.html)
24 [2010/fil10037.html](http://www.ncua.gov/Resources/RegulatoryAlerts/Files/2010/10-RA-10.pdf). The NCUA alert is available at [http://www.ncua.gov/Resources/Regulatory](http://www.ncua.gov/Resources/RegulatoryAlerts/Files/2010/10-RA-10.pdf)
Alerts/Files/2010/10-RA-10.pdf.

25 ⁴ In the Southern District of New York, the OCC (represented by the United States
26 Attorney) has filed a motion to dismiss the administrative law claim. The OCC's brief in support
27 of that motion is attached as Attachment 1. A third case raising similar issues is pending in
28 Florida. See Leon County v. FHFA et. al., 4:10-cv-00436 (N.D. Fla.). FHFA has moved the
Judicial Panel on Multidistrict Litigation to centralize all seven actions.

1 As explained below, it is the position of the United States that Plaintiffs' notice and comment
 2 claim must be dismissed for lack of jurisdiction and for failure to state a claim. FHFA's
 3 Statement notified the public of FHFA's interpretation of statutory safety and soundness
 4 requirements as applied to novel PACE programs and affirmed Fannie Mae and Freddie Mac's
 5 earlier stated position that such programs violate their uniform security instruments. Plaintiffs
 6 have alleged no facts suggesting that the relief they seek against FHFA – that the Court set aside
 7 the Statement – would alter Fannie Mae and Freddie Mac's treatment of PACE programs.
 8 Because vacating the Statement would not redress Plaintiffs' alleged injuries, Plaintiffs lack
 9 Article III standing to challenge the Statement. Further, the Statement had no legal effect and did
 10 not impose a legal obligation on Fannie Mae and Freddie Mac. Plaintiffs' claim therefore fails
 11 for the additional reason that the Statement does not constitute final agency action and thus is not
 12 subject to review under the APA. Finally, because the Statement is not a legislative rule, but
 13 merely interprets the safety and soundness standard, FHFA was not required to undertake notice
 14 and comment prior to issuing it.

15 BACKGROUND

16 I. Defendants

17 FHFA is an independent federal agency created by the Housing and Economic Recovery Act
 18 of 2008 (“HERA”)⁵ to supervise and regulate Fannie Mae, Freddie Mac, and the Federal Home
 19 Loan Banks (“Banks”). 12 U.S.C. § 4501 *et seq.* Fannie Mae and Freddie Mac (collectively
 20 “Enterprises”) are government sponsored entities that facilitate the secondary market in
 21

22 ⁵ HERA amended the Safety and Soundness Act. The Safety and Soundness Act,
 23 Chapter 46 of Title 12, is divided into three subchapters. Subchapter I, “Supervision and
 24 Regulation of Enterprises” (12 U.S.C §§ 4511–4603), provides for the structure and the general
 25 regulatory authority of FHFA. Subchapter II, “Required Capital Levels for Regulated Entities,
 26 Special Enforcement Powers, and Reviews of Assets and Liabilities” (12 U.S.C. §§ 4611–4624),
 27 authorizes (and sometimes requires) FHFA to take more specific actions to ensure the regulated
 28 entities have sufficient capital and reserves. Subchapter II also provides for FHFA's powers as
 Conservator. *See* 12 U.S.C. § 4617. Subchapter III, “Enforcement Provisions” (12 U.S.C.
 §§ 4631–4642), empowers FHFA to take certain enforcement actions against the regulated
 entities.

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1 residential mortgages by purchasing loans from mortgage lenders. The Enterprises together own
2 or guarantee about half of all residential mortgages, holding more than \$5 trillion in mortgage-
3 related assets. The Banks are 12 regional cooperative banks relied on by lending institutions to
4 help finance housing development.

5 FHFA oversees the operations of the Enterprises and the Banks in order to ensure that they
6 operate in a financially safe and sound manner, and that they comply with the law. See 12 U.S.C.
7 § 4513(a). FHFA's director is authorized to "issue any regulations, guidelines, or orders
8 necessary to carry out the duties of the Director under this chapter or the authorizing statutes."
9 12 U.S.C. § 4526(a). Regulations (but not guidelines or orders) issued by the Director are
10 subject to the notice and comment provisions of the APA. See 12 U.S.C. § 4526. FHFA has
11 enforcement powers, and may, for example, issue notice of charges and "cease and desist" orders
12 to regulated entities to prohibit unsafe or unsound practices or violations of law. See 12 U.S.C.
13 §§ 4631(a), (c), 4632(a). The Director is authorized to appoint FHFA as Conservator of the
14 regulated entities "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a
15 regulated entity." 12 U.S.C. § 4617(a)(2).

16 On September 6, 2008, the Director placed the Enterprises into conservatorship.⁶ As a result,
17 FHFA, "by operation of law, immediately succeed[ed] to all rights, titles and powers, and
18 privileges of the regulated entity, and of any stockholder, officer, or director of such regulated
19 entity." 12 U.S.C. § 4617(b)(2)(A). As Conservator, FHFA may take any action "necessary to
20 put the regulated entity into sound and solvent condition" and "appropriate to carry on the
21 business of the regulated entity and preserve and conserve the assets and property of the
22 regulated entity." 12 U.S.C. § 4617(b)(2)(D).

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26 ⁶ At the same time, FHFA, acting as Conservator, entered into a Preferred Stock Purchase
27 Agreement with Treasury, through which Treasury extended a line of credit to keep the
28 Enterprises solvent. Through the third quarter of 2010, Treasury advanced \$151 billion to the
Enterprises. See http://www.fhfa.gov/webfiles/19585/Conservator's_Report112910.pdf, at 9.

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1 **II. PACE Programs**

2 Property Assessed Clean Energy (“PACE”) programs are state programs that allow local
3 governments to offer loans to individual property owners to fund energy retrofits to their homes.
4 Homeowners repay the amount borrowed, with interest, over a period of years through tax
5 assessments, which traditionally have priority over mortgages. In most states that have instituted
6 PACE programs, including California, state law provides that the liens resulting from PACE
7 assessments have priority over mortgages, including pre-existing first mortgages. See Cal. Am.
8 Compl. ¶ 33.⁷

9 California has passed legislation authorizing local governments to set up PACE
10 programs. See Cal. Am. Compl. ¶ 21; Cal. Streets & Hwy Code § 5898.14; Cal. Gov. Code
11 § 53311 et seq. According to California’s complaint, PACE programs were rapidly adopted
12 across California in 2008. See Cal. Am. Compl. ¶ 22. Sonoma County instituted a particularly
13 significant program, financing nearly 1,000 projects totaling over \$30 million. See Cal. Am.
14 Compl. ¶ 22.

15 **III. Financial Regulators’ Response to PACE Programs**

16 On June 18, 2009, FHFA issued a letter to state officials and regulators raising concerns
17 about PACE programs that create first liens with priority over pre-existing mortgages. See Cal.
18 Am. Compl. ¶ 23. FHFA explained that such programs create risk for the Enterprises and other
19 mortgage holders by exposing them to defaults on PACE loans without giving them any control
20 over the underwriting of the loans.⁸ It also raised the concern that PACE programs may harm
21 consumers by increasing the risk of foreclosure due to extra debt burdens.

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25 ⁷ At least one state, Maine, has authorized a PACE program that does not give priority to
26 PACE assessments over mortgages. See Me. Rev. Stat. tit. 35-A, § 10156 (2010). Versions of
27 PACE programs have been enacted in over 20 states. See <http://pacenow.org/blog/>.

28 ⁸ The letter is available at <https://www.efanniemae.com/sf/guides/ssg/related-sellinginfo/pdf/fhfacltapletter.pdf>.

1 On September 18, 2009, Fannie Mae issued a "Lender Letter" responding to questions from
2 mortgage lenders concerning PACE programs. The letter noted that PACE loans "bear similarity
3 to special assessments, which may be imposed by local governments" but "differ in that they are
4 a loan made by a government or private entity to fund improvements to the borrower's private
5 residence, and the total obligation is generally considerably higher." See Cal. Am. Compl. Ex.
6 A. The letter stated that Fannie Mae was reviewing its underwriting guidelines to address PACE
7 programs, but that until such guidelines are issued, "[s]ervices should treat [PACE loans] as any
8 tax or assessment that may take priority over Fannie Mae's lien." Id.

9 On May 5, 2010, Fannie Mae and Freddie Mac issued new letters stating that PACE loans
10 violate the Enterprises' mortgage agreements. Fannie Mae's "Lender Letter" provided, "PACE
11 loans generally have automatic first lien priority over previously recorded mortgages. The terms
12 of the Fannie Mae/Freddie Mac Uniform Security Instruments prohibit loans that have senior lien
13 status to a mortgage."⁹ Cal. Am. Compl. Ex. B. Freddie Mac's "Industry Letter" provided, "The
14 purpose of this Industry Letter is to remind Seller/Serviceicers that an energy-related lien may not be
15 senior to any Mortgage delivered to Freddie Mac. Seller/Serviceicers should determine whether a
16 state or locality in which they originate mortgages has an energy loan program, and whether a
17 first priority lien is permitted." Id. Both letters stated that the Enterprises would provide
18 additional guidance as necessary.

19 On July 6, 2010, FHFA issued a "Statement" affirming the position taken by the Enterprises.
20 See Cal. Am. Compl. Ex. C. The Statement provided:

21 After careful review and over a year of working with federal and state government
22 agencies, the Federal Housing Finance Agency (FHFA) has determined that certain
23 energy retrofit lending programs present significant safety and soundness concerns that
24 must be addressed by Fannie Mae, Freddie Mac and the Federal Home Loans Banks.

25 The Statement detailed FHFA's concerns, explaining that "[f]irst liens established by PACE
26 loans are unlike routine tax assessments and pose unusual and difficult risk management

27 ⁹ The relevant provision of the uniform security instruments is in Section 4. See Fannie
28 Mae Form 3005, California Deed of Trust, available at Border Decl. Ex 13.

1 challenges for lenders, servicers and mortgage securities investors.” The Statement cited
2 additional concerns: “Underwriting for PACE programs result in collateral-based lending rather
3 than lending based upon ability-to-pay, the absence of Truth-in-Lending Act and other consumer
4 protections, and uncertainty as to whether the home improvements actually produce meaningful
5 reductions in energy consumption.”

6 The Statement provided that the Fannie Mae and Freddie Mac “lender letters remain in
7 effect.” It directed Fannie Mae and Freddie Mac to waive prohibitions on first liens for
8 homeowners who obtained PACE loans prior to June 6, 2010. It further stated that “Fannie Mae
9 and Freddie Mac should undertake actions that protect their safe and sound operations. These
10 include, but are not limited to:” (1) adjusting loan-to-value ratios; (2) ensuring that loan
11 covenants require consent for any PACE loan; (3) tightening borrower debt-to-income ratios; and
12 (4) ensuring that mortgages on properties in jurisdictions offering PACE-like programs satisfy all
13 applicable regulations and guidance. The Statement directed the Banks “to review their collateral
14 policies in order to assure that pledged collateral is not adversely affected by energy retrofit
15 programs that include first liens.”

16 Also on July 6, 2010, the Office of the Comptroller of the Currency (“OCC”), the Federal
17 Deposit Insurance Corporation (“FDIC”), and the National Credit Union Administration
18 (“NCUA”) issued statements echoing FHFA’s position. The OCC’s “Supervisory Guidance”
19 “alert[ed] national banks to concerns and regulatory expectations” regarding PACE loans, and
20 cited the FHFA Statement. It instructed that “[n]ational bank lenders should take steps to
21 mitigate exposures and protect collateral positions,” and suggested a number of possible steps
22 banks could take to do so. The FDIC’s “Financial Institution Letter” alerted lenders to FHFA’s
23 Statement and noted that “[t]he FDIC shares the FHFA’s concerns about the lack of appropriate
24 underwriting and consumer protection standards.” The NCUA’s “Regulatory Alert” “advise[d]
25 [credit unions] of potential risks associated with” PACE programs. It noted FHFA’s Statement
26 and suggested risk mitigation steps. It stated, “If the PACE loans available in your credit union’s
27 service area present potential safety and soundness concerns, management should make
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1 appropriate adjustments to the credit union's underwriting criteria and collateral monitoring
2 practices.”

3 On August 31, 2010, the Enterprises issued further guidance to mortgage sellers and
4 servicers. See Border Decl. Ex. 20, 21. The August 31 announcements stated that the
5 Enterprises would not purchase mortgages secured by properties subject to first-lien PACE
6 obligations, and provided guidelines for refinancing mortgages secured by properties subject to
7 PACE obligations originated before July 6, 2010.

8 ARGUMENT

9 **I. Plaintiffs Lack Article III Standing to Challenge the Statement.**

10 Plaintiffs lack standing to challenge the Statement because their purported injury is not
11 redressable by the relief requested in this action. There is no reason to believe that setting aside
12 the Statement would alter in any way the Enterprises' treatment of PACE programs.

13 In order to meet the “case or controversy” requirement of Article III of the Constitution, a
14 plaintiff must establish that it has standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560
15 (1992); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-103 (1998). The “irreducible
16 constitutional minimum of standing” contains three requirements. Steel Co., 523 U.S. at
17 102-103 (quoting Lujan, 504 U.S. at 560). First, the plaintiff must allege an “injury in fact — a
18 harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or
19 hypothetical.” Id. (internal quotation marks omitted). Second, “there must be causation — a fairly
20 traceable connection between the plaintiff's injury and the complained-of conduct of the
21 defendant.” Id. And third, “there must be redressability — a likelihood that the requested relief
22 will redress the alleged injury.” Id. “This triad of injury in fact, causation and redressability
23 constitutes the core of Article III's case-or-controversy requirement, and the party invoking
24 federal jurisdiction bears the burden of establishing its existence.” Id. at 103-104. “To have
25 standing, Plaintiffs must meet the established three part test outlined above for each claim.” W.
26 Watersheds Project v. Kraayenbring, 620 F.3d 1187, 1198 (9th Cir. 2010).

1 Even assuming Plaintiffs can satisfy the first two standing requirements, their claim against
 2 FHFA must be dismissed because they cannot meet the redressability requirement.¹⁰ Where a
 3 plaintiff challenges governmental action, “the nature and extent of facts that must be averred” to
 4 satisfy the redressability requirement “depends considerably upon whether the plaintiff is himself
 5 an object of the [governmental] action” or whether the “asserted injury arises from the
 6 government’s allegedly unlawful regulation . . . of someone else.” Lujan, 504 U.S. at 561-562
 7 (emphasis omitted). In cases where redressability “hinges on the response of the regulated . . .
 8 third party to the government action,” then “much more is needed.” Id. The court may not
 9 “presume” or “predict” that such a third party will act in a manner that will redress plaintiff’s
 10 injury: it is incumbent on the plaintiff to allege facts “showing that those choices have been or
 11 will be made in such a manner as to . . . permit redressability of injury.” Id.; see also, e.g.,
 12 Levine v. Vilsack, 587 F.3d 986, 992 (9th Cir. 2009) (stating that the redressability standard “is
 13 altered somewhat when third parties not before the court must change their behavior in order for
 14 any injury suffered to be redressed”); Burton v. Cent. Interstate Low-Level Radioactive Waste
 15 Compact Comm’n, 23 F.3d 208, 210 (8th Cir. 1994) (when redressability of injury depends on
 16 actions of third parties not before the court, the complaint must contain allegations that the injury
 17 is likely to be redressed by a favorable decision: court does not accept “on faith” that the third
 18 party will act in a manner that will redress the plaintiff’s injuries).

19 In Levine, for example, several plaintiffs challenged the USDA’s enunciation of its position
 20 that chickens, turkeys, and other domestic fowl are excluded from the humane slaughter
 21 provisions of the Humane Methods of Slaughter Act of 1958 (“HMSA”). See 587 F.3d at
 22 987–88. The district court held that the plaintiffs satisfied Article III standing requirements. Id.
 23 at 992. The Ninth Circuit reversed, explaining that redress of the plaintiffs’ alleged injury

24
 25 ¹⁰ While “[t]he most obvious problem in the present case is redressability,” Lujan, 504
 26 U.S. at 568, Plaintiffs also fail to meet the causation requirement. The Enterprises’ May 5, 2010
 27 letters declared that PACE loans violate their uniform security instruments. Plaintiffs have
 28 alleged no facts suggesting that the Enterprises would have altered their position if FHFA had not
 issued its Statement.

1 depended on the actions of third parties not before the court (poultry processors and
2 slaughterhouses). See id. at 992–93. The court refused to engage in “speculation” or even
3 “confident speculation” that a ruling for the plaintiffs would result in third party action redressing
4 plaintiffs’ injury. Id. at 993. A ruling vacating USDA’s interpretation of HMSA would have no
5 effect on the third parties because HMSA “contain[ed] no statutory enforcement mechanisms.”
6 Id. at 992–93. And although the USDA conceivably could enforce humane slaughter provisions
7 through a separate statute, the agency’s actions under that alternative statute were “equally
8 outside the scope of this lawsuit . . . and therefore subject to some significant measure of
9 speculation.” Id. at 993. “It is therefore simply impossible for the court to predict that” a ruling
10 in the plaintiffs’ favor would affect the behavior of poultry processors and slaughterhouses. Id. at
11 995.

12 Similarly, in this case, Plaintiffs’ cannot satisfy the redressability requirement because it
13 would be pure speculation to think that, if the Statement were set aside, individuals would be
14 able to obtain mortgages, or refinance existing mortgages, on properties that are subject to PACE
15 program priority liens. In particular, Plaintiffs have alleged no facts suggesting that vacatur of
16 the Statement would have any effect on the Enterprises’ treatment of PACE programs. See
17 Levine, 587 F.3d at 992 (“Absent [factual allegations demonstrating that third party would act in
18 a manner that would redress plaintiff’s injury], any pleading directed at the likely actions of third
19 parties or of parties under separate and independent statutory obligations would almost
20 necessarily be conclusory and speculative.”). Nor could they. Even before FHFA issued its
21 Statement, the Enterprises had released letters on May 5, 2010, declaring that PACE loans
22 violated their uniform security instruments. The Enterprises may independently believe that their
23 current treatment of PACE programs is required by the safety and soundness standards. And
24 FHFA’s status as Conservator of the Enterprises further suggests that the Enterprises would
25 behave the same with or without the Statement.¹¹ See infra pp. 13–14.

26
27 ¹¹ Notably, Plaintiffs do not challenge FHFA’s actions as Conservator, because the Court
28 plainly would not have jurisdiction to consider that challenge. 12 U.S.C. § 4617(f) mandates that

1 Plaintiffs also cannot establish standing to challenge the Statement based on a purely
 2 procedural injury from not being provided opportunity for notice and comment. The Supreme
 3 Court has made clear that a procedural injury is, by itself, insufficient to confer standing. See
 4 Lujan, 504 U.S. at 572. Indeed, “deprivation of a procedural right without some concrete interest
 5 that is affected by the deprivation — a procedural right *in vacuo* — is insufficient to create
 6 Article III standing. Only a ‘person who has been accorded a procedural right to protect *his*
 7 *concrete interests* can assert that right without meeting all the normal standards for redressability
 8 and immediacy.’” Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (Mar. 3, 2009) (quoting
 9 Lujan, 504 U.S. at 572, n. 7).

10 Because vacatur of the Statement would not redress Plaintiffs’ alleged injuries, Plaintiffs
 11 challenge to the Statement should be dismissed for lack of Article III standing.¹²

12 **II. The Statement Is Not a Final Agency Action and Therefore Is Not Subject to Review**
 13 **Under the APA.**

14 The Statement is not subject to review under the APA, because it does not constitute final
 15 agency action. See 5 U.S.C. § 704. Two conditions must be satisfied for an agency action to be
 16 final. “First, the action must mark the consummation of the agency’s decisionmaking process —
 17 it must not be of a merely tentative or interlocutory nature. And second, the action must be one
 18 by which rights or obligations have been determined, or from which legal consequences will
 19 flow.” Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (quotations omitted).

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 22 “no court may take any action to restrain or affect the exercise of functions of the [FHFA] as
 23 conservator.”

24 ¹² The Court has raised the possibility of issuing a preliminary injunction order that leaves
 25 the Statement in place but requires FHFA to initiate the notice and comment process while this
 26 lawsuit is pending. See Order Regarding Sonoma County’s Motion for a Preliminary Injunction
 27 in the Sonoma County Action, at 4 (4:10-cv-03270, Doc. 90). It would be pure speculation to
 28 believe that requiring FHFA to undertake notice and comment procedures, alone, would redress
 Plaintiffs’ injuries. Plaintiffs have alleged no facts suggesting that the notice and comment
 process would affect the Enterprises’ treatment of PACE programs.

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1 FHFA's July 6, 2010 Statement does not satisfy the second Bennett requirement, because it
2 imposes no legal obligation on the Enterprises. The Statement is like the jurisdictional
3 determination addressed in Fairbanks North Star Borough v. U.S. Army Corps of Engineers, 543
4 F.3d 586 (9th Cir. 2008). In that case, the Ninth Circuit held that the Corps of Engineers'
5 determination that Fairbank's proposed area of development contained United States wetlands
6 did not constitute final agency action. Id. at 593-97. Under the Clean Water Act ("CWA"), an
7 individual must obtain a permit prior to discharging dredged or fill materials into United States
8 wetlands. Id. at 589. The Corps "issued a 'preliminary' jurisdictional determination finding that
9 Fairbanks' entire parcel contained wetlands." Id. The Corps subsequently issued an "approved"
10 jurisdictional determination to the same effect, and denied Fairbanks' administrative appeal. Id.
11 at 589-90. Fairbanks challenged the determination in court. The Ninth Circuit concluded that
12 although the Corps' determination "mark[ed] the consummation of the agency's decision-making
13 process," it did not constitute final agency action, because "Fairbanks' rights and obligations
14 remain[ed] unchanged by the approved jurisdictional determination." Id. "Up to the present, the
15 Corps has 'expresse[d] its view of what the law requires' of Fairbanks without altering or
16 otherwise fixing its legal relationship." Id. at 594 (quoting AT&T v. EEOC, 270 F.3d 973, 975
17 (D.C. Cir. 2001)). "In any later enforcement action, Fairbanks would face liability only for
18 noncompliance with the CWA's underlying statutory commands, not for disagreement with the
19 Corps' jurisdictional determination." Id.

20 Similarly, FHFA, through its Statement, expresses its view of what the Safety and Soundness
21 Act requires, without altering the legal obligations of the Enterprises or the Banks. The
22 Statement opines that PACE loans "present significant safety and soundness concerns that must
23 be addressed by Fannie Mae, Freddie Mac and the Federal Home Loans Banks." But any
24 subsequent FHFA enforcement action against an entity dealing with assets covered by PACE
25 program liens would be for violations of the Safety and Soundness Act, not for violations of the
26 Statement. See 12 U.S.C. § 4631(a)(1); see also Fairbanks North Star Borough, 543 F.3d at 594;
27 Golden and Zimmerman, LLC v. Domenech, 599 F.3d 426, 433 (4th Cir. 2010) (no final agency
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1 action “because legal consequences do not emanate from [the document] but from the Gun
2 Control Act and its implementing regulations”). And, just as the Corps’ jurisdictional
3 determination did not pre-determine the agency’s response to Fairbanks’ use of the land without
4 a permit, the Statement does not commit the FHFA to bringing an enforcement action against an
5 entity that chooses not to follow the Statement’s directives. See Fairbanks North Star Borough,
6 543 F.3d at 594 (“Notably, jurisdictional determinations ‘do not include determinations that a
7 particular activity requires a . . . permit.’” (quoting 333 C.F.R. § 331.2)); see also Biotics
8 Research Corp. v. Heckler, 710 F.2d 1375, 1378 (9th Cir. 1983) (FDA regulatory letter was not a
9 final agency action because “such letters do not commit the FDA to enforcement action”);
10 AT&T, 270 F.3d at 975 (no final action where “agency merely expresses its view of what the law
11 requires of a party, even if that view is adverse to the party”).

12 Furthermore, a “pragmatic” evaluation of the context surrounding the Statement’s issuance
13 supports the conclusion that it does not constitute final agency action. See FTC v. Standard Oil
14 Co., 449 U.S. 232, 239 (1980) (the finality element of administrative actions must be evaluated
15 in a “pragmatic” way). Prior to the Statement, the Enterprises already had issued their May 5th
16 letters concluding that first-lien priority PACE loans violate the Enterprises’ uniform security
17 instruments. The Statement merely agrees with those letters. Beyond that, the Statement directs
18 that the Enterprises “should undertake actions that protect their safe and sound operations,” but
19 does not state that they “must.” See, e.g., Nat’l Resources Defense Council v. EPA, 559 F.3d
20 561, 565 (D.C. Cir. 2009) (giving “decisive weight to the agency’s choice between ‘may’ and
21 ‘will’” (quotation omitted)); Nat’l Ass’n of Home Builders v. Norton, 415 F.3d 8, 14 (D.C. Cir.
22 2005) (“Given the voluntary nature of the language contained in the Protocols, it is futile for
23 Home Builders to argue that the Protocols are binding on their face.”).¹³ Moreover, the FHFA
24

25 ¹³ The Statement’s directions to the Banks are even more precatory. It merely directs
26 them “to review their collateral policies in order to assure that pledged collateral is not adversely
27 affected by energy retrofit programs that include first liens.” The only portion of the Statement
28 that even arguably constitutes a mandatory order is the portion “directing Fannie Mae and
Freddie Mac to waive their Uniform Security Instrument prohibitions against senior liens” for

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1 had no reason to legally obligate the Enterprises though the Statement to take actions that FHFA
2 itself could take in its role as Conservator. As Conservator of Fannie Mae and Freddie Mac,
3 FHFA “succeed[ed] to all rights, titles, powers, and privileges of [the Enterprises], and of any
4 shareholders, directors, and officers” of the Enterprises. 12 U.S.C. § 4617(b)(2)(A). Even
5 assuming that FHFA did not issue the Statement in its role as Conservator,¹⁴ that role obviated
6 the need for the Statement to legally bind the Enterprises.

7 There are also sound policy reasons for not treating the Statement as final agency action. As
8 Defendants explain, courts have long recognized that financial regulators must rely on frequent
9 informal communications to effectively exercise their supervisory function. See Def. Brief on
10 the Balance of Hardships, at 2–4 (4:10-cv-03270, Doc. 95); see also United States v. Gaubert,
11 499 U.S. 315, 333–34 (1991) (citing United States v. Phila. Nat’l Bank, 374 U.S. 321, 330
12 (1963)); In re Subpoena Served upon the Comptroller of the Currency, 967 F.2d 630, 633–34
13 (D.C. Cir. 1992). Such informal communication has been deemed an “excellent practice in
14 administrative procedure.” Nat’l Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d
15 689, 699 (D.C. Cir. 1971). “Administrative opinions should, to the greatest extent possible, be
16 available to the public as a matter of routine; it would be unfortunate if the prospect of judicial
17 review were to make an agency reluctant to give them.” Id. at 699–700; see also, e.g.,
18 Domenech, 599 F.3d at 432 (“Holding that the publication of the Reference Guide constitutes
19 agency action ‘would quickly muzzle any informal communications between agencies and their
20 regulated communities — communications that are vital to the smooth operation of both
21 government and business.’” (quoting Indep. Equip. Dealers Ass’n v. EPA, 372 F.3d 420, 428

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23 homeowners who had already obtained PACE loans. Plaintiffs do not challenge that portion of
24 the Statement.

25 ¹⁴ As noted above, 12 U.S.C. § 4617(f) mandates that “no court may take any action to
26 restrain or affect the exercise of functions of the [FHFA] as conservator.” Defendants argue that
27 § 4617(f) withdraws the Court’s jurisdiction to review the Statement, because such review would
28 affect the exercise of FHFA’s powers as conservator. The Department of Justice expresses no
views as to that argument, which involves issues particular to FHFA and thus is beyond the scope
of this Statement.

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1 (D.C. Cir. 2004)). The Statement communicated FHFA's views of the new PACE programs to
2 the public at large, in addition to the regulated entities, as part of a dialogue about the risks,
3 effectiveness, and design of such programs. The APA does not provide for judicial review of
4 this type of informal communication. See, e.g., Am. Land Title Ass'n v. Clarke, 743 F. Supp.
5 491, 495–497 (W.D. Tex. 1989) (OCC interpretive letters addressing hypothetical questions not
6 reviewable final agency action).

7 Plaintiffs' arguments regarding final agency action are unavailing. See Opp. to Motion to
8 Dismiss, at 13–14. Plaintiffs rely on Oregon Natural Desert Ass'n v. U.S. Forest Service, 465
9 F.3d 977 (9th Cir. 2006), in which the Ninth Circuit held that the Forest Service's annual
10 operating instructions constituted final agency action. But, as the Ninth Circuit observed, those
11 instructions imposed "substantive legal constraints," and "contain[ed] 'directives' that, if not
12 followed, [could] trigger the Forest Service to institute agency proceedings." Id. at 985 n.10,
13 987. By contrast, FHFA's Statement contains no substantive legal constraints, and failure to
14 follow the Statement does not trigger agency proceedings.¹⁵ Similarly misplaced is Plaintiffs'
15 emphasis on the fact "that Fannie Mae and Freddie Mac took decisive anti-PACE action in
16 response to the Statement on August 31, 2010." Opp. to Motion to Dismiss, at 14. Even before
17 FHFA's Statement, the Enterprises shared the view that PACE loans violate their uniform
18 security instruments. And the Enterprises' subsequent actions are at least as attributable to
19 FHFA's role as Conservator as to the Statement. In any event, an agency's guidance does not
20 become a final action merely by virtue of a regulated entity's voluntary compliance with it. See
21 Air Cal. v. U.S. Dep't of Transp., 654 F.2d 616, 621 (9th Cir. 1981) ("We are loath to recognize
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23 ¹⁵ Contrary to Plaintiffs' statement otherwise, see Opp. to Motion to Dismiss, at 35,
24 FHFA is not authorized to take enforcement action against an entity merely because the entity
25 fails to comply with FHFA's informal guidance. See 12 U.S.C. § 4631(a)(1). To the extent the
26 Statement could be read to suggest that FHFA would have "reason to believe" that an entity, in
27 the course of dealing with assets covered by PACE program liens, was violating the safety and
28 soundness guidelines, the Statement would still not constitute final agency action. See Standard
Oil Co., 449 U.S. at 241 (FTC's complaint averring that the Commission had "reason to believe"
that Standard Oil Co. was violating the Federal Trade Commission Act, while a "a prerequisite to
a definitive agency position," was not in itself a final agency action.).

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1 a test of final agency action which would turn upon a regulated party's will to resist.”). A final
 2 agency action must have legal consequences, not merely practical effects. See Fairbanks North
 3 Star Borough, 543 F.3d at 596 (rejecting plaintiff’s argument because it “erroneously conflates a
 4 potential *practical* effect with a *legal* consequence”).

5 Because the Statement did not impose any obligations or entail legal consequences, it
 6 does not constitute agency final action and is not subject to judicial review under the APA.¹⁶

7 **III. The Statement Is Not a Legislative Rule and Therefore Is Not Subject to the APA’s**
 8 **Notice and Comment Requirements.**

9 Even if the Court had jurisdiction to review Plaintiffs’ APA claim, the July 6, 2010 Statement
 10 is not a legislative rule and therefore is not subject to the notice and comment requirements of the
 11 APA. The APA does not require federal agencies to follow notice and comment for all
 12 pronouncements of the agency’s views, but only for legislative (or substantive) rules. See Hemp
 13 Indus. Ass’n v. DEA, 333 F.3d 1082, 1087 (9th Cir. 2003). Exempt from notice and comment
 14 requirements are “interpretive rules, general statements of policy, or rules of agency organization,
 15 procedure, or practice.” 5 U.S.C. § 553(b)(3)(A).

16 Legislative rules “create rights, impose obligations, or effect a change in existing law
 17 pursuant to authority delegated to Congress.” Hemp Indus. Ass’n, 333 F.3d at 1087. Interpretive
 18 rules, on the other hand, “merely explain, but do not add to, the substantive law that already
 19 exists in the form of a statute or legislative rule.” Id. In order for a rule to have the “force of
 20 law” and therefore be a legislative rule, at least one of three conditions must be met: (1) in the
 21 absence of the rule, there would not be an adequate legislative basis for enforcement action; (2)
 22 the agency has explicitly invoked its general legislative authority; or (3) the rule effectively

23 ¹⁶ The fact that the FHFA Statement does not constitute final agency action also means
 24 that this Court does not have jurisdiction over Plaintiffs’ NEPA claim. To sue the United States,
 25 a plaintiff must establish for each claim (1) that Congress waived the United States’ sovereign
 26 immunity and (2) that Congress provided a private cause of action. See FDIC v. Meyer, 510 U.S.
 27 471, 475–77 (1994). NEPA contains no private cause of action or waiver of sovereign immunity,
 28 so Plaintiffs can only bring a claim under the APA. Rattlesnake Coal. v. EPA, 509 F.3d 1095,
 1103 (9th Cir. 2007) (citing 5 U.S.C. § 702). In the absence of final agency action, there is no
 such APA claim available.

1 amends a prior legislative rule. See Erringer v. Thompson, 371 F.3d 625, 630 (9th Cir. 2004)
2 (citing Hemp Indus. Ass'n, 333 F.3d at 1088)).

3 In this case, none of the three conditions necessary for the Statement to be a legislative rule
4 are met. First, FHFA has adequate legislative authority without the Statement to pursue actions
5 against entities it deems to be operating in violation of safety and soundness requirements. See
6 12 U.S.C. §§ 4513(a)(1)(B)(i), 4631(a), 4632(a); Erringer, 371 F.3d at 631 (holding rules to be
7 interpretive because they “simply interpret the ‘reasonable and necessary’ standard contained in
8 the statute”). Second, the Statement does not invoke FHFA’s rule-making authority under 12
9 U.S.C. § 4526. See Erringer, 371 F.3d at 631. Third, the Statement does not effectively amend a
10 prior legislative rule, but merely interprets the safety and soundness standard as it applies to a
11 new potential risk, first lien PACE loans. See Mora-Meraz v. Thomas, 601 F.3d 933, 940 (9th
12 Cir. 2010) (concluding that because a new regulation “is not inconsistent with the [prior]
13 regulation and instead only seeks to clarify language within the [prior] regulation, it is a valid
14 interpretive rule and need not comply with § 553's requirements”).

15 The Statement adds nothing substantively to the Safety and Soundness Act. It merely
16 interprets the safety and soundness standard set forth in the statute, and does not alter the
17 obligations of regulated entities. The Statement therefore is not a legislative rule and is not
18 subject to the notice and comment requirements of the APA.

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CONCLUSION

For the reasons stated herein, the United States respectfully asserts that the Court should dismiss Plaintiffs' notice and comment challenge to FHFA's July 6, 2010 Statement.

Dated: February 8, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 8, 2011, I caused a copy of the foregoing Notice by the United States to be filed electronically and that the document is available for viewing and downloading from the ECF system.

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