

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information
Regarding the Bureau's Inherited Regulations and Rulemaking Authorities – **PACE loans**

Dear Acting Director Mulvaney:

The undersigned consumer, community, civil rights and legal services organizations submit these comments in response to the Consumer Financial Protection Bureau (“CFPB”)’s Request for Information (“RFI”) regarding its inherited regulations and rulemaking authorities. These comments focus on the urgency of adopting regulations explicitly incorporating Property Assessed Clean Energy (PACE) loans into the Truth in Lending Act’s (TILA) Regulation Z mortgage protections.

Addressing the problems with PACE loans and closing the misinterpreted loophole in Regulation Z is our top priority rulemaking for the CFPB. It is also a priority of Congress: a provision directing the CFPB to adopt ability-to-repay rules for PACE loans is included in the bipartisan banking bill package recently passed by Congress in Public Law 115-174 and signed by President Trump. We note there also is widespread agreement among creditors of the importance of promulgating TILA PACE regulations. While the CFPB should preserve existing TILA regulations, we urge the CFPB to swiftly enact the rules mandated by Congress and to ensure that PACE providers comply with the other mortgage protections required by Regulation Z, with appropriate modifications as necessary to address the unique structure of PACE loans.

Many of our organizations have also joined other comments that discuss other inherited regulations and rulemaking authorities, including Regulation Z generally.

Section 307 of Public Law 115-174 amended TILA to require the CFPB to issue regulations implementing the statute’s Ability to Repay and Qualified Mortgage requirements in 15 U.S.C. § 1639c as they apply to PACE, including application of the provisions under 15 U.S.C. § 1640 for damages, defense to foreclosure and other remedies. Section 307 directs the CFPB to account for the unique nature of PACE loans, permits the CFPB to collect information and data necessary for issuing such rules, and mandates that it consult with state and local governments and bond-issuing authorities. The agency also should consult with consumer organizations. Accounting for the unique nature of PACE will allow the CFPB to ensure that defenses to tax lien collection actions are incorporated into the protections and that other TILA provisions are adapted as necessary to accommodate the role of government taxing authorities.

The CFPB already has the authority to clarify that TILA’s mortgage protections apply to PACE loans and should do so while implementing section 307’s requirements. The agency should do so expeditiously, as the rising abuses in the PACE market must be addressed before they spread.

Serious problems have emerged in the rapidly growing PACE market. PACE programs offer loans for energy efficient home improvements, such as solar panels, HVAC systems, and energy efficient windows. PACE loans are offered through home improvement contractors and are secured by a property tax lien. That property tax lien is collected through a property tax assessment, and it typically takes priority over any existing mortgage. PACE programs must be authorized by state and local governments, but PACE programs are privately run with little or insufficient government oversight.¹ Even if states and localities strengthen their oversight, there will remain a need to assure national standards of performance and enforcement to assure uniform and equitable treatment of consumers.

Over the last three years there has been a sharp increase in homeowners seeking assistance from legal services and other organizations in relation to PACE loans. It is becoming more apparent that the laudable goal of improving home energy efficiency is being undermined by the lack of adequate consumer protection for these loans. There are growing signs that unscrupulous home improvement contractors are selling unnecessary and unwanted home improvements, at times with little connection to deep energy savings and often overpromising the extent of resulting energy savings where any ensue, through misrepresentation and in some cases outright fraud. Weak PACE loan regulation enables these contractors to saddle homeowners with debt they cannot afford, putting their homes at risk of foreclosure.

To date, over 20 states have authorized residential PACE programs, but most have not implemented the programs. The program is most established in California, where serious consumer protection problems have emerged including the making of unaffordable loans, making loans without proper disclosure of loan terms, contractor high-pressure sales tactics and fraud, elder abuse, inflated home improvement costs, insufficient or minimal energy savings, and double-contracting on the same property.² The following story from the daughter of a California homeowner is unfortunately far too typical of the problems that we continue to see with PACE loans:

My elderly mother suffered a number of medical issues earlier this year, resulting in an extended stay in hospitals and nursing homes, and now in assisted living. She had some falls and was also diagnosed with cognitive impairment and probable vascular dementia. I've had to take over her financial affairs, including the sale of her house

During the title search, the realtors uncovered two property tax liens, one for HERO (\$22K) and one for PACE (\$49K).... The buyer was willing to assume the HERO assessment, but not the PACE assessment. I am now faced with paying off the \$49K out

¹ For example, the California statute's ability to repay requirement does not require that the analysis be done prior to the signing of the contract. Missouri and Florida's active programs do not have ability to repay requirements or other consumer protections

² See Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements, National Consumer Law Center (Sept. 2017), available at https://www.nclc.org/images/pdf/energy_utility_telecom/pace/ib-pace-stories.pdf.

of the proceeds from the sale of the house -- this money was to pay for nearly a year of her care in the assisted living facility.

.... They never completed the interconnect agreement with the Department of Water and Power, so the panels aren't even working.... I also don't understand how my Mom would've qualified to borrow the money, as she clearly cannot afford the payments on her SSI income. In addition to the solar panels, there was other work done that I believe was "upsold." To add insult to injury, the interest rate exceeds 8% (APR exceeds 9%).

This is such a bad deal, all the way around. I'm sure my mother didn't understand what she was getting herself into³

Concerns are just beginning to emerge in the more recent programs in Missouri and Florida.

The CFPB's PACE regulations for a Qualified Mortgage PACE loan should include the following elements.

Ability to repay. As with other closed-end obligations secured by real property, property owners should be reviewed for their ability to repay the PACE loan while meeting other expenses prior to signing the contract and the commencement of any work. All mortgage liens, including other recorded and, where available, unrecorded PACE loans, should be included in this analysis. Debt and income verification must be based on reliable third-party records. Affordability thresholds must be established based on data. The CFPB should clarify that, in addition to the QM standard established for PACE, the overall ability to repay rules also apply to PACE.

Advanced Disclosure. TILA pricing and term disclosures, modified as necessary and with additional PACE-tailored disclosures, should be provided in writing free of charge three business days in advance of signing the contract unless there is a bona fide personal financial emergency confirmed in writing by the consumer. The rules should specify limited criteria for the emergency exception, including the size of the loan, to avoid evasions.

Electronic Disclosure Protections. Door-to-door contractors should not be allowed to satisfy disclosure requirements solely through helping the consumer to view the disclosures on an electronic tablet concurrently with signing the contract. Disclosures should be provided in a form the consumer can keep and can review during the three day right to cancel period. Disclosures and copies may be provided by email only if the consumer voluntarily chooses that option and only with full compliance with the E-Sign Act, including demonstration by the consumer that they are able to access records electronically. Providers should be prohibited from

³ This text is from the email the National Consumer Law Center received from the homeowner's daughter. (On file with National Consumer Law Center). This story is also included in Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements, National Consumer Law Center (Sept. 2017), available at https://www.nclc.org/images/pdf/energy_utility_telecom/pace/ib-pace-stories.pdf.

assisting the consumer in creating an email account or demonstrating ability to access electronic records on the provider's electronic device.

Right to Cancel. Homeowners should have a three business-day right to cancel. No contractor work can begin until this period expires. Waiver only should be available in case of bona fide emergency meeting specified criteria with a handwritten request from the homeowner.

Loan Term Limitations and Monthly Statements. PACE loans should be repaid through monthly payments made to the mortgage servicer on the property (if there is an escrow account), the PACE provider, or the government authority. Homeowners should receive monthly statements from one of those entities, based on the requirements for periodic statements in 12 C.F.R. § 1026.41. Regulations implementing 15 U.S.C. § 1639c should be extended to PACE loans to ensure that contracts do not include forced arbitration clauses, class action waivers, or releases or waivers of rights or claims. Rules should provide that Qualified Mortgage PACE loans must be fully amortizing and must not include prepayment penalties.

Reasonable Property Valuation. The provisions in 12 C.F.R. § 1026.42 dealing with valuation independence should be applied with appropriate modifications to PACE loan transactions.

Lien Status Clarity. PACE loans only should qualify for QM status where they either have subordinate lien status or, where not provided for under state law, measures to result in a similar outcome. First lien holders must be absolutely protected and held harmless, including having no reduction in their proceeds, such as a reduced sales price in the event of foreclosure. As with other QM criteria, subordinating the PACE lien helps to enforce the ability-to-repay requirement, as it gives the creditor an incentive to ensure that the consumer can afford to repay the PACE loan on top of the existing mortgage.

Hardship Protections. PACE rules should include provisions ensuring the borrower will have access to the CFPB's loss mitigation procedures to avoid tax lien foreclosures.

Remedies. As required in Public Law 115-174, homeowners must have the right to pursue TILA remedies for any violations, including individual and class damages and defense to foreclosure. In order to account for the unique structure of PACE loans and to protect consumers from fraud and misrepresentations by contractors, the CFPB should protect homeowners from liability on PACE loans when there are seller-related defenses in a similar fashion as for other seller-related home improvement financing. PACE providers should indemnify government entities for any liability.

The PACE loan market is still young and it is critical to address abuses now before the problems become too entrenched, widespread and difficult to address.

We note that PACE loans have also posed a number of other problems that we have not focused on in these comments, including making it difficult for consumers to refinance or sell their

homes without unexpectedly having to pay off a PACE lien that they were assured ran with the land. These issues and the superior lien status of most PACE loans have created problems not only for homeowners but also for realtors and mortgage lenders. The widespread agreement among both consumer and industry participants gives further weight to the importance of making PACE loan regulations a priority for the CFPB. We urge the agency to hear from stakeholders and then swiftly issue a proposed rule.

Sincerely,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
Bet Tzedek Legal Services (CA)
CASH Campaign of Maryland
Center for NYC Neighborhoods
Consumer Action
Consumer Federation of America
Consumers Union
Florida Alliance for Consumer Protection
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Housing and Economic Rights Advocates (CA)
Housing Options & Planning Enterprises, Inc. (MD)
Illinois People's Action
Jacksonville Area Legal Aid, Inc.
Legal Aid Society of San Diego, Inc.
Low-Income Energy Affordability Network (MA)
Main Street Alliance
Maryland Consumer Rights Coalition
Mississippi Center for Justice
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
National Housing Law Project
Neighborhood Housing Services of Baltimore
New Jersey Citizen Action
Pennsylvania Utility Law Project
(cont'd)

People's Action Institute
Public Citizen
Public Counsel (CA)
Public Justice Center (MD)
Public Law Center (CA)
Public Utility Law Project of New York
Texas Appleseed
The Utility Reform Network (CA)
U.S. PIRG
West Virginia Center on Budget and Policy
Woodstock Institute