May 7, 2019

Director Kathleen Kraninger
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Via regulations.gov

Re: Advanced Notice of Proposed Rulemaking for Residential Property Assessed Clean Energy (PACE) Financing, Docket No. CFPB-2019-0011

Dear Director Kraninger,

The 26 undersigned consumer, community, civil rights and labor organizations submit these comments in response to the Consumer Financial Protection Bureau (CFPB or Consumer Bureau)'s Advance Notice of Proposed Rulemaking (ANPR) on Residential Property Assessed Clean Energy (PACE) financing.

We are glad to see the Consumer Bureau take the first step to implement Section 307 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, which requires the CFPB to issue regulations implementing the Truth in Lending Act (TILA)'s "Ability to Repay" (ATR) requirements for PACE loans. The statute also requires the Bureau to apply the TILA remedies to PACE loans so that harmed consumers may recover damages and have access to foreclosure defense and other remedies for violations of the PACE regulations.

For the past several years, we have seen unregulated PACE loans wreak havoc on vulnerable consumers under the false guise of home improvement and energy efficiency. Contrary to the promises made in overzealous and often deceptive marketing, in reality, PACE loans often have little connection to the advertised energy savings. Congress's directive to issue regulations presents an important opportunity to prevent further harm and ensure that this emerging mortgage product abides by safe and transparent practices**.** Energy efficiency upgrades are a laudable goal, but they should not become a cover for practices that harm vulnerable homeowners.

Like traditional mortgages or other lines of credit, PACE financing is tied to the borrower's home. For many borrowers, PACE loans are unaffordable mortgage products that put them in danger of foreclosure. Like the subprime lending abuses that led to the recent financial crisis, PACE loans frequently target the most vulnerable borrowers: low-income families, the elderly, and communities of color. PACE lending has become an urgent problem in low-income communities where the product is actively sold, upending financial stability for homeowners whose neighborhoods already were decimated by the Great Recession.

The looming spread of PACE loans throughout the country and the well-documented problems faced by homeowners receiving unaffordable PACE loans and obtaining limited or misleading information demonstrate the necessity for clearer rules around PACE financing. Action is needed to address some of the well-documented consumer problems identified in media reports and by some of our organizations to address PACE lending's place in the existing consumer protection framework. As this is a form of consumer credit, PACE loans are subject to the same rules as all other forms of consumer credit used for home improvement, especially when the consumer uses their home as collateral for the loan. The Consumer Bureau should retain this rubric.

The CFPB should propose a strong Ability to Repay rule that takes into account the uniquely harmful aspects of the abuses possible in the PACE mortgage loan product and also issue regulations to address the remainder of TILA compliance, including provisions addressing disclosure, periodic statements, arbitration clauses, loan originator compensation, and higher and high-cost mortgage rules.

PACE Loans need a strong Ability to Repay Rule

The CFPB should issue a strong and thorough rule that explicitly applies the Dodd-Frank ATR test to PACE loans. PACE loans already constitute consumer credit and meet the definition of "residential mortgage loan." Currently, when a homeowner takes out a PACE loan, there is a superpriority lien on the person's primary residence. As a result, unlike homeowners who finance environmental retrofits with credit cards or other unsecured loans, if a PACE loan is unaffordable, the homeowner faces default and in many cases foreclosure. Moreover, because the loans are processed through the tax system, the homeowner does not have access to many of the essential protections built into the foreclosure process on a traditional first lien mortgage. Thus, ensuring a thorough ATR analysis prior to the closing of a PACE loan is particularly vital in restoring fairness to this market. A strong ATR rule is needed to provide homeowners with adequate protection prior to entering into a loan that could place them at risk of default and foreclosure, and should include the following:

Broad applicability. The Dodd-Frank ATR test applies to all residential mortgage loans, and similarly, the PACE ATR test should apply to all residential mortgage loans too. It is important to note that while the current ATR test does not apply to reverse mortgages, PACE loans provided to borrowers who have reverse mortgages would be subject to the ATR requirement, since they are separate products.

The Dodd-Frank flexible yet rigorous ATR test. Regulation Z's ATR requirements should apply in their entirety to PACE loans. Regulation Z allows creditors to use either a debt-to-income calculation or residual income analysis. PACE program administrators are actively using stand-alone residual income tests with unaffordable results. The CFPB's PACE ATR rule should establish that any PACE residual income measure should be based on a reasonably reliable method for measuring affordability, properly tested, reviewed by the Consumer Bureau, and publicly available.

Income verification and documentation. Regulation Z provides clear verification and documentation requirements that should also apply to PACE loans. The rule should also provide clear guidance around what is not acceptable for automated income verification, and methods that use average income for the homeowner's employer or local area should not be permitted. Income verification and documentation should be limited to information about the specific borrower.

Consideration of the infrequent nature of PACE payments. It is important that the rule account for the fact that even if a borrower has the monthly income to cover the PACE payments, those payments come due only once or twice per year. The CFPB should consider additional measures of affordability to account for this supplemental burden and require clear disclosures, provided in advance, for the homeowner to consider this arrangement. This is particularly important for reverse mortgage borrowers who do not even need to budget for monthly mortgage payments because their only obligations are to pay for property taxes and insurance.

Provisions to address borrowers with existing escrows. When a PACE loan is added to a borrower's tax bill, the mortgage servicer only knows to increase the escrow payment after the new tax bill arrives, often many months later, at which point the servicer has the discretion to add an escrow cushion of 1/6 of the annual property tax increase. Many homeowners face a predictable escrow shortage, which induces a cycle of incomplete payments and resulting mortgage delinquencies. To account for these issues, PACE program administrators should also be required to notify the servicer of the additional tax liability, and the PACE ATR determination should take into account (1) 1/6 of the annual property tax increase attributable to the PACE assessment to cover the likelihood of the servicer including the permitted escrow cushion; and (2) the inclusion of the cost of a likely escrow shortage payment.

Rules to address loan stacking. Contractors often seek to maximize their income from PACE financing and evade any existing loan-to-value limits by returning to a PACE borrower to sell additional products with additional PACE loans, often through a different PACE program administrator. In some cases, a contractor divides up the work for a single project and bids it out to different PACE administrators, analogous to loan splitting. The existing TILA ATR rule requires inclusion of previous loans in the analysis of a new loan, and thus the PACE ATR rule must include previous PACE loans in the ATR analysis for the new PACE loan. Because PACE loans are often not recorded right away and hard to find, the PACE ATR rule should require any ATR analysis to include recent assessments from other PACE administrators. If it is later established that there was a previous PACE loan that reasonably should have been included in an ATR analysis, the homeowner should be allowed to rescind the loan if it is unaffordable.

No Qualified Mortgage presumption. Due to the heightened risks associated with PACE, the Qualified Mortgage presumption is not appropriate for PACE lending. PACE is a relatively new product that so far has become a source of mortgage abuse and heightened foreclosure risk for many low-income, elderly borrowers and homeowners in communities of color. The Qualified Mortgage rule is intended to create a presumption of no liability for inherently safer loans. PACE's structure is, by definition, unsafe and requires a higher ATR standard with no presumption of ATR compliance.

TILA remedies, including enhanced damages and assignee liability, and rescission for loan stacking. Congress also directed the CFPB to apply the TILA remedies to PACE loans, and thus the Bureau's PACE ATR rule necessarily triggers remedies under Sections 1640 and 1641 of TILA. Maintaining these remedies is essential to promote rule compliance and to ensure harmed consumers are properly compensated. This includes assignee liability for ATR violations under section 1640(k) in cases brought in defense of foreclosure. As described above, rescission would be an important additional remedy in cases of loan stacking.

<u>Because PACE loans already are subject to TILA, borrowers should also be protected by other TILA provisions</u>

Because PACE loans are mortgage products subject to TILA, the CFPB should issue rules to expressly address PACE loans under TILA provisions beyond the ATR requirements to provide adequate consumer protections.

Periodic Statements. The CFPB should explicitly mandate periodic statements for PACE loans, adjusting due dates for the relevant tax schedule. Because payments are not made monthly, periodic statement information is even important for homeowner seeking to keep track of their PACE loans. Moreover, due to electronic closings and non-compliance with e-sign requirements, periodic statements present a crucial opportunity to provide concrete information about the PACE loan to the homeowner. The schedule can be adapted for the tax payment dates.

Restrictions on Forced Arbitration and Court Actions. TILA restricts forced arbitration clauses on residential mortgage loans as well as terms that bar a consumer from bringing a court action for damages or other relief in connection with a violation of federal law. As discussed above, PACE loans are residential mortgage loans and thus the CFPB should explicitly apply these requirements to PACE loans.

TILA/RESPA Disclosures. The CFPB should issue regulations establishing clear rules for how TILA's disclosure regime applies to PACE loans. Homeowners often go into PACE loans unaware of the costs and risks. Disclosure is a crucial component of establishing a fair and efficient PACE lending market. Given that PACE loans are real property liens, the TILA three-day waiting period before the Closing Disclosure and consummation should specifically apply to PACE loans.

High-Cost Mortgages. TILA's high-cost protections should be explicitly applied to PACE. While certain functions of the tax system may conflict with certain HOEPA requirements, loans can be priced under the HOEPA triggers to avoid such a conflict.

Loan originator compensation. The loan originator compensation rules under TILA restrict compensation based on the terms of the mortgage and prohibit dual compensation. The CFPB should issue regulations explicitly stating that PACE loans are subject to the loan originator compensation rules. This is especially important because home improvement contractors are the main contact for homeowner obtaining PACE loans and their incentives for upselling homeowners to fund their own projects are significant

Remedies. Just as TILA's provisions apply to PACE, TILA's remedies apply to PACE, and any TILA non-ATR regulations should specify the applicable remedies to PACE as well. Application of all of TILA's remedies to PACE loans would serve those same important purposes: protecting consumers and ensuring compliance.

In conclusion, PACE loans are a type of residential mortgage loan and should be regulated as such.

Sincerely,

Americans for Financial Reform Education Fund
Alliance of Californians for Community Empowerment (ACCE)
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
California Reinvestment Coalition
Center for Responsible Lending
Connecticut Fair Housing Center
Consumer Action
Consumer Federation of America
Demos
Florida Alliance for Consumer Protection
Genesee Co-op Federal Credit Union
Massachusetts Communities Action Network
National Association of Consumer Advocates
National Community Stabilization Trust
National Consumer Law Center (on behalf of its low-income clients)
National Fair Housing Alliance
North Carolina Justice Center
Prosperity Now
Public Citizen
Public Justice Center
Public Law Center
TASH
The Leadership Conference on Civil and Human Rights
Virginia Poverty Law Center
Woodstock Institute