

Action, Inc., Americans for Financial Reform, Arkansans Against Abusive Payday Lending, Bet Tzedek Legal Services (Los Angeles), California Reinvestment Coalition, Center for NYC Neighborhoods, Center for Economic Integrity (Arizona) Connecticut Association for Human Services, Connecticut Legal Services, Consumer Action Consumer Federation of America, Consumers Union, Empire Justice Center Florida Alliance for Consumer Protection, Housing and Economic Rights Advocates (San Francisco), Iowa Community Action Association, Jacksonville Area Legal Aid, Inc., Legal Aid Services of Oklahoma, Inc., Long Island Housing Services, Inc. Low-income Energy Affordability Network, National Association of Consumer Advocates, National Association of Consumer Bankruptcy Attorneys, National Consumer Law Center (on behalf of its low income clients), National Fair Housing Alliance, National Housing Resource Center, Neighborhood Housing Services of Greater Cleveland, New Haven Legal Assistance Association, North Carolina Justice Center, Pennsylvania Utility Law Project (on behalf of our low-income clients), People's Action Institute, Public Citizen, Public Counsel (Los Angeles), Public Good Law Center, Public Law Center (Santa Ana, CA), Public Justice Center (Baltimore), Public Utility Law Project of New York, Southern Poverty Law Center, Tennessee Citizen Action, Virginia Citizens Consumer Council, Virginia Poverty Law Center, Woodstock Institute (Chicago)

October 18, 2016

Department of Energy  
Office of Energy Efficiency & Renewable Energy  
Forrestal Building  
1000 Independence Avenue, SW  
Washington, DC 20585  
rpaceguidelines@ee.doe.gov

Re: Supplemental Comments on Best Practice Guidelines for Residential PACE Financing

To the Department of Energy:

The undersigned consumer, civil rights and community organizations appreciate the opportunity to comment on and urge you to strengthen the proposed Best Practice Guidelines for Residential PACE Financing Programs. Well-designed energy-efficiency programs can not only help the environment but can enable homeowners to reap the benefits of energy savings. However, the guidelines as currently drafted must do more to balance these benefits by more clearly highlighting the serious risks that some PACE programs can pose, and must emphasize the responsibility of state and local governments to address risks created by government-sponsored PACE programs.

**As structured today, most PACE programs eliminate existing legal protections for home improvement loans and for contractor misrepresentations and fraud; often do little to validate claims of energy savings for the homeowner or the cost-effectiveness of the improvements; and can impose substantial costs on lower income and older homeowners, who may have access to free or lower cost energy efficiency improvements.** In the absence of national regulatory standards, state and local governments should be strongly urged to incorporate the following elements in their PACE programs to protect homeowners and to ensure that energy savings are real and cost-effective.

**1. Require assessment of ability-to-repay consistent with the Truth in Lending Act Qualified Mortgage standard.** The federal Truth in Lending Act (TILA) imposes critically important protections against lax underwriting, high-cost loans and abusive practices in connection with loans secured by the borrower's home. However, because of an obscure loophole—intended for traditional property taxes, not privately financed, real estate-secured lending—when governments permit PACE loans to run through the tax assessment system, PACE lenders avoid these rules. Thus, governments that authorize PACE programs have a responsibility to ensure that the loans meet a high standard of affordability. The Qualified Mortgage (QM) standard that was incorporated into TILA after the mortgage crisis identifies the features of a relatively (but not perfectly) safe loan. In brief, the QM standard requires that income and debt obligations be verified; that the ratio of total housing-related debt-to-income be 43 percent or less; and that points and fees be limited. DOE should strongly urge PACE programs to require evaluation of the homeowner's ability to repay the tax assessment using these key elements of the TILA QM standard.

**2. Require loan contracts to incorporate the FTC's Holder Rule notice to protect consumers from contractor misrepresentations and fraud.** Many years ago, the Federal Trade Commission (FTC) recognized the problems posed when sellers like home contractors steer consumers to third-party financing but then do not perform as promised. The FTC declared it to be an unfair and deceptive practice for a seller to make the consumer's duty to pay independent of the seller's duty to fulfill its obligations. Yet PACE contracts today do just that, forcing the consumer to repay the loan with no defenses even in the case of fraud, false claims of energy savings, or shoddy work. The FTC Holder Rule requires contractor-arranged financing contracts to include a notice that preserves the consumer's claims and defenses arising out of the contractor's misconduct. PACE programs should require that same notice in PACE contracts. PACE providers that authorize contractors to originate PACE contracts and provide them with the tools to do so must be responsible for the conduct of those contractors.

**3. Limit PACE financing, with narrow exceptions, to cost-effective projects reasonably expected to pay for themselves as confirmed by an energy audit.** PACE programs promote claims of energy efficiency and savings to the homeowner. The programs are designed to address hurdles to adopting improvements that will save money in the long term but require high up-front expenses. Yet as currently designed, most PACE programs have little accountability built in to ensure that the improvements will actually deliver as promised and will be cost-effective. The mere use of Energy Star products and similar requirements does not ensure that the work will provide deep savings for a particular home. The PACE program should be limited to projects that are reasonably expected to pay for themselves; it should not be a substitute for general home improvement financing. An energy audit should be required before any PACE loan, with narrow exceptions for emergency replacement of essential appliances. Building in accountability for energy efficiency is essential in a government-sponsored program.

**4. Screen out low-income consumers and seniors and divert them for assessment by independent third parties to determine whether they have access to free or lower cost improvements and can afford the tax assessment.** The federal Weatherization Assistance Program provides free energy efficiency improvements for low income households. Many state or utility-funded programs provide free or lower cost options than PACE financing. Housing counselors are also adept at helping lower income families assess how home loans fit into their budgets. Contractors cannot be expected to help homeowners assess whether a PACE loan is their best option. In addition, older homeowners may be at special risk of misleading sales tactics or problems posed by dementia. Contractors should be required to refer lower income and older homeowners for assessment by an independent program identified by

the state or locality, such as Weatherization programs, Community Action Centers, housing counselors, or older American programs.

**5. Require recorded oral verification that the homeowner understands the terms of the tax assessment and is aware of the risks of the program, including difficulties refinancing an existing mortgage or selling the home.** We have received numerous reports of consumers who did not understand that they were being given a loan or a tax lien, were unaware of the cost of the loan, or did not know that the tax assessment could impede refinancing or sale of the home. It is even possible that adding a senior lien could violate the consumer's existing mortgage contract. Simply adding more written disclosures would not address these problems. Some PACE providers record homeowner conversations, which is a positive step, but ideally the government sponsor would set standards for such calls and monitor compliance with them, or conduct them themselves. Governments that sponsor and endorse these programs and permit their tax systems to be used as a collection mechanism for private loans, bypassing homeowners' typical rights, have a duty to be involved and oversee implementation to ensure that the programs are operating as intended and homeowners are not being misled. Governments should require an oral conversation with the homeowner before the project begins and before the contractor is paid to communicate the terms of the tax assessment, the scope of work, the risks of insufficient energy savings, and the issues posed when refinancing or selling the home.

**6. Require protections against foreclosure.** PACE programs should be required to provide loan modifications akin to existing mortgage loan modification programs. Specifically, PACE programs should forbear collecting debt in cases of temporary hardship (typically episodic loss of income), without increasing subsequent monthly payments; should restructure or forgive debt in cases of permanent hardship (including loss of income due to death or disability); and should modify loan terms to complement modifications made to other mortgage obligations. In addition, PACE providers should be required to respect the rights provided by the Servicemembers Civil Relief Act. It is essential these requirements be binding regardless of subsequent transfers in the interest in repayment.

**7. Give consumers enforceable protections and prohibit forced arbitration clauses and class action bans.** PACE providers and contractors need to be accountable if they violate the law or defraud homeowners. Congress prohibited forced arbitration clauses in mortgage contracts after the mortgage crisis. The Consumer Financial Protection Bureau has proposed to prohibit forced arbitration clauses that contain class action bans in all contracts for consumer financial products and services. PACE contracts should not be permitted to have forced arbitration clauses or class action bans. States should also ensure that homeowners have a right of action under state laws that prohibit unfair, deceptive, or abusive acts or practices.

We support the goal of energy efficiency and recognize the benefits that homeowners can gain from cost-effective energy improvements. But current PACE programs can pose substantial risks for homeowners that are not sufficiently highlighted or addressed in the draft best practices. We strongly urge you to strengthen the guidance and to work with other federal, state and local agencies to ensure that these and other protections are enforceable and are not just voluntary best practice s.

Thank you for your consideration.

Yours very truly,

Action, Inc.  
Americans for Financial Reform  
Arkansans Against Abusive Payday Lending  
Bet Tzedek Legal Services (Los Angeles)  
California Reinvestment Coalition  
Center for NYC Neighborhoods  
Center for Economic Integrity (Arizona)  
Connecticut Association for Human Services  
Connecticut Legal Services  
Consumer Action  
Consumer Federation of America  
Consumers Union  
Empire Justice Center  
Florida Alliance for Consumer Protection  
Housing and Economic Rights Advocates (San Francisco)  
Iowa Community Action Association  
Jacksonville Area Legal Aid, Inc.  
Legal Aid Services of Oklahoma, Inc.  
Long Island Housing Services, Inc.  
Low-income Energy Affordability Network  
National Association of Consumer Advocates  
National Association of Consumer Bankruptcy Attorneys  
National Consumer Law Center (on behalf of its low income clients)  
National Fair Housing Alliance  
National Housing Resource Center  
Neighborhood Housing Services of Greater Cleveland  
New Haven Legal Assistance Association  
North Carolina Justice Center  
Pennsylvania Utility Law Project (on behalf of our low-income clients)  
People's Action Institute  
Public Citizen  
Public Counsel (Los Angeles)  
Public Good Law Center  
Public Law Center (Santa Ana, CA)  
Public Justice Center (Baltimore)  
Public Utility Law Project of New York  
Southern Poverty Law Center  
Tennessee Citizen Action  
Virginia Citizens Consumer Council  
Virginia Poverty Law Center  
Woodstock Institute (Chicago)