July 26, 2023

c/o Legal Division Docket Manager
Consumer Financial Protection Bureau (CFPB)
1700 G Street NW
Washington, DC 20552

Re: Residential Property Assessed Clean Energy Financing (Regulation Z)
Docket No. CFPB–2023–0029; RIN 3170–AA84

Dear Director Chopra and CFPB Staff:

Americans for Financial Reform Education Fund, along with 20 undersigned organizations in the housing, consumer protection, climate and environmental justice, and community investment spaces, are pleased to submit comments on the Consumer Financial Protection Bureau (CFPB)'s proposed rule on residential Property Assessed Clean Energy (PACE) financing. We thank you for requesting comment on this proposed rule, and urge you to finalize this rule swiftly to protect consumers. In addition, the CFPB should monitor and incorporate consumer protections into other emerging green lending products, to minimize the types of public harm and negative consequences that resulted from the problematic design of and predatory practices associated with PACE financing.

PACE financing was developed in response to the growing demand for energy efficiency and renewable energy and as a way for consumers to reduce their climate change impacts and benefit from reduced energy burden and cost savings. However, the challenges that emerged from the residential PACE program demonstrate that safe climate investment must require strong consumer protections at the inception of the program design, not after the product reaches consumers. A just and equitable green transition in the face of the climate crisis can only occur if individuals, small businesses, and communities across the country, particularly those that have been historically underserved, such as low-income, Black, and other BIPOC communities, are all prioritized for access to these needed green lending products and programs and protected from any predatory practices surrounding them.

Background

PACE financing is available through commercial and residential programs, but this proposed rule and comment only address residential PACE finance. PACE programs offer financing to cover the costs of home improvements, most often energy efficiency improvements or solar installation. PACE loans are repaid via a tax assessment on the 'real property of the consumer'[1] (i.e., the home) when PACE loans are added to a homeowner's tax bill.[2] PACE programs began in California in 2007. A series of state laws were passed over the years to address problems with the program, but it was not until 2019 that California law required the California Department of Financial Protection and Innovation to begin licensing PACE program administrators and regulating the PACE industry.[3] The CFPB also issued an advance notice of proposed rulemaking on PACE financing in 2019.[4] Residential PACE lending, which this proposed rule addresses, currently occurs exclusively in California, Florida, and Missouri.[5]

Unfortunately, residential PACE loan products have often been pushed onto consumers through predatory and fraudulent sales practices, sometimes by unscrupulous contractors, binding consumers to unsustainable loans that they cannot repay. Paired with the problematic structure of PACE loans – which involves superpriority liens[6] being placed on consumers' homes – the program has resulted in many consumers losing their homes through foreclosures.

It is critical for the CFPB to swiftly amend the Truth in Lending regulations to prevent further wrongdoing and add the much needed protections that consumers required from the start. We urge the CFPB to finalize the proposed rule on PACE immediately to protect consumers and prevent further harm. The CFPB's Office of Research Publication's 2023 Report on PACE Financing and Consumer Financial Outcomes found that:

- PACE loans cause an increase in negative credit outcomes, particularly mortgage delinquency.
- PACE borrowers were relatively more likely to live in Black or Hispanic neighborhoods compared to the state average.

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[1] "Proposed Rule: Residential Property Assessed Clean Energy Financing (Regulation Z)," *CFPB*. May 11, 2023. https://www.federalregister.gov/documents/2023/05/11/2023-09468/residential-property-assessed-clean-energy-financing-regulation-z

[2] "Property Assessed Clean Energy (PACE) Loans," *National Consumer Law Center*. https://www.nclc.org/topic/property-assessed-clean-energy-pace-loans/

[3] "PACE (Property Assessed Clean Energy): What Homeowners Need to Know," *California Department of Financial Protection & Innovation*. https://dfpi.ca.gov/pace-program-administrators/pace/

[4] "Consumer Financial Protection Bureau Issues Advance Notice of Proposed Rulemaking on Property Assessed Clean Energy Financing," *CFPB*. March 4, 2019. https://www.consumerfinance.gov/about-us/newsroom/bureau-issues-advance-notice-proposed-rulemaking-property-assessed-clean-energy-financing/

[5] "Property Assessed Clean Energy Programs," *U.S. Department of Energy's State and Community Energy Programs*. https://www.energy.gov/scep/slsc/property-assessed-clean-energy-programs

[6] A lien is "a legal claim against another person's property as security for a debt." https://www.dccourts.gov/node/281. A superpriority lien gives a lien priority over all others, including the first mortgage on a home.

- State regulation of PACE loans in California improved PACE outcomes.[7]

We strongly support the proposed rule's application of the ability-to-repay rules for PACE financing and the civil liability provisions of the Truth in Lending Act (TILA) for violations.[8] The TILA's ability to repay (ATR) requires a creditor to make a reasonable, good faith determination of a consumer's ability to repay a residential mortgage loan.[9] We support subjecting PACE loans to ATR, giving consumers access to more sustainable loans and offering them safeguards to comparison shop for services that best fit their financial needs. We also support the CFPB's decision to exclude PACE loans from the TILA ATR rule's Qualified Mortgage (QM) presumption of compliance, as the nature of PACE is inherently risky and it should not receive the same protections from liability as other mortgages. In addition, the CFPB should not permit creditors to consider projected energy savings into the ability to repay analysis for PACE; estimated future savings may or may not materialize, due to shifting household and market factors, and incorporating speculative savings can increase default and foreclosure risk.

We also support the proposed rule's application of the TILA-RESPA integrated disclosure requirements[10] to PACE transactions, including the timing of the advance disclosures to slow down the speed of transactions. Residential PACE loans are frequently originated very quickly through door-to-door solicitations by home improvement contractors. This has led to the type of borrower pressure and obscuring of financial terms that advance disclosures are meant to dissuade.

Finally, TILA's civil liability provision imposes monetary damages when a creditor fails to comply with the Acts' requirements. Creditors may be held liable to the consumer for actual damages and the cost of any legal action. Subjecting creditors to liability standards that would deter them from issuing loans consumers are unable to afford will decrease the frequency of consumer delinquency under these PACE loans.

Applying Lessons from PACE for Other Green Lending

The CFPB should work with other federal agencies as well as consumer advocates, financial institutions, and community groups to develop consumer protection guidance for existing and

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[7] Siobhan McAlister and Ryan Sandler, "Property Assessed Clean Energy (PACE) Financing and Consumer Financial Outcomes," *CFPB*, May 2023.
https://files.consumerfinance.gov/f/documents/cfpb_pace-rulemaking-report_2023-04.pdf

[8] "Truth in Lending," *Office of the Comptroller of the Currency*.
https://www.occ.treas.gov/topics/consumers-and-communities/consumer-protection/truth-in-lending/index-truth-in-lending.html#:~:text=The%20Truth%20in%20Lending%20Act,for%20certain%20types%20of%20loans.

[9] "Ability-to-Repay/Qualified Mortgage Rule," *CFPB*.
https://www.consumerfinance.gov/rules-policy/final-rules/ability-to-pay-qualified-mortgage-rule/#:~:text=The%20Ability%2Dto%2DRepay%2F,loan%20according%20to%20its%20terms

[10] RESPA = Real Estate Settlement Procedures Act; "TILA-RESPA integrated disclosures (TRID)," *CFPB*.
https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/tila-respa-integrated-disclosures/

emerging green lending products in addition to PACE. Demand and resources going towards green projects are on the rise, and there will likely be an influx of predatory providers and scammers alongside the influx of capital for green lending products.[11]

Given the federal government's role in incentivizing green projects, technologies, activities, and financing to support them all, the CFPB must coordinate with other agencies. The CFPB should work with the implementing agencies of various Inflation Reduction Act (IRA) programs, such as the Internal Revenue Service (IRS), the Environmental Protection Agency (EPA), the Department of Energy (DOE), as well as the White House and others to deliver joint-agency memoranda or other guidance on new green lending products. Products are being developed or scaled at unprecedented levels across all 50 states and territories, for example, through the injection of capital from the Greenhouse Gas Reduction Fund, a provision of the IRA. The agencies should begin working on initial guidance on consumer protections for green financial products before the products are marketed to consumers.

The CFPB should issue supervisory guidance to its regulated entities,[12] and broader public guidance alongside other agencies. CFPB-coordinated green financial product guidance should include, for example:

- The need for independent energy audits/assessments as an essential first step for ensuring that tenants and homeowners are aware of a home's baseline energy use and its greatest opportunities for energy and cost savings before they finance any home energy improvements, as well as the importance of an independent assessment of the home improvements before a contractor is paid;[13]
- That lenders should direct low-income homeowners to available no-cost programs ahead of financing opportunities;
- Incorporation of housing counseling into programs that could put a participant at risk of losing their home; and,
- Requirements for clear and transparent instructions on how the payment process will be structured and any types of forgiveness programs available should the consumers experience any change in their circumstances, such as job loss.

Additionally, the agencies should require lenders to include warning disclaimers of potential scams on outgoing marketing materials and list the CFPB's phone number with instructions on

[11] Green lending products can include: electric vehicle loans, residential and community solar loans, energy efficiency and other home improvement loans, loans for electric vehicle charging stations and infrastructure.
[12] The CFPB has supervisory authority over banks, thrifts, and credit unions with assets over $10 billion, as well as their affiliates, as well as over nonbank mortgage originators and servicers, payday lenders, and private student lenders of all sizes. "Institutions subject to CFPB supervisory authority," *CFPB*. https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/#:~:text=We%20have%20supervisory%20authority%20over,student%20lenders%20of%20all%20sizes.
[13] "Professional Home Energy Assessments," *U.S. Department of Energy's Energy Saver*. https://www.energy.gov/energysaver/professional-home-energy-assessments

how to submit a complaint. The warning disclaimers must be provided in the consumer's preferred language and any support lines should offer live in-language support. Also, the CFPB should provide a separate ADA-compliant hotline and phone numbers for the speech- or hearing-impaired.

The CFPB should also continue to be vigilant about potential abuses in new green lending products. This vigilance should include devoting attention to scrutinizing new products and services and their impacts, making sure consumers know how and where to raise concerns, and taking swift enforcement action against predatory practices and actors. If the CFPB finds that consumers are victims of scams of fraudulent products, the CFPB should prevent negative impacts on their credit scores. Finally, the CFPB should update the public consumer complaint database[14] with green lending products so that consumers can feel more comfortable navigating and filing their complaint with the CFPB. For example, amending existing categories like "Vehicle loans or leases" to "Vehicle loans or leases (including for electric vehicles)", and adding in a new category such as "green lending products (including PACE, solar loans, and electric vehicle infrastructure)".

Climate-related Financial Risk

As more member agencies of the Financial Stability Oversight Council (FSOC)[15], to which the CFPB is also a member, work towards mitigating climate-related financial risk to investors, consumers, homeowners, businesses, and workers[16], the CFPB should continue to disseminate information on these risks to its regulated entities and the public. The CFPB has started on this with a blog titled: "Climate risk should be considered in housing decisions," which contains some resources for homebuyers, homeowners, renters, and real estate professionals.[17] The CFPB should consider following this with a request for information on greenwashing related to financial products and climate risk. In a world of growing climate-related financial risks the CFPB has an important role to play in protecting consumers from potentially harmful industry responses to managing climate risk, as well as from poorly designed or predatory climate-related financial programs and products.

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[14] "Submit a complaint about a financial product or service," *Consumer Financial Protection Bureau*. https://www.consumerfinance.gov/complaint/

[15] "Financial Stability Oversight Council Identifies Climate Change as an Emerging and Increasing Threat to Financial Stability," *U.S. Department of the Treasury*. October 21, 2021. https://home.treasury.gov/news/press-releases/jy0426

[16] "FACT SHEET: President Biden Directs Agencies to Analyze and Mitigate the Risk Climate Change Poses to Homeowners and Consumers, Businesses and Workers, and the Financial System and Federal Government Itself," *The White House*. May 20, 2023. https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/20/fact-sheet-president-biden-directs-agencies-to-analyze-and-mitigate-the-risk-climate-change-poses-to-homeowners-and-consumers-businesses-and-workers-and-the-financial-system-and-federal-government/

[17] Mark McArdle, Mikayla Mitchell, and Erik Rubinyi, "Blog: Climate risk should be considered in housing decisions," *CFPB*. April 8, 2022; updated May 11, 2023. https://www.consumerfinance.gov/about-us/blog/homebuyers-homeowners-renters-should-consider-climate-risks-in-decisions-about-future/

Conclusion

Many consumers, particularly those from underserved communities, are still reeling from the financial harms caused by residential PACE loans, and this proposed rule on PACE financing is an opportunity to prevent future harms to consumers. We strongly encourage the CFPB to finalize this proposed rule swiftly and enforce the rule when it is released. We thank the CFPB for this opportunity to provide comment, and hope to see proactive engagement from the bureau on consumer protections for additional green lending products.

Sincerely,
Americans for Financial Reform Education Fund

Atlanta Legal Aid Society, Inc.
Better Markets
Consumer Action
Consumer Federation of America
Consumer Reports
Delaware Community Reinvestment Action Council
Georgia Watch
National Association of Consumer Advocates
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low-income clients)
National Fair Housing Alliance
Public Citizen
Public Counsel, Consumer Rights and Economic Justice Project
Public Good Law Center
Revolving Door Project
Rise Economy (formerly California Reinvestment Coalition)
South Carolina Appleseed Legal Justice Center
The Greenlining Institute
Tulipshare, Sustainable Investment Fund
Tzedek DC