July 26, 2023

Comment Intake—PACE
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Proposed Rule on Residential Property Assessed Clean Energy (PACE) Financing [Docket No. CFPB-2023-0029; RIN 3170-AA84]

To Whom It May Concern:

Better Markets[1] appreciates the opportunity to comment on the above-captioned proposed rule ("Proposal") on Residential Property Assessed Clean Energy (PACE) Financing.[2]

PACE financing allows borrowers to fund clean-energy improvements on their homes by applying a special tax assessment on the borrower's real property. While these programs may offer some promise, they also pose significant risks to consumers as well as markets. This is most notably because of the industry's lack of clear and stringent underwriting standards, which has largely resulted from the powerful tax liens on homes associated with PACE financing that reduce incentives for careful underwriting. This lack of underwriting standards incentivizes imprudent lending and facilitates the financial exploitation of some of society's most vulnerable consumers.

---

1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 Consumer Financial Protection Bureau, *CFPB Proposes New Consumer Protections for Homeowners Seeking Clean Energy Financing* (May 01, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-new-consumer-protections-for-homeowners-seeking-clean-energy-financing/; *Residential Property Assessed Clean Energy Financing (Regulation Z)* (hereinafter "Proposal"), 88 Fed. Reg. 30388 (May 11, 2023), https://www.federalregister.gov/documents/2023/05/11/2023-09468/residential-property-assessed-clean-energy-financing-regulation-z.

Congress rightfully sought to rectify this by instructing the Bureau to promulgate a rule (1) subjecting PACE loans to the Truth in Lending Act's (TILA) Ability-To-Repay requirements and (2) applying TILA's civil liability provisions for violations of those new requirements. The Bureau is thus well within its authority to issue the instant rule on both legal and policy grounds. Better Markets supports a strong and broadly applicable rule with robust disclosure requirements. We support the Bureau's application of TILA's civil liability provisions to PACE loans and urge the Bureau to similarly include robust disclosure and remedy requirements throughout where it has the discretion to do so.

BACKGROUND

Property Assessed Clean Energy (PACE) financing is a mechanism that allows property owners to finance energy efficiency, renewable energy, and water conservation improvements on their properties.[3] PACE programs enable property owners to obtain up-front funding for these types of projects and repay the financing over an extended period of time through an additional assessment on their property tax bill.

PACE assessments are recorded as a lien against the property, which takes priority over other liens, except for property taxes. The loan amount is typically repaid over a long term, ranging from 10 to 20 years, as an additional assessment on the property tax bill, spreading the cost over time. Moreover, PACE loans are attached to the property rather than the individual, meaning the loan obligations transfer to subsequent property owners. If the property is sold before the PACE assessment is fully repaid, the remaining obligation typically transfers to the new property owner. However, homeowners seeking to sell a home subject to a PACE loan often face pressure to pay off the loan so the buyer does not have to assume the liability.

Although PACE loan agreements are made between consumers and their sponsoring state or local government, most governments contract with private PACE companies to operate the programs. Those companies in turn may rely heavily on home improvement contractors to handle much of the promotion and negotiation with homeowners. According to a recent CFPB Report, the average original balance of PACE loans made between 2014 and 2020 was around $25,000, payable over an average term of just under 20 years, with an average interest rate of about 7.6 percent.[4]

---

[3] Kirsten Grind, *Green-Energy PACE Home Loans Catch Congress's Ire*, THE WALL STREET JOURNAL (Apr. 5, 2017), https://www.wsj.com/articles/fastest-growing-type-of-loan-faces-political-backlash-1491384612.

[4] Consumer Financial Protection Bureau, *Property Assessed Clean Energy (PACE) Financing and Consumer Financial Outcomes: Data Point* (May 2023) ("CFPB PACE Report"), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_pace-rulemaking-report_2023-04.pdf.

While PACE financing may offer some benefits, many critics point out that PACE loans carry increasing amounts of economic risk, have under-delivered their promised green benefits, and have harmed many vulnerable borrowers. Some key risks of PACE loans include high-pressure sales tactics, excessive fees, higher property taxes, higher interest rates, increased mortgage delinquencies, increased credit card balances, and a disproportionately adverse impact on the elderly, non-native English speakers, and Black and Hispanic neighborhoods. Most notable among these risks, however, are the uniquely relaxed underwriting standards for PACE loans relative to other traditional mortgage loans. These insufficient underwriting standards produce undue systemic risks along with harm to markets and consumers.

Given these underwriting concerns, especially in light of the similar underwriting problems that preceded the Great Recession, Congress saw fit to direct the Bureau to promulgate the instant rule, expressly applying the Truth in Lending Act's Ability-To-Repay and civil liability provisions to PACE financing. With the proposed rule, the Bureau has faithfully implemented these congressional mandates.

OVERVIEW OF THE PROPOSAL

Section 307 of the 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act directs the Consumer Financial Protection Bureau to prescribe Ability-To-Repay rules for PACE financing and to apply the civil liability provisions of the Truth in Lending Act for violations of those rules.[5] The Bureau's Proposal would implement these congressional mandates and amend the Truth in Lending Act's implementation regulation, Regulation Z, to address how TILA applies to PACE transactions to account for the unique nature of PACE financing.

Most notably, the Bureau's Proposal: (1) clarifies that PACE loans qualify as "credit" under the Truth in Lending Act; (2) amends the disclosures requirements for PACE loans to equip PACE borrowers with better and more standardized material information; (3) expressly applies the Truth in Lending Act's Ability-to-Repay requirements in § 1026.43 to PACE transactions; (4) expressly applies the Truth in Lending Act's civil liability and remedy provisions found in Section 130 to PACE transactions; and (5) provides that a PACE transaction is not a qualified mortgage as defined in Section 1026.43 of TILA.

COMMENTS

I. The Current State of PACE Financing Poses Numerous Risks and Harms to Markets and Consumers Alike.

While PACE loans offer some benefits that may appeal to homeowners and environmental advocates, such as reduced energy costs, increased property value, and reduced carbon emissions,

---

[5] The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 was signed into law on May 24, 2018. Pub. L. 115-174, 132 Stat. 1296 (2018).

they can also present risks for homeowners, as well as for financial markets generally. Many observers have noted that PACE loans carry increasing amounts of economic risk, have under-delivered their promised green benefits, and have harmed many low-income homeowners.[6] Perhaps most notably, many borrowers do not understand the tax implications of obtaining a PACE loan, and many are shocked to later see their tax bills skyrocket.[7] According to a recent CFPB Report, some other key risks of PACE loans include high-pressure sales tactics, excessive fees, higher property taxes, higher interest rates, increased mortgages delinquencies, increased credit card balances, and a disproportionately adverse impact on the elderly, non-native English speakers, and Black and Hispanic neighborhoods.[8] These risks and harms to consumers and markets are outlined in more detail below.

A. **PACE Financing Introduces Undue Risk into the Market, "Echoing" the Subprime Mortgage Wave That Fueled the 2008 Financial Crisis.**

Many have begun to observe that PACE financing — as it stands today — increasingly displays many qualities of the subprime mortgage markets that preceded the financial crisis of 2008–2009,[9] posing undue levels of systemic risk to our financial markets.[10] As one author put it,

---

[6] *See* Prentiss Cox, *Keeping PACE?: The Case Against Property Assessed Clean Energy Financing Programs*, 83 U. COLO. L. REV. 83 (2011); Kirsten Grind, *America's Fastest-Growing Loan Category Has Eerie Echoes of Subprime Crisis*, THE WALL STREET JOURNAL (Jan. 10, 2017), https://www.wsj.com/articles/americas-fastest-growing-loan-category-has-eerie-echoes-of-subprime-crisis-1484060984.

[7] Jeremy Kohler & Hary Corybe, *State-Supported "Clean Energy" Loans Are Putting Borrowers at Risk of Losing Their Homes*, PROPUBLICA (Apr. 23, 2023), https://www.propublica.org/article/missouri-pace-loans.

[8] *See* CFPB PACE Report, *supra* note 4.

[9] Robert C. Barnes, *The Promise and Peril of Assembly Bill 811's Contractual Assessments*, CAL. REAL EST. J., at 1 (Jan. 26, 2009) (arguing that PACE programs risk creating the same conditions that led to the Great Recession); David A. Felt, *PACE Loans—Another Subprime Mortgage Crisis?*, MKT. SOLUTIONS, at 1 (June 2010) (arguing that PACE risks outweigh benefits).

[10] Kirsten Grind, *America's Fastest-Growing Loan Category Has Eerie Echoes of Subprime Crisis*, THE WALL STREET JOURNAL (Jan. 10, 2017), https://www.wsj.com/articles/americas-fastest-growing-loan-category-has-eerie-echoes-of-subprime-crisis-1484060984; Jonathan R. Sichtermann, *Slowing the PACE of Recovery: Why Property Assessed Clean Energy Programs Risk Repeating the Mistakes of the Recent Foreclosure Crisis*, 46 VAL. U. L. REV. 263, 308 (2011) ("PACE programs also have significant unintended consequences that could cause the United States housing market to once again experience the painful recession that began in 2008."); Erik Dolan-Del Vecchio, *Fastest-Growing PACE Loans Beginning to Resemble Pre-Crisis Subprime Market*, FORBES (Jan. 11, 2017), https://www.forbes.com/sites/bisnow/2017/01/11/fastest-growing-pace-loans-beginning-to-resemble-pre-crisis-subprime-market/?sh=786e453777e3; MoneyTips, *Another Debt Time Bomb: PACE Loans*, CONNECTICUT POST (Feb. 9, 2017),

PACE programs represent "a new and potentially devastating shock to the mortgage securities markets and the financial system," which "threaten[s] to undermine the already battered mortgage market in the United States."[11]

As with the unscrupulous subprime lenders leading up to the Great Recession, many PACE lenders care little — if at all — about borrowers' creditworthiness or ability to repay. In the absence of express ability-to-repay requirements, relaxed underwriting standards foster the proliferation of imprudent loans with little realistic possibility of being paid back.[12] Indeed, the Bureau's findings in analogous rules, such as its rule on payday, vehicle title, and certain high-cost installment loans,[13] demonstrate the systemic risks posed by insufficient underwriting standards, as well as the consumer harm they cause.

As outlined by the Wall Street Journal in one 2017 report, the nature of the incentives in PACE financing produces a situation where third-party contractors with scant training and oversight "essentially function as loan brokers" and "often pitch PACE loans to help land contracting jobs and earn referral fees from lenders."[14] This creates the all too familiar specter that PACE loan borrowers are generally at greater risk of default.[15] And indeed, the CFPB's own PACE

---

https://www.ctpost.com/business/moneytips/article/Another-Debt-Time-Bomb-PACE-Loans-10923179.php.

[11] Felt, *PACE Loans—Another Subprime Mortgage Crisis?*, *supra* note 9, at 1.

[12] *See generally* Sichtermann, *Slowing the PACE of Recovery: Why Property Assessed Clean Energy Programs Risk Repeating the Mistakes of the Recent Foreclosure Crisis*, *supra* note 10, at 308–09 ("PACE programs potentially enable homeowners to take on inappropriate debt levels and even make that debt senior to preexisting mortgages.").

[13] *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 FR 54472 (Nov. 17, 2017), https://www.govinfo.gov/content/pkg/FR-2020-07-22/pdf/2020-14935.pdf.

[14] Kirsten Grind, *America's Fastest-Growing Loan Category Has Eerie Echoes of Subprime Crisis*, *supra* note 10.

[15] *See generally* Kirsten Grind, *More Borrowers Are Defaulting on Their "Green" PACE Loans*, WALL ST. J., (Aug. 15, 2017) ("[A] Wall Street Journal analysis of tax data in 40 counties in California—by far the biggest market for PACE loans—shows that defaults have jumped over the last year. . . . The data, which only offer a limited view of overall PACE loan performance, show that the average default rate has climbed to 1.6% from 0.9% in the previous tax year. The default rate is . . . higher than the first-mortgage rate of 0.6%, according to the S&P Dow Jones Indices. But the PACE default rate doesn't capture borrowers whose missed payments are covered by mortgage escrow accounts, which appears to be a common occurrence, according to borrowers, banks, real estate agents and attorneys."), https://www.wsj.com/articles/more-borrowers-are-defaulting-on-their-green-pace-loans-1502789401.

Report bears out this concern, showing that PACE loans tend to cause an increase in negative credit outcomes, particularly mortgage delinquency and foreclosure.[16]

Coupled with these lowered underwriting standards is the alarming fact that many of these PACE loans are then securitized and sold to investors, creating another parallel with the collateralized debt obligations preceding the Financial Crisis.[17]

Moreover, the unique priority lien associated with PACE transactions creates further incentives for PACE companies and contractors to originate loans quickly without regard to affordability or consumer understanding, potentially exacerbating systemic risk.[18] In fact, mortgage industry stakeholders have also asserted that PACE financing introduces risk to the mortgage market, as PACE liens take priority over pre-existing mortgage liens.[19] The OCC and the FDIC have similarly expressed concern that PACE loans' "priority status . . . raises safety and soundness concerns."[20]

And while the data on this point is mixed, some critics also argue that PACE loans can, in fact, negatively impact the housing market. The higher debt burden, combined with the senior lien position, may deter potential homebuyers from purchasing properties with existing PACE assessments. This reduced demand could potentially lead to decreased property values or longer selling times. Moreover, the FHFA and OCC have also "noted the possibility that PACE loans could affect the value of mortgage-backed securities that are based on mortgages secured by properties in places where the loans are available," which "could affect secondary market participants."[21]

---

[16] *See* CFPB PACE Report, *supra* note 4, at 3 ("[O]n average, getting a PACE loan increases the risk of a mortgage delinquency by about 35 percent over two years, relative to what would have happened without the PACE loan.").

[17] *See* Grind, *America's Fastest-Growing Loan Category Has Eerie Echoes of Subprime Crisis*, *supra* note 10; *see also*, e.g., *Ygrene Completes $318 Million Securitization of Pace Assets* (July 2020), https://ygrene.com/press-releases/ygrene-completes-318-million-securitization-pace-assets.

[15] *See generally* Sichtermann, *Slowing the PACE of Recovery: Why Property Assessed Clean Energy Programs Risk Repeating the Mistakes of the Recent Foreclosure Crisis*, *supra* note 10.

[19] *See, e.g.*, Fed. Hous. Fin. Agency (FHFA), *FHFA Statement on Certain Energy Retrofit Loan Programs* (July 6, 2010), https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Statement-on-Certain-Energy-Retrofit-Loan-Programs.aspx; *FHFA Notice and Request for Input on PACE Financing*, 85 FR 2736 (Jan. 16, 2020); *Joint Letter from Mortgage Trade Assocs. to FHFA Director Mark Calabria* (Mar. 16, 2020), https://www.housingpolicycouncil.org/_files/ugd/d315af_6cb569a5427f4e26ab4ef4d55038b3f6.pdf.

[20] 29 No. 8 BANKING & FIN. SERVICES POL'Y REP. 34, 35 (2010).

[21] *Id*.

Another drawback of PACE loans is their limited transferability.[22] While PACE loans are generally transferable to new property owners if the property is sold, the reality is that not all buyers are willing to assume the additional debt obligation. This limited transferability could reduce the pool of potential buyers, making it more challenging to sell a property with an outstanding PACE loan. As one author put it:

> [I]n many instances PACE programs fail to anticipate that, while property encumbered with a PACE lien may be sold at any time without any lingering PACE obligations for the prior owner, a mortgage that is encumbered with a PACE lien may be very difficult to sell on the secondary mortgage market. Moreover, real estate transactions do not take place in a vacuum, and potential buyers are likely to consider all encumbrances on real property, including PACE liens, when negotiating purchases. As a result, some argue that the perceived benefits of PACE financing are often negated upon resale of property.[23]

Thus, on the whole, current PACE financing standards introduce a concerning amount of risk into the financial markets, and this is largely predicated on the industry's fundamental lack of meaningful underwriting standards — a problem the Bureau's Proposal seeks to address.

B. PACE Loans Pose Considerable Risks and Harms to Consumers, Especially Among Vulnerable Consumers.

1. The lack of regulation and clarity surrounding PACE loans invites fraud and enables unscrupulous actors to prey upon unsuspecting homeowners.

Numerous examples illustrate fraud and abuse that occurs in PACE financing,[24] and we do not attempt to provide an exhaustive list here. It is nonetheless worthwhile to review a few notable examples, which we provide below.

---

[22] *See* Cox, *Keeping PACE?: The Case Against Property Assessed Clean Energy Financing Programs*, *supra* note 6, at 96–100 (outlining transfer risks associated with PACE financing).

[23] Michael A. Wrapp, *Property Assessed Clean Energy (Pace): Victim of Loan Giants or Way of the Future*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 273, 283 (2013).

[24] Andrew Khouri, *PACE lender approved 'potentially fraudulent loans,' ex-employee alleges*, LOS ANGELES TIMES (Mar. 1, 2019), https://www.latimes.com/business/la-fi-e3-pace-loans-20190301-story.html; Andrew Khouri, *Homeowners were defrauded through the PACE lending program, L.A.'s city attorney alleges*, THE SAN DIEGO UNION-TRIBUNE (Apr. 4, 2019), https://www.sandiegouniontribune.com/business/la-fi-pace-solar-lawsuit-20190404-story.html; Andrew Khouri, *These loans were created to help homeowners, but for some they did the opposite*, LOS ANGELES TIMES (June 4, 2017), https://www.latimes.com/business/la-fi-pace-loans-20170604-story.html; Andrew Khouri, *Lawsuits Filed Against LA County, Lenders Over*

In August 2019, Renovate America, Inc., a major PACE program administrator at the time, reached a $4 million settlement with six counties and one city in California.[25] The lawsuit brought by the California localities alleged that advertising and promotion by the company of its PACE program "misrepresented the program or failed to make adequate disclosure to avoid misleading consumers."[26] These misrepresentations included: that their PACE program was government affiliated or subsidized; the nature of the tax deductibility of the PACE assessments; key facts about the transferability of the PACE assessments to subsequent property owners; the costs of financing under the program; and; the nature of its policy of "verifying" contractors to work on PACE-related projects.[27]

Similarly, in October 2022, the Federal Trade Commission and the State of California sued the PACE financing provider Ygrene Energy Fund, Inc. "for deceiving consumers about the potential financial impact of its financing, and for unfairly recording liens on consumers' homes without their consent."[28] The lawsuit alleged that "Ygrene and its contractors falsely told consumers that the financing wouldn't interfere with the sale or refinancing of their homes, in many instances relying on high-pressure sales tactics or outright forgery to sign consumers up."[29]

A private lawsuit brought by the L.A. City Attorney in 2019 levied similar allegations at the PACE industry. As recounted by the Los Angeles Times, unlicensed salespeople used "high-pressure in-home sales tactics, misrepresentations, and false promises" to sign consumers up for PACE:

Green Energy Program, LOS ANGELES TIMES (Apr. 12, 2018), http://www.latimes.com/business/la-fi-pace-lawsuits-20180411-story.html.

25 *See* Proposal, at 11; Riverside Cnty. Dist. Att'y, *District Attorneys Announce $4 Million Consumer Protection Settlement With "PACE" Program Administrator Renovate America, Inc.* (Aug. 9, 2019), https://rivcoda.org/community-info/news-media-archives/district-attorneys-announce-4-million-consumer-protection-settlement; *see also State of California v. Renovate America*, Case No. RIC1904068 (Super. Ct. Riverside Cnty. 2019).

26 *Id*.

27 *Id*.

28 *See* Fed. Trade Comm'n, *FTC, California Act to Stop Ygrene Energy Fund from Deceiving Consumers about PACE Financing, Placing Liens on Homes Without Consumers' Consent* (Oct. 28, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-california-act-stop-ygrene-energy-fund-deceiving-consumers-about-pace-financing-placing-liens; *see also* Complaint for Permanent Injunction, Monetary Relief, Civil Penalties, and Other Relief, *Fed. Trade Comm'n et al v. Ygrene Energy Fund Inc.*, No. 2:22-cv-07864 (C.D. Cal. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Complaint%20-%20Dkt.%201%20-%2022-cv-07864.pdf.

29 *Id*.

> When it came to financing, authorities said, consumers in many ways were left in the dark. In signing up homeowners, the lawsuit alleged, Eco Solar often failed to make required disclosures and 'misrepresented or concealed entirely from their victims critical information about PACE loan applications.' That included the cost and the fact that loans are secured by a house and, if unpaid, can lead to foreclosure.[30]

The National Consumer Law Center also issued a report containing numerous consumer stories of negative experiences with PACE financing.[31] As the report found, many of the abuses were in fact directed at particularly vulnerable communities, such as the elderly. As the report puts it: "Many of the worst abuses described, from upselling and shoddy work to making unaffordable loans, have been targeted at elders living on fixed incomes and suffering from health problems."[32]

2. Current PACE loan practices demonstrate imprudent underwriting standards and inadequate disclosures.

As noted above, current PACE financing practices do not adhere to meaningful underwriting standards, and they fail to make adequate disclosures to meaningfully inform consumers about the nature of the transaction. PACE programs have rightly faced criticism for not conducting thorough assessments of a borrower's ability to repay the loan. This lack of stringent underwriting standards may increase the risk of defaults, putting property owners in acute financial distress. Moreover, inadequate disclosures and the lack of standardized TILA disclosure forms result in unexpected and unaffordable tax payment spikes that can lead to delinquency, late fees, tax defaults, and foreclosure actions.[33]

3. PACE loans tend to impose higher costs, fees, and interest rates than traditional financing options.

Moreover, the cost of funding for PACE financing is unusually high compared to other mortgage debt. As outlined by the recent CFPB report, PACE loans typically carry higher interest

---

30 Andrew Khouri, *Homeowners were defrauded through the PACE lending program, L.A.'s city attorney alleges*, THE SAN DIEGO UNION-TRIBUNE (Apr. 4, 2019), https://www.sandiegouniontribune.com/business/la-fi-pace-solar-lawsuit-20190404-story.html.

31 JOHN RAO, RESIDENTIAL PROPERTY ASSESSED CLEAN ENERGY (PACE) LOANS: THE PERILS OF EASY MONEY FOR CLEAN ENERGY IMPROVEMENTS, National Consumer Law Center (Sep. 2017), https://www.nclc.org/wp-content/uploads/2022/09/IB_PACE_stories.pdf.

32 RAO, RESIDENTIAL PROPERTY ASSESSED CLEAN ENERGY (PACE) LOANS: THE PERILS OF EASY MONEY FOR CLEAN ENERGY IMPROVEMENTS, *supra* note 31.

33 Kirsten Grind, *Renovate America Masked Borrower Debt Woes*, THE WALL STREET JOURNAL (Mar. 8, 2017), https://www.wsj.com/articles/renovate-america-one-of-americas-fastest-growing-lenders-didnt-disclose-it-made-payments-to-some-borrowers-1488969001?mod=article_inline.

rates and fees compared to traditional financing options.[34] As recounted by the National Consumer Law Center, "the cost of PACE financing is nearly double other home equity loan products."[35] Moreover, it is important to consider the additional costs to borrowers that may arise from states that impose considerable penalties and interest on borrowers who are behind on their tax assessment payments. These higher costs could even potentially offset the anticipated savings from energy efficiency improvements.

The relative ease with which a PACE loan can be obtained despite a lack of creditworthiness also enables overpricing at the contracting stage when contractors forge a deal to renovate the borrower's home. For example, one story recounted by the National Consumer Law Center details how "one homeowner was charged $23,150 for exterior home painting, a job that should have been less than 25% of that figure."[36]

4. The senior lien position of PACE loans poses unique risks and harms.

As outlined elsewhere in this comment,[37] PACE assessments hold a senior lien position, meaning they take priority over existing mortgages or other liens. This arrangement can create complications for property owners if they encounter financial difficulties or default on their payments. Lenders may be hesitant to provide refinancing or approve additional loans on properties with PACE assessments, which restricts the property owner's options.

The priority position of PACE liens can be particularly dangerous for seniors with reverse mortgages who could face mortgage foreclosure and loss of their homes merely by obtaining a PACE loan. In fact, this concern led to the Federal Housing Administration (FHA) announcing in December 2017 that they would no longer insure new mortgages with PACE loans, following the lead of the Federal Housing Finance Agency, which already prohibited Fannie Mae and Freddie Mac from purchasing mortgages involving PACE loans.[38]

---

[34] CFPB PACE Report, *supra* note 4, at 12 ("PACE loans had relatively high costs compared to primary mortgages, and had particularly high fees relative to the loan amounts. Many have fees above the levels used in the regulatory threshold for a high-cost mortgage.").

[35] Rao, *supra* note 31, at 3.

[36] Rao, *supra* note 31, at 3.

[37] *See supra* notes 19–21 and accompanying text.

[38] *See* Andrew Khouri, *FHA to No Longer Insure New Mortgages with PACE Loans*, LOS ANGELES TIMES (Dec. 7, 2017), http://www.latimes.com/business/la-fi-fha-pace-20171207-story.html.

C. <u>These Risks and Harms Disproportionately Impact Some of the Most Disadvantaged Borrowers, Particularly the Elderly, Non-Native English Speakers, and Borrowers of Color.</u>

PACE financing is disproportionately targeted at older Americans, consumers with limited English proficiency or lower incomes, and consumers in predominantly Black or Hispanic neighborhoods.[39] Using census data from the states of California and Florida, the CFPB's recent PACE report found that "the average share of Black and Hispanic residents in census tracts where PACE applicants reside was significantly higher than the average for all census tracts . . . ."[40] Moreover, PACE applicants were more likely to reside in census tracts with lower shares of residents who speak English "less than very well."[41]

Additional reporting demonstrates the unique harms visited upon lower-income and elderly borrowers,[42] who are all too often on the losing end of a PACE loan.[43] Given the harms uniquely visited upon some of our most disadvantaged communities, the Bureau's implementation of the PACE financing Proposal, therefore, carries an important social and racial justice element.[44]

---

39 *See* Consumer Financial Protection Bureau, *Property Assessed Clean Energy (PACE) Financing and Consumer Financial Outcomes* at 4 (May 2023), https://files.consumerfinance.gov/f/documents/cfpb_pace-rulemaking-report_2023-04.pdf; *see also* Proposal, at 21 ("the PACE borrowers discussed in the PACE Report resided in census tracts with higher percentages of Black and Hispanic residents than the average for their States.").

40 CFPB PACE Report, at 20.

41 *Id*.

42 *See generally* Claudia Polsky, Claire Christensen, Kristen Ho, Melanie Ho & Christina Ismailos, *The Darkside of the Sun: How PACE Financing Has Under-Delivered Green Benefits and Harmed Low Income Homeowners*, BERKELEY L., ENV'T L. CLINIC, at 8-13 (Feb. 2021), https://www.law.berkeley.edu/wp-content/uploads/2021/02/ELC_PACE_DARK_SIDE_RPT_2_2021.pdf

43 Rebecca Burns, *The Subprime Solar Trap for Low-Income Homeowners*, BLOOMBERG (Apr. 6, 2021), https://www.bloomberg.com/news/features/2021-04-06/the-subprime-solar-trap-for-low-income-homeowners?sref=mQvUqJZj; Andrew Khouri, *A loan program was set up to boost energy efficiency. Instead, it's being used to build 'granny flats'*, LOS ANGELES TIMES (Feb. 17, 2019), https://www.latimes.com/business/la-fi-pace-adu-bankrupt-20190217-story.html; Anna Scott, *When Going Green Brings an Unexpected Financial Burden*, KCRW (Mar. 5, 2019), https://www.kcrw.com/news/shows/kcrw-features/when-going-green-brings-an-unexpected-financial-burden.

44 *See* Jeremy Kohler & Haru Coryne, *Clean-Energy Loans Trapped Black Homeowners in Debt. The Legislature Just Started Trying to Fix the Problem: Lawmakers in Missouri are exploring ways to rein in the state's clean-energy loan program, which ProPublica found disproportionately harms Black homeowners*, PROPUBLICA (May 6, 2021), https://www.propublica.org/article/clean-energy-loans-trapped-black-homeowners-in-debt-the-legislature-just-started-trying-to-fix-the-problem; Jeremy Kohler & Haru Coryne, *State-Supported "Clean Energy" Loans Are Putting Borrowers at Risk of Losing Their Homes*,

II. Congress Provided the Bureau with a Clear Congressional Directive to Issue a Strong, Broadly Applicable Ability-To-Repay Rule, Which Should Include Robust Disclosures and Remedies.

In light of the many harms that have been identified surrounding PACE financing, Congress rightfully enacted the Economic Growth, Regulatory Relief and Consumer Protection Act of 2018, directing the CFPB to promulgate ability-to-repay regulations pertaining to PACE loans.[45] More specifically, Congress directed the CFPB to clarify the Truth in Lending Act's application to PACE financing by expressly subjecting PACE loans both to TILA's Ability-To-Repay requirements and TILA's civil liability provisions. Congress provided a clear blueprint and the Bureau has faithfully implemented both of the related mandates in the Proposal.

The CFPB is thus operating well within its authority and under a clear congressional directive. The Bureau should therefore pursue a robust rule with minimal fear of litigation risk. Although PACE loans already meet the definitions of consumer credit and a "residential mortgage loan," a strong rule explicitly applying Ability-To-Repay requirements to PACE loans will reduce ambiguity and better protect consumers.

As noted by the Bureau, this rule should include the income verification provisions set forth in TILA to better ensure PACE borrowers have a realistic possibility of repaying the loans. Better Markets thus supports the application of TILA's requirements for "creditors," as defined by Section 1026.2(a)(17), and "loan originators," as defined by Section 1026.36(a)(1).

The Bureau's proposed Ability-To-Repay rule also appropriately includes robust disclosure requirements. Better Markets supports these proposed disclosure requirements. Section 1405(b) of the Dodd-Frank Act plainly empowers the Bureau to modify the disclosure requirements for qualifying residential mortgage loans.[46] And as noted by the Bureau, TILA disclosure forms provide key benefits to borrowers who rely on them for access to material information:

PROPUBLICA (Apr. 23, 2021) ("By marketing their programs to people who need urgent repairs but have few options for credit, they have disproportionately burdened some of the state's most vulnerable homeowners, a ProPublica investigation has found."), https://www.propublica.org/article/missouri-pace-loans.

[45] The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 was signed into law on May 24, 2018. Pub. L. 115-174, 132 Stat. 1296 (2018).

[46] Section 1405(b) of the Dodd-Frank Act provides that, in order to improve consumer awareness and understanding of transactions involving residential mortgage loans through the use of disclosures, the Bureau may modify disclosure requirements, in whole or in part, for any class of residential mortgage loans if the Bureau determines that it is in the interest of consumers and the public.

> [D]isclosure forms use clear language and design to make it easier for consumers to locate key information, such as interest rate, periodic payments, and loan costs. The forms also provide information to help consumers decide whether they can afford the loan and to compare the cost of different loan offers, including the cost of the loans over time. These benefits are important for PACE borrowers just as they are for other mortgage borrowers.[47]

The Bureau's inclusion of such disclosures is thus plainly in the interests of consumers and the public and well within its authority.

Better Markets also supports the Bureau's decision to exclude PACE financing from the Truth in Lending Act's Qualified Mortgage presumption of compliance.[48] Given the unique risks posed by PACE financing, these loans do not deserve the liability protections enjoyed by other, more standard mortgages.

Moreover, as others have observed, "yet another potential disadvantage of PACE financing is the possibility that the technology used for energy improvements will become obsolete and lose significant value during the life of a PACE lien."[49] This is especially concerning given the rapid pace of innovation and development in the renewable energy industry. Given this concern, the Bureau should rebuff industry requests that lenders be permitted to factor in projected energy cost savings into an ability-to-repay determination. Given the uncertainty involved as to whether such savings may come to fruition, it would be ill-advised to allow such considerations to taint creditors' risk assessments of borrowers.

We also support the Bureau's application of TILA's civil liability provisions to PACE financing,[50] including enhanced monetary damages and assignee liability, rescission, prohibition of mandatory arbitration.[51]

---

47 Proposal, at 44.

48 *See* Proposal, at 93–104.

49 Michael A. Wrapp, *Property Assessed Clean Energy (Pace): Victim of Loan Giants or Way of the Future*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 273, 282 (2013), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1040&context=ndjlepp.

50 *See generally*, 15 U.S.C. § 1640.

51 Under the Truth in Lending Act, mandatory arbitration is prohibited in consumer credit transactions that are secured by the borrower's principal dwelling. 15 U.S.C. § 1639c(E); 12 C.F.R. § 1026.36(h).

III. <u>The Bureau's Cost-Benefit Analysis Is Appropriate.</u>

The Bureau's Proposal also faithfully implements the Consumer Financial Protection Act's cost-benefit analysis requirements without needlessly attempting an exhaustive quantitative analysis.[52]

We note that decades ago, the Supreme Court held that an agency's duty to conduct cost-benefit analysis is not to be inferred without a clear indication from Congress: "Congress uses specific language when intending that an agency engage in cost-benefit analysis."[53] And one of the basic canons of judicial review of agency rules is that "the scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of an agency."[54] This is "especially true when the agency is called upon to weigh the costs and benefits of alternative policies,"[55] and in fact, "cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency."[56] The Supreme Court has also explained that the duty to "consider" various economic factors in the rulemaking process entails wide agency discretion. As the Court explained, when statutorily mandated "considerations" are not "mechanical or self-defining standards," they "in turn imply wide areas of judgment and therefore of discretion."[57]

The Bureau has thus rightfully exercised its discretion in conducting an appropriately qualitative cost-benefit analysis, one that clearly supports the Proposal. Indeed, the Bureau canvassed in detail the many benefits of the Proposal while considering the costs on covered persons and consumers.[58] The Bureau's Proposal is thus well justified not only on policy and legal grounds but also on economic ones.

---

[52] *See* 12 U.S.C. 5512(b)(2)(A).

[53] *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 30 (1981).

[54] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[55] *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003).

[56] *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C.Cir. 1983).

[57] *See Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611-12 (1950).

[58] *See* Proposal, at 109–47.

CONCLUSION

We hope these comments are helpful as the Bureau finalizes the Proposal.

Sincerely,

Stephen W. Hall
Legal Director and Securities Specialist

Brady Williams
Legal Counsel

Better Markets, Inc.
2000 Pennsylvania Avenue, NW, Suite 4008
Washington, DC 20006
(202) 618-6464

shall@bettermarkets.org
http://www.bettermarkets.org/