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**PROTECTING CONSUMERS SINCE 1975**

July 26, 2023

***Via Electronic Submission***
Comment Intake – PACE
c/o Legal Division Docket
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20554

**RE: Docket No. CFPB-2023-0029; Residential Property Assessed Clean Energy Financing (Regulation Z)**

Dear Director Chopra:

The South Carolina Department of Consumer Affairs ("SCDCA"/"Department") is pleased to offer comments in response to the Consumer Financial Protection Bureau's ("CFPB"/"Bureau") proposed rule regarding ability-to-repay guidelines for Property Assessed Clean Energy (PACE) financing and to apply the civil liability provisions of the Truth in Lending Act (TILA) for violations.

SCDCA is South Carolina's consumer protection agency. Established in 1974, SCDCA is responsible for the administration and enforcement of over 120 state and federal laws. A large part of our authority stems from Title 37 of the South Carolina Code of Laws, the Consumer Protection Code (the "Code"), of which the Truth in Lending Act is incorporated. The Code, among other purposes, is meant to further consumer understanding of the terms of credit transactions, foster competition among suppliers of consumer credit, and permit and encourage the development of fair and economically sound credit practices.[1] Further, it requires the Department to undertake activities to encourage business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion and sale of consumer goods and services.[2]

SCDCA supports the Bureau's efforts to collect information from the public and interested stakeholders on PACE. We offer the comments below based upon our experience regulating non-depository financial institutions and collecting and handling consumer complaints.[3]

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[1] *S.C. Code Ann.* § 37-1-102(c)-(e)(2019).
[2] *S.C. Code Ann.* § 37-6-117(f) (2019).
[3] SCDCA's Consumer Services Division processes and mediates written consumer complaints, seeking to find equitable solutions for the consumer and the business, including refunds, adjustments and credits to consumer accounts.

## ***Discussion***

1. Amendment to Interpretations at 1026.2 (a) (14)-1. ii (qualifying the general exclusion of tax liens and assessments from the scope of "credit" under TILA by making the exclusion apply only to *involuntary* tax liens and assessments) at 91 Fed. Reg. 30390.

The Department agrees with and supports this amendment. It appears to be the simplest and most efficient means of allowing PACE transactions to be subject to the requirements of TILA and Regulation Z, since they are clearly a form of consumer credit, without drafting other exceptions to involuntary tax liens which are clearly not extensions of consumer credit.

2. Proposed Regulation Z §1026.37(p)(3) (Creditor contact information) at 91 Fed. Reg. 30402-04.

The Department agrees with and supports the concept of clearly identifying the existence of a PACE Company. The Department has some concern that as proposed the form could be confused as part of the evidently separate "Lender" heading that it appears to be a part of or the "Mortgage Broker" heading. An additional separate subheading might be clearer, and it does not appear that it would require the form on page 30435 to extend to another page.

3. Proposed Regulation Z §1026.41(e)(7) (exempting PACE transactions from periodic statements).

South Carolina is not one of the States in which PACE transactions are currently made. Logically, many if not most debtors would have existing mortgages on their homes and in most cases, the PACE transactions would be for smaller dollar amounts. The Department has no objection to this proposal. The more important issues seem to be front end disclosures that will help the borrower make financing decisions and avoid escrow shock.

4. Proposed definition of "PACE transaction" in Reg. Z § 1026.43(b) (15) based on the EGRRCPA section 307 definition at 91 F.R. 30431.

The Department agrees with proposal. The definition is clear and likely could not be improved significantly.

5. Proposal to apply existing Reg. Z § 1026.43(c) to PACE transactions specifically, thus requiring creditors to be subject to a good faith determination of the debtors' ability to repay (ATR) under that section pursuant to the Dodd-Frank reforms [91 F.R. 30409].

This requirement is a linchpin of the whole rulemaking. Given that PACE financing is new, not fully understood by consumers, is marketed by door- to-door sales techniques and creates a danger of escrow payment shock, it is important that some burden is placed on the companies/originators to realistically assess debtors' ability to repay and adjust their offers of credit accordingly.

6. Proposal to amend the Interpretation of §1026.43(c)(2)(iv) to add subitem -4 to give guidance to PACE lenders that if they know or have reason to know that the debtor has other loans that are PACE loans or will have them prior to the consummation of the transaction. Also, if the any database exists to which the creditor has access which does not consult, the debtor will not pass the ATR test, and may have certain defenses to any foreclosure of the loan. In addition to making sure the loan is affordable in general, this is intended to reduce the risk of "loan splitting" and "loan stacking" [91 F.R. 30409].

The Department agrees with and supports this amendment. Its effectiveness may depend on the scope of the definition of "PACE Company" as discussed below at item 11. South Carolina in 2009 passed reforms for the deferred presentment industry requiring those lenders to consult a data base to assure that the lenders were not making loans stacked on top of other prior deferred presentment loans. The requirement was initially very effective in combatting this kind of loan stacking, although many of those lenders have since switched to less restrictive licensing statutes.

7. Proposal to amend Interpretation §1026.43 (c)(3)-5. Reg. Z § 1026.43 (c) (3) to require creditors to review consumer reasonably reliable third-party records in analyzing the borrower's ATR such as employment records, credit reports and the like. The new Interpretation at § 1026.43 (c)(3)-5 would specify that mortgage related transactions addressed in the section also include property taxes to be considered under § 1026 (c)(2)(v), and that local taxing authorities qualify as reasonably reliable [91 F.R. at 30409].

The Department agrees with and supports this amendment.

8. Regarding Reg. Z § 1026.43(c), the CFPB seeks comment on whether the Interpretation should be amended to permit or require the PACE lender to consider the effect of potential savings from the anticipated energy improvements in determining ATR.

The Department recommends at most allow permitting only, and no mandate. It seems unlikely that the industry would not seek to consider potential savings unless it were forbidden. Any savings claim should be based on variable scientific data regarding the particular product. Unless there is an effective way to police bogus savings claims, which seems more in the area of unfair trade practices than TILA, nothing more that permitting should be done.

9. The proposal for amending Regulation Z at § 1026.43(i)(1) by adding requirement for PACE consumers who pay taxes through escrow that the ATR analysis must consider the impact of the PACE transaction itself [91 F.R. 30341]. This proposal was in reaction to certain commenters describing escrow payment shocks as a result of escrows not being adjusted until some time after the PACE transaction is consummated. The revision would require the PACE creditor to consider such escrow adjustments as part of its ATR analysis.

The Department agrees with and supports this amendment.

10. EGRRCPA directed the CFPB to prescribe regulations to carry out the purposes of TILA Section 129 C (a) [15 U.S.C. § 1639c (a)] minimum standards for residential mortgage loans requirements for ability to repay (ATR). The CFPB considered but declined to apply § 1026.43 (e) "qualified mortgage" safe harbor standards to PACE transactions. The CFPB appears to have declined to extend safe harbor protections based on the consumer risks discussed throughout the Rulemaking as well as statistics from the prior PACE report showing that 29% of new PACE borrowers who had no previous PACE credit had a significant increase in credit card debt. [91 F.R.30413].

The Department agrees with and supports this determination. PACE credit is at best a form of credit with significant risks to borrowers that are not yet fully understood, and appears to create added risks for existing mortgage loans underwritten without consideration that a loan could replace its priority position. PACE also appears to be dissimilar enough to regular mortgage credit to make authorizing the safe haven unrealistic.

11. Proposal to use EGRRCPA Section 307 authority to apply Section 130 [15 U.S.C.§ 1640] penalties to PACE companies for violations of § 1026.43. The CFPB seeks comments on this provision and whether the proposed definition of PACE company in proposed § 1026.43(b)(14) is the best way to target persons responsible for violations. [30416, -431]

The Department agrees with and supports this amendment. Periodic Congressional anger at TILA plaintiffs over the decades has significantly chipped away TILA's value as a deterrent of violators. Since PACE transactions appear to be subject to forms of abuse, it is important to reinstate effective disincentives to violators.

The harder question is whether the definition is inclusive enough. Section 1026.43 (b)(14) as proposed still *excludes* natural persons (and presumably sole proprietor contractors or even runners who make pitches and get borrowers to fill out apps) *as well as* government units. No doubt many PACE programs are administered by loose associations of cities, counties, or governmental or quasi-governmental units. This could automatically exclude a fair amount of the entities actually running the programs, and include only private third-party servicers or administrators. Avoiding the political backlash when governmental units face lawsuits is a consideration, but there is a risk is the loophole may too large and some governmental units that directly administer programs could violate the law with impunity in collaboration with corrupt contractors. It is also foreseeable that private companies which would otherwise meet the definition of PACE company would shift just enough functions to the taxing entity that allow it to assert it was not a PACE company so as to allow no 15 U.S.C.§ 1640 remedy. Currently neither 15 U.S.C. § 1603 nor §1026.3 automatically exclude government credit other than credit *to* government. But the cat is now out of the bag.

One solution may be to revise the definition entirely as to natural persons or amend it to *include* persons in the business of solicitation for sales or services associated with or reasonably contemplated to be financed by PACE loans. If any governmental exclusion is maintained, perhaps fashion a definition that includes persons or companies (including LLCs, partnerships, or quasi-governmental organizations) that take applications for, evaluate applications for,

investigate ATR issues for or establish underwriting standards for PACE loans for a particular locality. This might provide an incentive to the actual tax authorities to farm the functions out to private third-party companies that would clearly qualify and let the governmental units merely fund the loans and collect the tax.

12. Requests for comment on whether PACE loans should be subject. limitations on pre- and post-default interest rate and late charges similar to those of 15 U.S.C. § 1639 (k) regarding high-cost mortgage loans [91 F.R 30398].

The Department believes such a proposal makes sense at lease for post-default limitations. PACE lending appears, at least for now, to be somewhat designed for to approach borrowers more likely to default. Existing late charge limitations for high-cost mortgage loans under § 1026.34 (a) (8) should at least be the maximum. on PACE loans too. Even then, the allowance for charges on payments remaining unpaid under § 1026.34 (a) (8) (iv) appearing to allow a charge for every unit period the payment remains unpaid, seems highly punitive for borrowers who by definition are deemed more likely to default and paying interests rates that already take such risks into consideration. These lenders should definitely not be allowed contract for more, and there is no reason on these loans that the lenders should be able to bump up the interest rate after default to force the marginal borrower into foreclosure or inescapable debt.

## ***Conclusion***

We hope the CFPB finds the information provided beneficial as you decide a path forward for this issue. We commend the Bureau for the work and effort put into this process and appreciate the opportunity to comment. Should you have any questions pertaining to our comments, please feel free to contact me at 803-734-4233.

Best regards,

Carri Grube Lybarker, Esq.