Comments to

The Consumer Financial Protection Bureau

Regarding

Proposed Rule

for

Residential Property Assessed Clean Energy Financing (Regulation Z)

Docket No. CFPB–2023–0029

Submitted by

National Consumer Law Center

(on behalf of its low-income clients)

and

National Housing Law Project

July 26, 2023

A. Introduction

Thank you for the opportunity to comment on the Bureau's proposed rule regarding Property Assessed Clean Energy (PACE) loans. The National Consumer Law Center[1] (on behalf of its low-income clients) and the National Housing Law Project[2] submit these comments in strong support of the rule and with recommendations to strengthen the proposal and help it more fully meet its goals.

PACE loans, since their inception, have brought significant risk of tax and mortgage delinquency and foreclosure to low- and moderate-income homeowners, often in communities of color. Homeowners in California,[3] Florida[4] and Missouri,[5] the three states with active residential PACE programs, have suffered significant harms from the lack of consumer protections for PACE due

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[1] The **National Consumer Law Center® (NCLC®)** is a non-profit corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of practice treatises on consumer credit laws and unfair and deceptive practices. NCLC attorneys regularly testify in Congress and provide comprehensive comments to the federal agencies on consumer regulations. More information is available at: www.nclc.org Questions for NCLC can be directed to John Rao (jrao@nclc.org).

[2] The **National Housing Law Project (NHLP)** is a non-profit law and advocacy center established in 1968 and based in San Francisco, California. NHLP is dedicated to advancing housing justice by using the power of the law to increase and preserve the supply of decent affordable housing, improve existing housing conditions, expand and enforce low-income tenants' and homeowners' rights, and increase opportunities for racial and ethnic minorities. More information is available at: www.nhlp.org Questions for NHLP can be directed to Lisa Sitkin (lsitkin@nhlp.org).

[3] Claudia Polsky, et al., The Dark Side of the Sun: How PACE Financing Has Under-Delivered Green Benefits and Harmed Low-Income Homeowners, Berkeley Law, Berkeley Environmental Law Clinic (2021), available at https://lawcat.berkeley.edu/record/1198493?ln=en.

[4] *See* Malena Carollo, *Tax Hit: An Energy Efficiency Finance Program is Trapping Florida Homeowners in Debt*, Tampa Bay Times (Sept. 10, 2020) (investigating the problematic nature of Florida's PACE loan program and its impact on Florida residents), https://www.tampabay.com/investigations/2020/09/10/tax-hit ; Alex Harris, *Other States Have Fixed Consumer Protection Problems with PACE Loans. Why Not Florida?,* Mia. Herald (Feb. 12, 2023)(discussing advocates calls for change to Florida's PACE loan program due to a lack of oversight and the unaffordable tax bills it places upon some citizens), https://www.miamiherald.com/news/local/environment/climate-change/article272022712.

[5] Jeremy Kohler & Haru Coryne, State-Supported "Clean Energy" Loans Are Putting Borrowers at Risk of Losing Their Homes, Pro Publica (Apr. 23, 2021), available at https://www.propublica.org/article/missouri-pace-loans.

to sudden spikes in payments owed without proper notice or analysis of ability to repay, contractor abuses, and limited available remedies.

The Bureau's own report on PACE lending highlights the importance of ensuring that PACE borrowers have the benefit of a strong rule. For example, on 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, with greatest effects for consumers with lower credit scores.[6] For borrowers without a mortgage, PACE loans are associated with increased credit card balances.[7] PACE loans increase consumers' property tax bills on average by about $2,700 per year, an average increase of about 88 percent.[8] Moreover, PACE loans are disproportionately made to consumers living in census tracts with larger shares of Black and Hispanic residents.[9]

We urge the Bureau to finalize many aspects of the proposed rule, formally bringing PACE loans within the purview of Truth in Lending mortgage regulation, while making certain additional changes to strengthen the rule and ensure that homeowners are protected as intended. Even in California, which has the most extensive state law protections for PACE loans, the Bureau's proposed rule will add essential additional protections, including more structure to the ability to repay requirements and remedies to better provide accountability. Below we highlight priorities for the final rule, with recommended clarifications or additions emphasized in the nested bullets. The final rule should:

- Clarify that PACE is credit and generally covered by TILA's mortgage provisions;

- Apply the requirements for high-cost mortgages to PACE loans, without any amendments, and also:

    - clarify that late fees that apply to all property tax assessments should be subject to HOEPA's limitations on late fees;

- Apply the TILA ability to repay framework to PACE, including the provisions on "stacking" or "splitting" of additional or previous PACE loans, exclude PACE from the Qualified Mortgage designation, and also;

    - exclude any estimates based on projected energy savings;

[6] *See* Siobhan McAlister & Ryan Sandler, *Property Assessed Clean Energy (PACE) Financing and Consumer Financial Outcomes*, Consumer Financial Protection Bureau (May 2023), at 3, *available at* https://files.consumerfinance.gov/f/documents/cfpb_pace-rulemaking-report_2023-04.pdf.
[7] *Id.* at 27.
[8] *Id.* at 13.
[9] *Id.* at 20.

    - treat any unsecured home improvement loan made alongside a PACE loan as a simultaneous loan;

    - require full consideration of any escrow shortage or deficiency charges likely to result from the PACE assessment based on the consumer's most recent escrow account statement and the timing of the first tax bill, and incorporation of such charges into the debt-to-income ratio or residual income analysis; and

    - ensure that the reference to "home improvement" in the definition of ''Property Assessed Clean Energy financing'' covers any work authorized under the PACE program in the consumer's state;

- Apply the TILA-RESPA integrated disclosure (TRID) requirements to PACE transactions, including the timing of the disclosures, and also:

    - clearly include the annual administrative fee for the PACE loan in the projected payments;

    - add specific late fees associated with late tax payments;

    - include a stronger statement about the consequences of non-payment;

    - require disclosure of the contact information for the PACE company under the category for PACE company even if the company is also a mortgage broker;

    - require disclosure of the contact information for the home improvement contractor;

    - provide enhanced disclosures to PACE borrowers who pay their property taxes through an escrow account;

    - permit the use of an alternative brand name rather than "PACE" in the disclosures only if it is used consistently throughout the program's marketing materials and financing documents;

    - exempt PACE creditors from the existing disclosure requirement for the type of loan;

    - include appraisal disclosures in the proposed PACE Loan Estimate;

    - enhance the partial payment disclosure; and

    - expand the warning about the potential need to pay off the loan upon sale to include refinances and additional mortgage loans on the property;

- Adopt a partial exemption, rather than the proposed complete exemption, to the periodic statement requirement, and:

    - require an annual statement that gives the PACE borrower essential account information;

- Require PACE companies, for all PACE loans, to:

    - determine if the borrower has a mortgage and, if so, whether there is an escrow; and

    - notify the escrow department of the mortgage servicer of the additional tax liability within 30 days of the recording of the PACE lien.

Below we comment in detail on the proposed rule. In addition, as noted in the comments from Americans for Financial Reform's coalition, we urge the Bureau to look more broadly at affordability in energy efficiency financing and to work across the federal government, including through implementation of the Inflation Reduction Act, to ensure that other products are sustainable for consumers and that consumer protection problems are identified early in the process.

B. The Bureau has made appropriate amendments to clarify that PACE is "credit" under TILA.

The Economic Growth, Regulatory Relief and Consumer Protection Act of 2018 (EGRRCPA)[10] amended the Truth in Lending Act (TILA) to require the Bureau to issue regulations addressing the application of the general TILA ability-to-repay standards to PACE loans, including by providing for its unique characteristics. In the absence of any contrary indication from Congress, the directive to write regulations under this TILA provision assumes that PACE loans be treated as credit for purposes of TILA. In fact, the Bureau would have no authority to issue regulations under TILA for PACE loans if they were not credit, as TILA applies to consumer credit transactions primarily for personal, family or household purposes.[11]

[10] Pub. L. No. 115-174, 132 Stat. 1296 (2018).
[11] 12 C.F.R. § 1026.1(c)(1).

As we discussed in detail in our comments to the Advanced Notice of Public Rulemaking (ANPR), the history and text of the TILA and Regulation Z make clear that PACE loans constitute credit, and they are not exempt from TILA's credit purview based on their association with the tax system. We stated that the exclusion for "tax liens" and "tax assessments" in the current commentary to Regulation Z (Official Interpretations § 1026.2(a)(14)-1) was intended to exclude involuntary obligations not contracted for between the parties, and therefore should not apply to PACE loans.

We applaud the Bureau for proposing to amend the commentary to clarify that PACE transactions are credit under TILA and Regulation Z. Comment 2(a)(14)–1.ii would be amended to state that "involuntary tax liens, involuntary tax assessments, court judgments, and court approvals of reaffirmation of debts in bankruptcy" are not considered credit for purposes of the regulation." This correctly ensures that TILA applies generally to PACE transactions.

Various disclosure and other requirements under TILA apply to the "creditor" as defined in § 1026.2(a)(17), and other requirements apply to a "loan originator" as defined in § 1026.36(a)(1). For PACE transactions, the Bureau has noted that the government sponsor in a PACE transaction typically is the creditor, and that a "PACE company"[12] or home improvement contractor could be a loan originator depending upon their role in the transaction. This is consistent with our understanding of the roles of the various entities in PACE transactions.

We strongly support the Bureau's clarification in the commentary that PACE transactions are credit and its decision to apply all of the regulatory framework under Regulation Z to PACE, subject to certain limited changes and exemptions. We will address those changes below, and do not believe that any additional amendments related to the treatment of PACE as credit are warranted for PACE transactions.

C. The Bureau has correctly applied to PACE loans, without any amendments, the requirements for high-cost mortgages under sections 1026.32 and 1026.34, but should clarify that late fees that apply to all property tax assessments should be subject to HOEPA's limitations on late fees.

Proponents of PACE have suggested that using the tax assessment structure as a financing tool results in cost savings to consumers. This is not consistent with our experience. In fact, the PACE financing structure, involving multiple entities that participate in the municipal bond and

[12] In our ANPR comments, we referred to the private companies that handle the underwriting and origination of PACE loans as "program administrators." Based on the definition the Bureau has provided of a "PACE company," we believe that the terms "program administrator" and "PACE company" refer to the same entity. Thus, we shall use "PACE company" in these comments in referring to a program administrator.

securitization process, has resulted in above-market interest rates and high costs and fees being imposed on borrowers.

The Bureau's Report on PACE loans similarly found that PACE loans have interest rates that are substantially higher than rates for mortgages or home equity loans, and they have high fees for the size of the loans.[13] The Report concluded that more than a third have APRs or fees that were high enough to meet the definition of a "high-cost mortgage" under Regulation Z.

We support the Bureau's proposal to apply the high-cost loan requirements under §§ 1026.32 and 1026.34 to PACE without any amendments. The Home Ownership and Equity Protection Act (HOEPA), and subsequent amendments under the Dodd-Frank Act, were intended to protect vulnerable consumers from some predatory lending practices by providing additional consumer protections for a class of relatively expensive home mortgage loans. PACE loans that meet the statutory definition for high-cost loans should be subject to the same prohibited acts and practices related to high-cost mortgages.

State property tax laws impose significant penalties on homeowners when tax assessments are not timely paid. These include late payment fees in the form of a lump-sum dollar amount and a percentage charge of additional interest, based on the amount of the delinquent tax payment. For PACE borrowers, these fees must be paid in addition to interest at the note rate under the assessment contract. Like the assessment itself, the additional interest and penalties are a lien against the property until they are paid.[14] For PACE borrowers who have a high-cost PACE loan and are experiencing a financial hardship, these penalties and additional interest would make it more difficult for them to cure a payment default, and put them at risk of foreclosure of both the PACE loan and any pre-existing mortgage. Thus, we urge the Bureau to clarify that for purposes of § 1026.34(a)(8), the restrictions on late fees apply to any late payment charge in connection with a high-cost PACE loan, either imposed by the terms of the assessment contract or under property tax law.

D. The Bureau's proposal to exempt PACE loans that are higher-priced mortgage loans from the escrow requirement under section 1026.35(b) is reasonable, but the Bureau should require for all PACE loans that the consumer's mortgage company be promptly notified of the PACE assessment.

The Bureau believes that requiring escrow accounts for PACE loans that are higher-priced mortgage loans would provide little or no benefit to consumers, and would impose a substantial burden on the PACE industry. The Bureau has proposed to add § 1026.35(b)(2)(i)(E) to exempt PACE transactions from the HPML escrow requirement. We agree with this approach, in part

[13] *See* Siobhan McAlister & Ryan Sandler, *Property Assessed Clean Energy (PACE) Financing and Consumer Financial Outcomes*, Consumer Financial Protection Bureau (May 2023), at 12-15.
[14] *See, e.g.*, Cal. Str. & H. Code § 5898.30.

because it would be unnecessarily complicated and confusing for borrowers to have a separately administered escrow impound for PACE assessments when those assessments must be paid as part of a property owner's annual property tax bills.

We do believe, however, that when a PACE borrower is already escrowed for property taxes with their mortgage company, the PACE company should be required to notify the mortgage company of the PACE transaction. Specifically, we strongly encourage the Bureau to require, with respect to all PACE loans, that PACE companies:

(a) determine before executing any PACE assessment contract whether the PACE borrower has a mortgage and, if so,

(b) determine whether the borrower pays their property taxes through an escrow account[15]; and, if so,

(c) provide a written notice to the escrow department of the borrower's mortgage company within 30 days of recording the PACE assessment lien that includes the amount and timing of the first annual PACE assessment that will be included with the borrower's property tax bill.

According to the Bureau's PACE data, nearly three-fourths of PACE borrowers had a mortgage at the time their PACE transactions were funded, and a "large proportion of PACE borrowers already may have escrow accounts."[16] When a homeowner has a mortgage loan with an escrow account for property taxes, the homeowner will make payments on the PACE assessment as part of the monthly escrow payment to the mortgage servicer. Due to the mechanics of escrow accounts, the vast majority of escrowed borrowers will end up paying significantly more each month in connection with the PACE assessment than 1/12 of the annual PACE assessment cost.

Mortgage servicers review escrow accounts and adjust escrow payments to reflect any changes in the property charges once every 12 months starting when the escrow account is first established. The annual escrow review date is not tied to the fixed date when property tax bills are issued. As a result, annual reviews are often conducted before the coming year's property tax bills are issued. When that happens, the escrow payment calculation will not reflect the actual amounts due. If there is a large, unanticipated increase in the property tax bill, such as a PACE assessment, the servicer will advance the full amount when it comes due, but the escrow account will carry a deficiency forward. At the next annual escrow account review, the servicer will calculate the new escrow payment by adding to the base payment (1/12 of the actual

[15] As discussed below in Section G, this determination will also be necessary in connection with the PACE company's consideration of the borrower's ability to repay the PACE loan.
[16] 88 Fed. Reg. 30398 (May 11, 2023).

annual property charges) a reserve cushion of up to 1/6 of the annual property charges, an amount sufficient to repay the deficiency (*i.e.*, the prior year's PACE assessment payment) plus an amount to cover the upcoming PACE assessment that was not accounted for in the prior year's escrow analysis (called an escrow shortage). These adjustments will result in a sharp increase in the escrow payment many months – in some cases more than a year – after the homeowner took out the PACE loan.

The way PACE programs currently handle the interplay between PACE assessments and escrow impound accounts is woefully insufficient to address and minimize this predictable kind of payment shock. Instead of providing an estimate of the potential downstream effects of a PACE assessment on an existing escrow payment and helping the PACE borrower communicate with the mortgage servicer's escrow department, PACE programs generally just offer vague recommendations that borrowers contact their lenders about the anticipated increase in the property tax bill. For example, the sample HERO Financing Program Application that we attached as Exhibit 1 to our ANPR comments included the following statement: "If your lender requires an impound for your property taxes, please consider notifying them of the annual assessment payment amount so they can adjust your impound amount."

Leaving it up to the homeowner to manage the necessary escrow payment adjustments does not work. In case after case, advocates have found that PACE borrowers experience severe payment shocks when a mortgage servicer finally takes a PACE assessment into account in an escrow payment calculation.[17] The PACE borrowers either did not know how to request an adjustment or tried to do so unsuccessfully.

The PACE company, which has all the paperwork and numbers readily available, and which is in a much better position to understand the mechanics of escrow accounts, is the party best situated to notify the mortgage servicer's escrow department of the anticipated increase in the property tax bill due to a PACE assessment. While such a notification will not guarantee that the mortgage company will conduct a timely "short year" escrow account review before the next scheduled annual review in every case, it will significantly increase the likelihood that the borrower will be able minimize the payment shock resulting from the PACE assessment.

As discussed in more detail in Section E.1.b.i below, the Bureau should also require PACE companies to provide enhanced disclosures to PACE borrowers who pay their property taxes through an escrow account.

[17] *See, e.g.,* Comments of the California Low-Income Consumer Coalition to the Advanced Notice of Public Rulemaking at 13 (May 7, 2019).

E. The Bureau's application to PACE loans of the TILA-RESPA Integrated Disclosure (TRID) requirements under sections 1026.37 and 1026.38 is necessary to curb PACE abuses, and should be finalized with several additional modifications.

Most consumers begin their involvement with PACE when a home improvement contractor knocks on their door or calls them to make a sales pitch for the program. This marketing is done in coordination with PACE companies, with PACE loans originated through contractor referrals. The goal of home contractors and PACE companies is to close the deal as quickly as possible. This process is aided by the rapid exchange of information between the contractor and PACE company, through the use of online contractor portals and mobile applications.

Consumers initially receive information about PACE orally from the contractors who come to their homes to bid jobs and offer financing options. Claims and misrepresentations made by PACE contractors regarding PACE financing have been and continue to be a major problem. Contractors frequently misrepresent the character, cost, and consequences of financing a project through PACE. Among other false and misleading claims, contractors have told consumers that PACE is a free government program that would not increase their property tax bill. Some home contractors have made use of their arrangement with PACE companies and local government sponsors to further deceptive practices. For example, as we stated in our ANPR comments, one Florida contractor solicited consumers by using an official-looking approval "NOTICE" with government seals, and the caption "STATE OF FLORIDA GOVERNMENT APPROVED," with the contractor listed as "coordinator for the Pasco County approved program" for PACE.

Consumers often go into PACE loans unaware of the costs, payment obligations, placement of liens, and risks related to the operation of tax assessments, including the potential for tax foreclosure. Entering into such an arrangement requires the time and information necessary to make such an important decision.

Based on this background, and because PACE loans are mortgage loans, we strongly support the Bureau's application of the TILA-RESPA Integrated Disclosure (TRID) requirements to PACE loans. Providing consumers with access to consistent information, through model forms (appendix H–24(H) and appendix H–25(K)) that contain PACE-specific TRID disclosures, may help consumers understand PACE loans despite contractor coercion and misrepresentations.

As mentioned, the goal of home contractors and PACE companies is to have consumers enter into PACE transactions as quickly as possible. This point-of-sale marketing has prevented consumers from considering other financing options or understanding the true costs and implications of PACE assessments. Thus, the Bureau's proposal to apply the timing requirements for the Loan Estimate and Closing Disclosure to PACE transactions without any modifications is critically important and will give consumers the time needed to reflect on the gravity of the PACE transaction.

The following are our comments on the specific disclosures and our recommendations for further modifications to improve the contents of the Loan Estimate and Closing Disclosure, reflecting the characteristics of PACE loans.

1. Content of Disclosures (Loan Estimate) - Section 1026.37

a. Section 37(p)(1) – Itemization

Section 1026.37(c)(1)-(5) requires creditors to disclose a table itemizing periodic payments for the loan under the heading "Projected Payments." Section 1026.37(c)(2)(iii) requires the disclosure of the amount payable into an escrow account (labeled "Escrow"), with a statement that the amount disclosed can increase over time. The Bureau has proposed to exempt PACE from the escrow account payment disclosure requirements, under proposed § 1026.37(p)(1). We do not oppose this exemption as we are not aware of escrow accounts being imposed by PACE creditors in connection with PACE transactions.

b. Section 37(p)(2) - Taxes, Insurance, and Assessments

Section 1026.37(c)(4)(ii) requires creditors to include in the projected payments table information about taxes, insurance, and assessments, with the label "Taxes, Insurance & Assessments." Section 1026.37(c)(4)(iii) - (vi) requires various statements related to this disclosure. The Bureau has proposed under § 1026.37(p)(2)(i) and (ii) to retain most of these requirements for PACE loans.

Under property taxes, the proposed Loan Estimate includes a more specific statement regarding the PACE payment, and is labeled ''PACE Payment.'' A statement about other property taxes would be labeled ''Property Taxes (not including PACE loan).'' Proposed § 1026.37(p)(2)(ii) would replace the existing disclosures with a statement that the PACE loan will be part of the property tax payment and a statement directing consumers who have a mortgage with an escrow account to contact their servicer find out what the consumer will owe and when. While we generally support these changes, we believe the Bureau should require a more specific and informative statement for consumers who pay their property taxes through an escrow account, and that other changes to the projected payments tables should be made to avoid confusion by consumers.

i. Escrow Statement

For PACE transactions, proposed § 1026.37(p)(2)(ii) would require, among other things, a statement directing the consumer, if the consumer has a pre-existing mortgage with an escrow account, to contact the consumer's mortgage servicer for what the consumer will owe and when. Given how escrow accounts are actually managed by mortgage servicers, it is doubtful that a borrower could simply obtain information about the amount and timing of their escrow payment incorporating a new PACE assessment by contacting the servicer. In order to determine those changes, the servicer will need specific information about the amount and timing of the PACE assessment in order to conduct a short year escrow account review. Moreover, the proposed statement does not inform the borrower that the PACE assessment will cause the escrow payment to increase by more than 1/12 of the annual PACE assessment charges.

We therefore believe that the Bureau should require PACE companies to provide a statement that will more clearly inform the consumer about both the expected impact of the PACE assessment on their escrow payment and the steps they need to take in order to have their escrow payment adjusted in a timely manner. We propose the following disclosure for borrowers who have a mortgage and pay property taxes through an escrow account:

> *If you pay your property taxes through monthly escrow payments to your mortgage company, adding this PACE assessment to your property tax bill will increase your monthly escrow payment. This increase will be at least $[INSERT 1/12 of total amount due annually for PACE assessment + fees] per month and may also include additional charges to insure that your escrow account has sufficient funds when your property bill comes due. We will notify your mortgage company of this PACE assessment, and you should also contact them to request a "short year" review of your escrow account so that your escrow payment can be adjusted appropriately.*

ii. Mortgage Insurance

Under the label "payment calculation" on the proposed PACE Model Form in Appendix H-24(H), a category for "Mortgage Insurance" has been retained from the existing model form, listed below the principal and interest payment. We are not aware of any insurance products similar to mortgage insurance that are required or sold in connection with PACE loans. If the disclosure is retained, however, we believe the label should be changed to "PACE loan insurance." This will avoid any confusion a consumer may have if they are paying for mortgage insurance on a pre-existing mortgage.

iii. PACE Annual Administrative Fee

It appears that the projected payments table on proposed PACE Model Form omits a payment obligation common to PACE loans. PACE borrowers are typically required to pay an annual administrative fee. Unlike the one-time administrative fee paid at closing, this fee is paid annually, and generally covers the costs of servicing the assessment payments by the local tax collector during the loan term. We believe this fee should be disclosed in the Payment Calculation box. We urge the Bureau to add a category for "Annual Administrative Fee," with a notation that the amount is subject to change during the loan term.

c. Section 37(p)(3) - Contact Information

i. PACE Company

Section 1026.37(k) requires disclosure of certain contact information, under the heading "Additional Information About this Loan." A creditor must disclose the name and NMLSR ID, license number, or other unique identifier for the creditor (labeled "Lender") and mortgage broker (labeled "Mortgage Broker), similar information for the loan officer (labeled "Loan Officer) of the creditor and the mortgage broker who is the primary contact for the consumer, and the email address and telephone number of the loan officer.

Proposed § 1026.37(p)(3) would require similar disclosures for PACE companies, requiring disclosure of the PACE company's name, NMLSR ID (labeled "NMLS ID/License ID"), email address, and telephone number of the PACE company (labeled "PACE Company"). Proposed comment 37(p)(3)–1 would clarify that if the PACE company is a mortgage broker as defined in § 1026.36(a)(2), the PACE company should be disclosed as a mortgage broker and the space for PACE company should be left blank.

We support the proposed modifications to the model form, but urge the Bureau to reject proposed comment 37(p)(3)–1. PACE companies engage in numerous activities related to the underwriting process that go well beyond the services of a mortgage broker. From the consumer's perspective, PACE companies are not perceived as mortgage brokers. To avoid any confusion, we believe that the name and contact information of the PACE company should be listed in all cases in the space for the PACE company. If the PACE company is also a mortgage broker, this information could be listed in both places on the form.

ii. PACE Company Definition

The proposed regulations for PACE loans refer to a "PACE company," which is defined in proposed § 1026.43(b)(14) as a "a person, other than a natural person or a government unit, that administers the program through which a consumer applies for or obtains PACE financing."

This definition is broad enough to apply to the functions of the current PACE program administrators. However, because the definition relies upon the general word "administers" and does not provide examples of the various functions, we are concerned that future contracts between the local government PACE sponsor and PACE companies may try to evade the definition by including conclusory statements that the program is "administered" by the local government PACE sponsor.

Thus, we are pleased that the Bureau has also proposed comment 43(b)(14), which provides non-exclusive examples of what it means to administer a PACE program: "Indicia of whether a person administers a PACE financing program for purposes of § 1026.43(b)(14) include, for example, marketing PACE financing to consumers, developing or implementing policies and procedures for the origination process, being substantially involved in making a credit decision, or extending an offer to the consumer." We support the adoption of this comment and suggest that the Bureau consider adding additional examples to the comment, such as "accepting and processing loan applications, obtaining credit, title, valuation and other reports used in making a credit decision, processing and finalizing the issuance of contractual assessment documentation and financing disclosures, and transferring data related to the PACE assessment to the local government PACE sponsor."

iii. Home Improvement Contractor

As discussed earlier, home improvement contractors play a significant role in the marketing of PACE loans, and are the source of many of the worst consumer abuses. In some cases, contractors have not only defrauded consumers but also PACE companies. For example, in revoking the PACE administrator license of Renovate America, the California Department of Financial Protection and Innovation found that despite Renovate's extensive fraud protection protocols, contractors were still able to submit false documents in order to get PACE loan approvals.[18] Some contractors even hired actors to pose as the consumer when confirmation calls were made.

Given the enormous problems with contractor abuse and the inability of PACE companies to effectively protect consumers from this abuse, we urge the Bureau to require disclosure on the PACE model form of the home improvement contractor, listing the contractor's name, state contractor license number, email address, and telephone number. Because unscrupulous

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[18] Press, Release, DFPI Moves to Revoke PACE Administrator's License After Finding Its Solicitor Defrauded Homeowners, June 4, 2021, available at: https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/06/DFPI-Press-Release_Renovate-PACE-Revocation_060421.pdf

contractors often operate under different names and corporate entities, this disclosure may alert consumers of a potential problem if they see that the creditor or PACE company has listed a contractor on the disclosure form that is different from the contractor they have been dealing with.

d. Section 37(p)(4) - Assumption

Section 1026.37(m)(2) requires the creditor to disclose a statement of whether a subsequent purchaser of the property may assume the remaining loan obligation, labeled “Assumption.” The Bureau believes this disclosure requirement could be misleading for PACE loans because PACE payment obligations typically transfer with the sale of the property. Instead, proposed § 1026.37(p)(4) would require a statement concerning a risk consumers may face when they try to sell the property. The proposed statement would state that if the consumer sells the property, the buyer or the buyer’s mortgage lender may require the consumer to pay off the PACE transaction as a condition of the sale. Proposed § 1026.37(p)(4) requires this disclosure to be labeled “Selling the Property.”

We support this change but believe it does not go far enough in warning consumers about similar risks with PACE transactions when the consumer attempts to refinance an existing mortgage or obtain a new mortgage on the property. The Bureau should add a new disclosure, labeled “Refinancing a Mortgage,” stating: “If you refinance a mortgage or seek other financing on the property, the mortgage lender may require you to pay off the PACE loan as a condition of the financing.” Alternatively, this disclosure could be added to the “Selling the Property” disclosure.

e. Section 37(p)(5) - Late Payment

Section 1026.37(m)(4) requires the creditor to disclose a statement detailing any charge that may be imposed for a late payment, as a dollar amount or percentage, and the number of days that a payment must be late to trigger the late payment fee, labeled “Late Payment.” Proposed § 1026.37(p)(5) would require PACE creditors to include one or more statements relating to late charges, as applicable.

If a late fee is imposed by the assessment contract, proposed § 1026.37(p)(5)(i) mirrors the existing regulation and would require a statement detailing the late fee, stated as a dollar amount or percentage charge, and the number of days that a payment must be late to trigger the late payment fee, labeled ‘‘Late Payment.’’ Proposed comment 37(p)(5)–1 would clarify that a charge is specific to the PACE transaction if the property tax collector does not impose the same charges for general property tax delinquencies. We support these changes.

In addition, if the late fee is imposed under property tax law for all tax obligations and not specific to the PACE transaction, proposed § 1026.37(p)(5)(ii) would require either a statement notifying the consumer that if the consumer's property tax payment is late, they may be subject to penalties and late fees set by their property tax collector, as well as a statement advising the consumer to contact the tax collector for more information. Alternatively, the creditor may include a statement describing any charges that may result from property tax delinquency, which may include dollar amounts or percentage charges and the number of days a payment must be late to trigger the fee. The Bureau made this proposal based on the view that it may be challenging for PACE creditors to disclose all late charges associated with a property tax default, in part because some states impose several types of late charges that may change based on the length of the delinquency or other factors.

We urge the Bureau to reject proposed § 1026.37(p)(5)(ii). The charges and penalties for late tax payments are clearly established under state and local law and are well-known to PACE creditors. The dollar amounts or percentage charges rarely change, as the laws that set them are almost never amended. In most jurisdictions, these charges and penalties are already disclosed on tax bills sent by local tax collectors, and are published on the tax collector's website.

PACE borrowers should have this specific information about the potential charges and penalties if their assessments are not timely paid when they consider borrowing with a PACE loan. It will also serve as another reminder to PACE borrowers about the nature and consequences of a loan program being operated through the property tax assessment structure. It is not sufficient to provide only a generic disclosure that "you may be subject to penalties and late fees established by your property tax collector." Disclosing specific information is not burdensome on PACE creditors as this information is readily available, and some PACE creditors already provide it on disclosure forms. For example, the sample Financing Estimate and Disclosure form for the California HERO program that we attached as Exhibit 1 to our ANPR comments included the following disclosure: "If your property tax payment is late, the amount due will be subject to a 10% penalty, late fees, and 1.5% per month interest penalty as established by state law and your property may be subject to foreclosure."

f. Section 37(p)(6) - Servicing

Section 1026.37(m)(6) requires the creditor to disclose whether the creditor intends to service the loan or transfer the loan to another servicer, using the label "Servicing." We agree with the Bureau's observation that PACE transactions do not appear to be subject to transfer of servicing rights.

In lieu of the existing servicing transfer disclosure, proposed § 1026.37(p)(6) would require the PACE creditor to provide a statement about how the consumer will pay the PACE transaction, including this statement on the proposed model form: "You will pay your PACE loan as part of your property tax payment. If you have a mortgage escrow account that includes property tax payments, contact your mortgage servicer for what you will owe and when. Otherwise you will pay your taxing authority directly." Proposed § 1026.37(p)(6) would retain the label "Servicing" for the disclosure.

Because proposed § 1026.37(p)(2)(ii) already includes a statement in the Loan Estimate section of the form directing consumers who have a mortgage with an escrow account to contact their servicer to find out what the consumer will owe and when (which will hopefully be modified as we suggest in Section E.1.b.i above), we believe that a more effective statement for proposed § 1026.37(p)(6) would be as follows: "You will pay your PACE loan as part of your property tax payment. If you have a mortgage escrow account that includes property tax payments, the PACE loan will increase the amount your servicer pays for your property taxes, and this in turn will increase your monthly mortgage payment. If you pay your property tax bills directly and you have a mortgage, failure to pay your PACE loan as part of the property tax bill could result in your mortgage servicer requiring that your property taxes be paid monthly through a mortgage escrow account."

g. Section 37(p)(7)(i) - Unit-Period

Because PACE loans are paid with property tax payments generally made once or twice a year, the Bureau notes that the applicable unit-period would typically be annual or semi-annual. Thus, the proposed PACE model form would use "annual" in the tables disclosing loan terms and projected payments. Proposed § 1026.37(p)(7)(i) would provide that, wherever the proposed form uses "annual" to describe the periodic payments or applicable unit-period, the creditor shall use the appropriate term to reflect the transaction's terms, such as semi-annual payments. We support this amendment.

h. Section 37(p)(7)(ii) - PACE Nomenclature

The Bureau believes that PACE companies may use marketing materials that rely upon brand names that do not include ''Property Assessed Clean Energy'' or ''PACE.'' We agree this could occur, as it was certainly true with the HERO program in California operated by the former program administrator, Renovate America.

To increase consumer awareness that the Closing Disclosures are being provided for PACE transactions, proposed § 37(p)(7)(ii) would clarify that wherever § 1026.38 or the model form requires disclosure of the term ''PACE,'' the creditor may substitute the name of a specific PACE financing program that will be recognizable to the consumer. Proposed comment 37(p)(7)(ii)–1 gives an example, substituting the name "XYZ Financing" for PACE.

We support these changes but urge the Bureau to modify comment 37(p)(7)(ii)–1 by stating that the alternative name may be used only if it is used consistently throughout the program's marketing materials and financing documents. If the assessment contract or other transaction documents, and information on the creditor or PACE company's website, use ''Property Assessed Clean Energy'' or ''PACE'' along with the alternative name, it will be difficult to determine whether the alternative name or PACE is most recognizable to the consumer. In that situation, we believe the TRID disclosure forms should not be modified and should refer to PACE and PACE loan.

i. Other Loan Estimate Requirements Not Addressed in the Proposed Rule

1. Section 1026.37(a)(11) - Loan Type

Section 1026.37(a)(11) requires disclosure of the type of loan offered to the consumer, labeled "Loan Type," using one of the following terms, as applicable: "Conventional," "FHA," "VA," and a blank space for other loans. The proposed PACE model Loan Estimate form retains this disclosure without modification. No discussion is provided by the Bureau about this requirement in the section-by-section analysis.

We do not believe this information is needed or helpful for PACE loans, and possibly could be confusing. PACE loans are never FHA insured or VA guaranteed loans. While the creditor or PACE company could possibly insert "PACE loan" in the blank space, this would not be consistent with § 1026.37(a)(11) because the other category is for federally-insured or guaranteed loans other than FHA and VA loans, and for loans insured or guaranteed by a state agency. Thus, the creditor or PACE company would need to check the box for "conventional," which is not an accurate description for a PACE loan. We request that the Bureau either exempt PACE creditors from the requirements under § 1026.37(a)(11) or modify the disclosure on the PACE model form to delete the inapplicable categories under Loan Type and add an option for "PACE loan."

2. Section 1026.37(m)(1) - Appraisals

For transactions subject to 15 U.S.C. § 1639h or § 1691(e), § 1026.37(m)(1) requires a statement labeled "Appraisal "containing certain information about appraisals, under the heading "Additional Information About This Loan" and the subheading "Other Considerations." This regulation implements disclosure requirements for the provision requiring appraisals for "higher-risk mortgages" that was added to TILA as part of the Dodd-Frank Act. For mortgage loans with an annual percentage rate that exceeds the average prime offer rate by a specified percentage, creditors are required to obtain an appraisal meeting certain standards, give applicants a notification regarding the use of the appraisal, and give applicants a copy of the written appraisals used.

Section 1026.37(m)(1) is implemented on the existing Loan Estimate by including this statement for appraisals: "We may order an appraisal to determine the property's value and charge you for this appraisal. We will promptly give you a copy of any appraisal, even if your loan does not close. You can pay for an additional appraisal for your own use at your own cost." This disclosure is omitted from the proposed PACE Loan Estimate model form, and there is no discussion in the section-by-section analysis related to this requirement. Curiously, the PACE Closing Disclosure model form does include an appraisal disclosure.

Appraisals play an important role in PACE loan underwriting. State law and program guidelines for most PACE programs require that the PACE loan amount not exceed a certain percentage of the property value. Thus, appraisals are typically required by PACE creditors. We request that the Bureau explicitly implement § 1026.37(m)(1) with respect to PACE transactions and include appraisal disclosures in the proposed PACE Loan Estimate model form.

2. Content of Disclosures (Closing Disclosure) - Section 1026.38

a. Section 38(u)(1) - Transaction Information

Section 1026.38(a)(4) requires disclosure of identifying information for the borrower, the seller, where applicable, and the lender, under the heading ''Transaction Information." Proposed § 1026.38(u)(1) would additionally require the Closing Disclosure model form for a PACE transaction to include the name of any PACE company involved in the transaction, labeled ''PACE Company.'' We support this modification.

b. Section 38(u)(2) - Projected Payments

Under § 1026.38(c)(1), the Closing Disclosure must disclose the information in the projected payments table required on the Loan Estimate under § 1026.37(c)(1)–(4), with certain exceptions. Proposed § 1026.38(u)(2) would retain this structure but would 1) delete the escrow account information from the periodic payment disclosure, 2) require the creditor to disclose whether the amount disclosed for estimated taxes, insurance, and assessments includes payments for the PACE loan, and 3) require a statement that the PACE loan will be part of the property tax payment and a statement directing consumers who have a mortgage with an escrow account to contact their servicer to find out what the consumer will owe and when.

We generally support these changes but request that the Bureau consider our comments about the Loan Estimate in section E.1 above concerning potential confusion by including a disclosure for mortgage insurance, the omission of the projected payment for the annual administrative fee, and our suggestion for revising the statement for borrowers who have a mortgage with an escrow account.

c. Section 38(u)(3) – Assumption

Under Additional Information About This Loan, the Bureau has proposed changes similar to the Loan Estimate under the label "Selling the Property." We support this change but request that the Bureau consider our suggestion for an additional disclosure related to refinancing a mortgage as discussed in section E.1.d above.

d. Section 38(u)(4) - Late Payment

Proposed § 1026.38(u)(4) would make changes to the disclosure of late payment charges on the Closing Disclosure that are consistent with the changes that would be made to the Loan Estimate. We urge the Bureau to reject the incorporation of proposed § 1026.37(p)(5)(ii) in proposed § 1026.38(u)(4), for the reasons stated in section E.1.e above.

e. Section 38(u)(5) - Partial Payment Policy

Section 1026.38(l)(5)(i)-(iii) requires disclosure of whether the creditor accepts partial payments and, if so, whether the creditor may apply the partial payments or hold them in a separate account. The Bureau believes the existing disclosures are not helpful to PACE borrowers because 1) they may be paying the loan through their mortgage escrow account, and 2) the taxing authority, not PACE creditor, determines if partial payments may be accepted. Thus, proposed § 1026.38(u)(5) would require the creditor to disclose a statement instructing the consumer to contact the mortgage servicer about the partial payment policy for the account if the consumer has a mortgage escrow account for property taxes, and to contact the tax collector about any partial payment policy if the consumer pays the property taxes directly.

One of the greatest risks with PACE loans is that borrowers are not given the opportunity to pay the loan in monthly installments like most other loan products. After a PACE assessment is entered on the local tax roll, the county or taxing authority includes it in the consumer's tax bill along with other real estate taxes. The PACE assessment is not separately billed, so the consumer must pay the PACE installment together with all other taxes and special assessments that come due. A significant challenge to PACE borrowers whose assessment is not being paid through a mortgage escrow account is that state tax laws generally prohibit assessments to be paid in monthly installments.[19] Instead, assessments are generally paid bi-annually or annually.

Partial payments typically are not accepted and will be returned to the taxpayer by the tax collector. Once returned, the entire tax payment, including the PACE assessment, is considered delinquent. PACE borrowers who have not adequately budgeted for the annual assessment payment (which for example would be approximately $3,200 on a $35,000 PACE loan) will face default, penalties and a possible tax lien sale or judicial foreclosure.

Given this unique aspect of PACE, we believe that the disclosure under proposed § 1026.38(u)(5) is not sufficient. Consumers should be aware that they may need to make adjustments to their budget to pay the increased property tax payment. If state or local law prohibits partial payment for tax assessments, the PACE creditor should be required to disclose that in the statement for consumers who pay the property taxes directly. We suggest that the first sentence of the proposed PACE Closing Disclosure model form under Partial Payment be replaced with, if applicable: "If you pay your property taxes directly, your PACE loan will increase your property tax bill and you will need to budget for that payment because your tax collector does not accept partial payments."

f. Section 38(u)(6) - Escrow Account

Section 1026.38(l)(7) requires a statement of whether an escrow account will be established, as well as information about the effects of having or not having an escrow account, under the subheading ''Escrow Account.'' For the reasons stated for the Loan Estimate, proposed § 1026.38(u)(6) would exempt PACE creditors from the requirement. We support this change but urge the Bureau to consider our comments related to escrow accounts in Sections D and E.1.b.i above.

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[19] The San Diego County Tax Collector provides this FAQ response on partial payments:

> **Can I pay for the PACE portion of the tax bill separately?:**
> No, state law requires certain information like special assessments to be included in the bill. Special assessments are collected at the same time as property taxes. Your tax bill is due in two installments, which must be paid in full. No partial payments are allowed.

Available at: https://www.sdttc.com/content/ttc/en/tax-collection/PACE-program.html

g. Section 38(u)(7) - Liability After Foreclosure

Section 1026.38(p)(3) requires the creditor to disclose certain information about the consumer's potential liability after foreclosure. The Bureau believes that anti-deficiency protections under state law may not be applicable to the enforcement of PACE assessments. Thus, proposed § 1026.38(u)(7) would not require the creditor to include the existing post-foreclosure liability disclosure. However, if the consumer may be responsible for a deficiency after foreclosure or tax sale under state law, the creditor must include a brief statement that the consumer may have such responsibility, a description of any applicable protections provided under state anti-deficiency laws, and that the consumer should consult an attorney for additional information. This information would be under the subheading ''Liability after Foreclosure or Tax Sale.''

Based on the super-priority lien status of PACE assessments, a property tax foreclosure is not likely to result in a deficiency even if state law permits such liability. Moreover, property taxes in many states do not result in personal liability. Thus, we support the proposal that would require disclosure only if the consumer may be responsible for a deficiency after foreclosure or tax sale under state law.

h. Section 38(u)(8) - Contact Information

Proposed § 1026.38(u)(8) would require contact information disclosures for the PACE company on the Closing Disclosure similar to that required under proposed § 1026.37(p)(3). We support this proposal and urge the Bureau to add a category on the form for contact information for the home improvement contractor as suggested in section E.1.c.i above.

i. Section 38(u)(9)(i) Unit-Period

The Closing Disclosure changes in proposed § 1026.38(u)(9)(i) are identical to the Loan Estimate changes in proposed § 1026.37(p)(7)(i). We support these changes.

j. Section 38(u)(9)(ii) - PACE Nomenclature

Proposed § 1026.38(u)(9)(ii) would permit the use of brand names in the same manner as proposed § 37(p)(7)(ii). We support this proposal but urge the Bureau to modify comment 38(u)(9)(ii)-1 for the reasons stated in section E.1.h above.

k. Other Closing Disclosure Requirements Not Addressed in the Proposed Rule

1. Section 1026.38(g)(3) - Initial Escrow Payment at Closing

Section 1026.38(g)(3) requires, under the subheading “Initial escrow payment at closing,” an itemization of each amount for escrow account charges described in § 1026.37(g)(3), and the applicable aggregate adjustment. The Bureau did not propose that this information be omitted from the Closing Disclosure, and the model form retains the disclosure. To be consistent with the exemption for escrow account information in the payment calculation section of the form, and to avoid consumer confusion, we suggest that the Bureau exempt PACE creditors from the § 1026.38(g)(3) requirements.

2. Section 1026.38(p)(2) - Contract Details

Section 1026.38(p)(2) requires a statement that the consumer should refer to the appropriate loan document and security instrument for information about nonpayment, default, loan acceleration, and prepayment rebates and penalties, under the subheading “Contract Details.” The proposed PACE Closing Disclosure model form does not modify this requirement and the disclosure begins with: “See your note and security agreement for more information about ….”

The terms “note” and “security instrument” are appropriate in the mortgage context because they are commonly used in the uniform instruments and are therefore more easily recognized by consumers. The Fannie Mae/Freddie Mac Uniform Notes are labeled as “Note.” Although the uniform security instruments are labeled as “Mortgage,” “Mortgage Deed, “Deed of Trust,” or “Security Deed,” these documents use the term “security instrument” throughout and “Security Instrument” is one of the defined terms in the document (“Security Instrument means this document”).

Unlike in a mortgage transaction, the PACE loan documents do not consist of a separate note and security instrument. The PACE loan note and security obligations are typically merged in a single document. In California, this document is often referred to as the assessment contract. In Florida, the document may be referred to as the financing agreement. The terms “note” and “security instrument” are not used in the PACE documents.

We urge the Bureau to replace the terms “note” and “security instrument” in the contract details disclosure with terms that will more appropriately assist the consumer in identifying the applicable PACE transaction documents. We suggest that the creditor be required either to use the actual name on the applicable PACE contract or a general phrase such as “PACE assessment contract documents.”

3. Section 1026.38(a)(5)(iv) - Loan Type

Section 1026.38(a)(5)(iv) requires disclosure of the type of loan offered to the consumer in the same manner as § 1026.37(a)(11), labeled “Loan Type.” For the reasons discussed in section

E.9.a above, we request that the Bureau exempt PACE creditors from the requirements under § 1026.38(a)(5)(iv).

F. The Bureau should not adopt its proposal for a complete exemption to the periodic statement requirements under section 1026.41(e) for PACE Transactions but instead should require an annual statement.

Proposed § 1026.41(e)(7) would exempt PACE transactions from the periodic statement requirement. The Bureau's primary justification for the exemption is that it will reduce confusion for consumers and avoid undue burden for PACE creditors.

We believe that a complete exemption will deprive consumers of critical account information that Congress intended all consumers to have in home secured loan transactions. Neither PACE programs nor local tax collectors currently provide even basic loan-specific information for PACE loans, such as the amount of principal, interest and fees paid, a breakdown of how payments were applied, and the balance owed on the account. Consumers have no way to track the performance of the PACE loan during the loan term, to verify that payments have been applied properly, or to check whether improper fees have been charged. This section discusses why the Bureau should not completely exempt PACE loans from this requirement, but should require that consumers be given an annual statement.

In support of the blanket exemption, the Bureau stated that "PACE payments and delinquency charges are typically integrated with other property tax payments and charges and consumers may be confused about whether periodic statements include details of the PACE financing, property taxes, or both, or why the figures do not align with those in their property tax statements."[20] This integration with the tax bill is actually the cause of consumer confusion that should be addressed by the Bureau by requiring a separate statement. In most cases, all the consumer receives with respect to the PACE loan is a line item on the tax bill that may provide the name of the PACE program and a dollar amount for the assessment charge.

In the example copied below, the tax bill has two items under "Direct Assessments" for "LA HERO" and "CAFIRST," with amounts listed of $6,994.64 and $5,295.65 respectively. These PACE loan charges are included in a list of other assessments and not separately identified. This is the sum total of the information consumers may receive on an annual basis about their PACE loans.

[20] 88 Fed. Reg. 30405 (May 11, 2023).

AGENCY	AGENCY PHONE NO.	RATE		AMOUNT
GENERAL TAX LEVY				
ALL AGENCIES		1.000000	$	2,252.74
VOTED INDEBTEDNESS				
CITY-L.A. SANTA		.021297	$	47.98
METRO WATER DIST		.003500		7.88
COMMNTY COLLEGE		.035956		81.00
UNIFIED SCHOOLS		.131096		295.32
DIRECT ASSESSMENTS				
FLOOD CONTROL	(626) 458-5165		$	37.96
LACO VECTR CNTRL	(800) 273-5167			8.97
CITY LT MAINT	(213) 847-1363			42.45
COUNTY PARK DIST	(213) 738-2983			12.86
LA HERO	(800) 969-4382			6,994.64
CAFIRST	(949) 955-1500			5,295.85
LACITY PARK DIST	(213) 847-4722			33.96
TRAUMA/EMERG SRV	(866) 587-2862			69.53
LA STORMWATER	(213) 485-2422			30.26

We do not believe that a separate annual statement sent by the PACE creditor, rather than the tax collector, providing limited information only about the PACE loan will be confusing to consumers. Moreover, any possible confusion can be addressed through a notice on the statement that the information provided relates only to the consumer's PACE loan and that the consumer should refer to their tax bill for information about all other tax obligations.

Another basis asserted by the Bureau for the complete exemption is that the annual or semi-annual payment schedule for PACE loans would mean that information on a periodic statement about the next periodic payment would be received by the consumer many months before the payment is due. We agree this would not be helpful for consumers if statements were provided on a monthly basis. However, our proposal for an annual statement avoids this issue as it would simply provide the due date and amount of the next scheduled payment. We think this will assist borrowers in confirming whether they are current or in default, and will not be confusing.

The Bureau also stated that "requiring a periodic statement could impose a significant burden on the party providing the statement given that local taxing authorities would hold needed information such as whether and when payments were made or delinquency charges applied."[21] Based on the financing structure for PACE loans, through municipal bonds and private securitizations, the information about payments, loan performance, and delinquency is

[21] 88 Fed. Reg. 30405 (May 11, 2023).

currently collected and exchanged between the PACE creditors and tax collectors. The specific duties related to these functions are detailed in contracts between the tax collectors and PACE creditors (and PACE companies). PACE payments not only can be accounted for separately from other tax payments, but that must be done in order to properly apply the PACE payments to the loan obligation, to correctly assess interest and other charges, and to make disbursements to bond holders and investors.

As we stated in our ANPR comments, the monitoring of PACE payments for purposes of the bonds and securitization notes is typically done by a contractor hired by the PACE creditor (local government sponsor) and PACE company (program administrator). For example, one such contractor, David Taussig & Associates, Inc. (DTA), reviews the payment reports provided by the tax collectors, identifies delinquencies, and sends delinquency reminder letters to PACE borrowers within 10 days of receiving the tax collector's payment report. DTA also prepares lists of the properties that remain delinquent at the foreclosure deadline. Like DTA, another contractor, Willdan Financial Services, serves as the assessment administrator for the securitization by Ygrene (a PACE company) of some Florida and California PACE assessments. Willdan performs the same functions as DTA – it reviews county tax payment records, prepares reports on PACE delinquent borrowers, sends delinquency reminder letters to PACE borrowers, and provides Ygrene with a list of the PACE liens that remain delinquent and require initiation of foreclosure proceedings.

Local tax collectors and authorities already provide payment reports and other information to PACE creditors (or their contractors) that could be used to prepare an annual statement to consumers, so this requirement would not impose a significant burden on tax collectors or PACE creditors.

Finally, the Bureau stated that if the periodic statement exemption were finalized, consumers would still get information about payments and delinquency from either the tax collector or their mortgage servicer if they have a mortgage with an escrow, and that consumers could also obtain information about the PACE loan by requesting a payoff statement pursuant to § 1026.36(c)(3).

As discussed earlier, consumers do not get information about PACE loan payments, such as the amount of principal, interest and fees paid and the current loan balance, from their tax collector. In fact, the only information that is provided is the amount of the annual assessment charge. Similarly, consumers' mortgage servicers do not provide this information, and could not provide it as they have no access to the consumer's PACE loan account. The only information mortgage servicers can provide relates to the disbursements made out of the consumer's escrow account for the total tax bill (not itemized for PACE).

While it is true that consumers can request a payoff statement pursuant to § 1026.36(c)(3), many consumers are unaware of this right. Following the origination of a PACE loan, consumers are not in regular contact with the PACE creditor or a servicer (unlike in a mortgage transaction), and may only be receiving tax bills. Thus, even if a consumer knew they could request a payoff statement, they may not know to whom they should send the request. And while mortgage servicers typically provide an itemization and additional information in response to a payoff request, § 1026.36(c)(3) requires only that a statement of the total outstanding balance that would be required to pay off the loan in full be provided. There is no reason to believe that PACE creditors would provide anything other than a lump-sum figure for the payoff amount.

In sum, we urge the Bureau to modify its proposal by granting a partial exemption to the periodic statement requirement. This partial exemption would require PACE consumers to receive an annual statement that contains more limited information. Providing a statement annually is consistent with the unique characteristics of PACE, as these loans are typically paid annually or bi-annually. The statement should correspond with the timing of the annual tax year, and should be sent before the due date for the first payment due in that tax year. The statement should provide the following limited information:

- the amount due for the next scheduled payment (and a statement that the consumer should not make the payment directly if it is being paid out of the consumer's mortgage escrow account);
- the payment due date for that payment;
- the amount of any late payment fee or penalty (based on the assessment contract and state tax law), and the date when that fee will be imposed if payment has not been received;
- an explanation of the amount due, including a breakdown showing how the payment will be applied to principal, interest, and fees, the total sum of any fees or charges imposed since the last statement, and any payment amount past due;
- the total of all payments received since the last statement, including a breakdown showing the amount that was applied to principal, interest, fees and charges;
- the amount of the outstanding principal balance;
- the current interest rate in effect for the PACE loan;
- a toll-free telephone number, e-mail address, or website portal that may be used by the consumer to obtain information about the consumer's account;
- the website to access either the Bureau list or the HUD list of homeownership counselors and counseling organizations and the HUD toll-free telephone number to access contact information for homeownership counselors or counseling organizations;

Such a statement would greatly benefit PACE consumers.

G. The Bureau's application of the ability-to-repay requirements under section 1026.43 to PACE loans appropriately considers the unique nature of PACE, and should be finalized with several additional modifications.

In our ANPR comments, we urged the Bureau to issue a strong and thorough rule that explicitly applies the TILA Ability-to-Repay (ATR) requirements to PACE loans. We recommended that in addition to applying the existing ATR framework for residential mortgage loans to PACE loans, the Bureau should adopt additional consumer protections, requiring heightened standards, to account for the unique nature of PACE. Due to the increased risks associated with PACE, we stated that PACE loans should not be entitled to the Qualified Mortgage presumption.

The Bureau has proposed a number of amendments to § 1026.43 to account for the unique nature of PACE. The proposed rule would "(1) define 'PACE company' and 'PACE transaction' for purposes of § 1026.43; (2) provide an additional factor a creditor must consider when making a repayment ability determination for PACE transactions extended to consumers who pay their property taxes through an escrow account; (3) provide that a PACE transaction is not a QM as defined in § 1026.43; and (4) extend the requirements of § 1026.43 and the liability provisions of section 130 of TILA 160 to any PACE company that is substantially involved in making the credit decision."[22] The commentary is also amended to address issues related to loan stacking and pre-existing PACE loans.

We applaud the Bureau for its proposal on ATR. It will implement the Dodd-Frank and EGRRCPA ATR amendments to TILA for PACE loans and prohibit a creditor from making a PACE loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that the consumer has a reasonable ability to repay the loan according to its terms. The amendments will help ensure that consumers are not put at risk of default and home foreclosure because their PACE loans were unaffordable. We provide the following suggestions for improving the final rule.

1. Section 43(b) Definitions.

a. Section 43(b)(8) - Mortgage-Related Obligations.

Section 1026.43(b)(8) defines ''mortgage-related obligations'' to include property taxes. Section 1026.43(c)(2)(v) requires a creditor to consider the consumer's monthly payment for mortgage-related obligations in making the ATR determination. The Bureau proposes to amend comment 43(b)(8)–2 to explicitly state that payments for pre-existing PACE transactions are considered property taxes for purposes of § 1026.43(b)(8).

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[22] 88 Fed. Reg. 30406 (May 11, 2023).

While existing comment 43(b)(8)–2 already provides that all obligations that are related to the ownership or use of real property and paid to a taxing authority, including tax assessments, are property taxes for purposes of § 1026.43(b)(8), we support this amendment as it eliminates any doubt as to whether payments on pre-existing PACE assessments are related to the ownership or use of real property and must be considered in the ATR determination. The explicit reference to pre-existing PACE loans will also serve as a reminder to PACE creditors and PACE companies of the need to diligently search for other PACE assessments on the property. On this point, we suggest that the Bureau add in proposed comment 43(b)(8)–2 a reference to proposed comment 43(c)(3)–5, to instruct that if a PACE creditor knows or has reason to know that a consumer has an existing PACE loan, it cannot rely on information provided by a taxing authority or other governmental organization if the information provided is incomplete and does not include the PACE transaction.

b. 43(b)(14) - PACE Company

The Bureau proposes to add a definition of ''PACE company'' in § 1026.43(b)(14): "PACE company means a person, other than a natural person or a government unit, that administers the program through which a consumer applies for or obtains a PACE transaction."[23] Proposed comment 43(b)(14)–1 gives indicia of whether a person is administering a PACE financing program. As discussed in Section E.1.c.i above, we support the adoption of the definition and comment, and suggest that the Bureau should consider adding additional indicia to comment 43(b)(14)–1.

c. 43(b)(15) - PACE Transaction

Section 307 of the EGRRCPA amended TILA to define the term ''Property Assessed Clean Energy financing'' as "financing to cover the costs of home improvements that results in a tax assessment on the real property of the consumer." Proposed § 1026.43(b)(15) would use the same definition.

PACE was initially conceived as a program to finance energy efficiency home improvements. California and Florida have expanded their PACE programs to include other qualifying work that relates to water conservation, electric vehicle charging, fire resistance, wind resistance and hurricane hardening. It is certainly possible that states will enact or amend PACE-enabling legislation to include other qualifying projects that the legislature has found serve a valid public purpose and are in the public interest.

The phrase "home improvements" in proposed § 1026.43(b)(15) is broad and could be construed as including projects that extend beyond the building structure, such as removing

[23] 88 Fed. Reg. 30408 (May 11, 2023).

vegetation from the property's perimeter (fire hardening) or building a sea wall (hurricane hardening). However, to avoid any ambiguity and to address future uses of PACE, we suggest that the definition (or a separate comment) include the financing of any qualifying project under state law or local government assessment authority. For example, proposed § 1026.43(b)(15) should be amended to provide: "financing to cover the costs of home improvements *and other qualifying improvements under state law and local government authority* that results in a tax assessment on the real property of the consumer."

2. Section 43(c) - Repayment Ability

The Bureau has correctly determined that the existing ATR framework set out in § 1026.43(c) is appropriate for PACE loans. We strongly support this decision to apply the ATR framework largely unchanged. A proposal that weakened the verification and repayment ability requirements for PACE loans would have completely ignored overwhelming evidence of PACE loan abuses that consumer advocates have presented to the Bureau, as well as the Bureau's own data collection and analysis on the impact of PACE loans.

The Bureau seeks comment on whether § 1026.43(c) should be amended to permit or require a PACE creditor to "consider the effect of potential savings resulting from the home improvement project financed in the PACE transaction (such as lowered utility payments)."[24] We strongly urge the Bureau to reject any proposals to consider potential energy savings in the ATR analysis, as such estimates are speculative and may not materialize, leaving homeowners with greater default and foreclosure risk.

Assessments to predict energy savings are a useful tool to help homeowners determine whether proposed home improvements could increase efficiency and potentially save money, but cost-savings estimates based on such assessments are not appropriate as a means of measuring the available income of a homeowner to pay recurring charges like a PACE assessment. First, energy assessments are frequently based on general modeling that is not specific to a homeowner's property or energy usage. In fact, PACE transactions rarely if ever consider a specific property's characteristics or a specific homeowner's past energy usage and future needs, so cost-savings estimates for PACE projects are essentially guesses based on generalizations.

Second, as the Bureau notes in the wording of its question, the savings identified in an energy report are only "potential savings." It is difficult to ensure that projected savings will actually pay for the cost of increasing energy efficiency due to a number of variable factors, such as household composition, household behavior, changes in household appliance configuration, or

[24] 88 Fed. Reg. 30409 (May 11, 2023).

external factors such as natural gas prices.[25] Seasonal changes also may complicate the calculation of projected savings. For example, if a new heating system is installed during warm weather, any savings may not be realized for months even though loan payments could come due much sooner.

Experiences with "tariffed on-bill financing" are instructive.[26] In states with such programs, the costs of energy efficiency measures are placed on the utility bill and connected to the meter-based invoice, rather than tied to personal debt. The additional payment to cover the measures generally is capped at some percentage (often 75%) of the expected monthly savings. While some argue that this makes financing accessible and affordable for low-income consumers seeking to lower their utility bills, a study of one such program found that about half of participants did not actually save enough money from the energy efficiency improvements to offset the cost of the improvements.[27] If the savings don't materialize, the homeowner is still on the hook for the payments; programs that rely on projected cost-savings to pay for energy improvements put vulnerable customers at risk.

Inclusion of projected savings in underwriting, if used, would increase a borrower's maximum allowable payment and therefore would most affect a borrower already close to the cap. As a result, adding additional debt in this manner would put homeowners at greater risk of default and foreclosure, especially a concern for LMI borrowers for whom a small increase may have a significant effect on the household budget.[28] While increasing home energy efficiency can help reduce utility bills and leave more funds available to pay the mortgage and other expenses for

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[25] Fisher, Sheehan & Colton, Public Finance and General Economics, Issue 15-04 (July/August 2015).

[26] *See* National Consumer Law Center, *Tariff-based On-Bill Financing: Assessing the Risks for Low-Income Consumers* (Feb. 2023), *available at* https://www.nclc.org/wp-content/uploads/2023/02/NCLC-PAYS-issue-brief_final-2.14.23.pdf.

[27] Jeff Deason et. al, *Customer Outcomes in Pay-As-You-Save Programs*, Electricity Markets & Policy Energy Analysis & Environmental Impacts Division, Lawrence Berkeley National Laboratory, reprinted from 2022 ACEEE Summer Study on Energy Efficiency in Buildings proceeding (Aug. 2022), at 17*, available at* https://eta-publications.lbl.gov/sites/default/files/deason_aceee_2022_preprint.pdf.

[28] We have raised similar concerns about government-backed mortgage loans incorporating assumed savings through FHA Energy Efficiency Mortgages in comments on the 203(k)program and more broadly through the use of stretch ratios for GSE and government-insured loans. *See, e.g.,* Americans for Financial Reform, et. al, *Comments to Federal Housing Commissioner in response to RFI regarding the use of FHA's 203(k) Rehabilitation Mortgage Insurance Program* at 8-17, *available at* https://www.nclc.org/wp-content/uploads/2023/04/Final-Comments-on-203k-RFI.-4.17.23.pdf.

some homeowners,[29] allowing the use of projected savings of this kind to determine an individual homeowner's ability to repay a PACE loan would undermine the integrity of the underwriting process. The installation of energy efficiency measures through PACE (or otherwise) should be underwritten based on traditional factors and should not rely on potential savings to supply the cash for such payments.

a. Section 43(c)(2) - Basis for Determination

As discussed in our ANPR comments, contractors often seek to maximize their income from PACE financing by returning to a PACE borrower to sell additional and often unwanted products and services with multiple PACE loans, often through a different PACE company or PACE creditor. This "stacking" of PACE loans may also be done to evade any existing loan-to-value PACE assessment limits or other underwriting guidelines. In some cases, a contractor divides up the work for a single project and bids it out to different PACE companies, analogous to loan splitting. Contractors are able to engage in these practices because of the lag time before PACE liens are recorded and registered with the local tax collector, knowing that PACE companies may not discover that other PACE loans are being made at approximately the same time.

TILA's existing ATR rules require inclusion of previous PACE loans in the analysis for the new PACE loan. Section 1026.43(c)(2)(iv) requires consideration of "[t]he consumer's monthly payment on any simultaneous loan that the creditor knows or has reason to know will be made . . . ." Thus, the PACE creditor is required to include any other pre-existing PACE loan in the ATR analysis, whether functionally simultaneous or separated in time. However, including recent PACE loans in a new loan's ATR analysis is challenging as recent loans may not have become part of the public record by the time a new PACE loan is being underwritten.

To address concerns about ''loan splitting'' and ''loan stacking,'' proposed comment 43(c)(2)(iv)–4 would provide that a "creditor originating a PACE transaction knows or has reason to know of any simultaneous loans that are PACE transactions if the transactions are included in any existing database or registry of PACE transactions that includes the geographic area in which the property is located and to which the creditor has access." We support this proposal.

Because it is our understanding that real-time registries or database systems for tracking both recorded and unrecorded PACE assessments do not currently exist and may not be developed in all states, we believe that it is essential that PACE creditors comply with existing comment

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[29] Energy Foundation, *Mortgages on Energy Efficient Homes More Successful* (May 17, 2013), *available at* https://www.ef.org/2013/05/17/mortgages-on-energy-efficient-homes-more-successful/#:~:text=The%20IMT-funded%20study%2C%20by%20the%20University%20of%20North,robust%2C%20significant%2C%20and%20consistent%20across%20several%20model%20specifications.

43(c)(2)(iv)–2 that discusses when a creditor "knows or has reason to know" of a simultaneous loan. Thus, we urge the Bureau to retain in the final comment 43(c)(2)(iv)–4 the introductory phrase as proposed: "In addition to the guidance provided under comment 43(c)(2)(iv)–2, …."

To further strengthen the connection between these two commentary sections, and to disabuse PACE creditors from believing that compliance with proposed comment 43(c)(2)(iv)–4 by simply checking a database or registry would relieve the creditor of other due diligence in determining whether there are other PACE loans on the property, we suggest that PACE-specific guidance and examples be added to existing comment 43(c)(2)(iv)–2. For example, comment 43(c)(2)(iv)–2 should require PACE creditors to develop and follow policies and procedures that are designed to determine whether at or before consummation the same consumer has applied for another PACE transaction on the property, such as by requiring the PACE company to check with all other PACE creditors (local government PACE sponsors) that make PACE loans in the property location. Other PACE creditors will have records of applications and all approved assessments in the program even before the assessment lien is recorded. The comment should also be amended to provide that a PACE creditor is obligated to investigate further if the PACE company knows or has reason to know that the home improvement contractor involved in the PACE transaction has been involved in loan splitting or loan stacking. Similarly, a PACE creditor should be obligated to investigate further if the home improvement contract shows that the total cost of the project exceeds the program's loan-to-value PACE assessment limit.

Many PACE companies offer unsecured loans products to consumers in addition to PACE loans. Home improvement contractors are typically approved for the PACE company's unsecured and PACE loan programs, and are encouraged to market both programs to consumers, often simultaneously. For example, before the former Renovate America ended its HERO PACE program and its Benji unsecured loan product was sold in its bankruptcy case, Renovate's website had this information for contractors: "Benji is an easy, unsecured financing platform designed to provide contractors with a one-stop shop for all their financing needs. Combo/split tickets can be used with Benji and HERO, allowing contractors to finance bigger projects."

The current PACE company Home Run Financing similarly offers an unsecured loan product, Home Run Loans, which its website describes as follows: "Home Run PACE Funding can be used to finance renewable energy projects, projects that improve energy efficiency or water efficiency, and home hardening improvements related to earthquakes, wildfires and hurricanes. Home Run Loans can be used for a wide variety of home improvement projects, including the types of projects allowable under PACE plus kitchen remodels, bathrooms, flooring, room additions, accessory dwelling units, gazebos, and many other projects."[30]

[30] See Frequently Asked Home Run Loan Questions, available at: https://www.homerunfinancing.com/home-run-loans/

The Bureau’s proposed rule does not address the problem of contractors and PACE companies making other non-PACE, unsecured home improvement loans at the same time. We believe the consumer's payment obligation on any simultaneous loan, including these unsecured home improvement loans, should be considered in determining a consumer's repayment ability for the PACE loan, rather than under the more flexible considerations used for other installment debt. However, the definition of “simultaneous loan” in existing § 1026.43(b)(12) is “another covered transaction or home equity line of credit subject to § 1026.40 that will be secured by the same dwelling.” Even though the Benji-type loans are effectively a “piggyback” second-lien, and function like a split loan, they would not need to be considered under the proposed rule because they are unsecured. Consistent with the unique nature of PACE, we urge the Bureau to modify the definition of “simultaneous loan” in existing § 1026.43(b)(12) to include any unsecured loan the PACE company has made or will make at or before consummation of the PACE transaction.

b. Section 43(c)(3) - Verification Using Third-Party Records

Current comment 43(c)(3)–5 provides that ‘‘[w]ith respect to the verification of mortgage-related obligations that are property taxes required to be considered under § 1026.43(c)(2)(v), a record is reasonably reliable if the information in the record was provided by a governmental organization, such as a taxing authority or local government.’’ The comment also provides that the creditor may rely on property taxes referenced in the title report if the source of the property tax information was a local taxing authority. The Bureau proposes to amend comment 43(c)(3)–5 to clarify that a “creditor that knows or has reason to know that a consumer has an existing PACE transaction does not comply with § 1026.43(c)(2)(v) by relying on information provided by a governmental organization, either directly or indirectly, if the information provided does not reflect the PACE transaction.”[31]

For the reasons we discussed in Section G.1.a above, we support this amendment.

c. Section 43(i) - PACE Transactions

As discussed in our ANPR comments (and in Section D above), the timing of when the initial assessment payment is due in relation to when the assessment contract is signed can affect the repayment ability of a PACE borrower with a mortgage escrow account. The consumer’s mortgage servicer will account for the large increase in tax disbursements by adjusting the monthly escrow payment, and the timing of the escrow analysis in relation to when the initial assessment payment is due often causes the escrow account to have a deficiency and/or shortage. Recovery of the deficiency and/or shortage together with the payments required to fund the escrow account going forward (including the typical two-month cushion) can produce a

[31] 88 Fed. Reg. 30409-10 (May 11, 2023).

sharp increase in the monthly escrow payment amount that significantly exceeds the monthly cost of the PACE assessment. We urged the Bureau to require that PACE creditors consider the effect of this payment shock on the consumer's ability to repay.

We applaud the Bureau for incorporating the impact of a consumer's escrow payments in the ATR analysis for PACE loans by proposing to add new § 1026.43(i)(1). This provision will require that a "creditor making the repayment ability determination under § 1026.43(c)(1) and (2) also consider any monthly payments the consumer will have to pay into the consumer's escrow account as a result of the PACE transaction that are in excess of the monthly payment amount considered under § 1026.43(c)(2)(iii)." However, we have concerns about the implementation of this provision based on the Bureau's comments in the section-by-section analysis, and the Bureau's decision not to require PACE creditors to notify servicers of PACE transactions as discussed in Section D above.

With respect to the consideration of increased escrow payments, the Bureau stated that PACE creditors would "not need to assume these higher payments would be owed for the entire duration of the loan."[32] In addition, the Bureau stated that PACE creditors "would also not be required to calculate this amount as part of the consumer's monthly payment amount for purposes of § 1026.43(c)(5) or to include the amount considered under proposed § 1026.43(i)(1) in their DTI or residual income calculations required under § 1026.43(c)(2)(vii) but could do so at their option as one possible means of complying with proposed § 1026.43(i)(1)."[33]

We urge the Bureau to reconsider the requirements regarding how PACE-driven escrow payment increases due to escrow deficiencies and/or shortages are treated in the ATR determination. First, we urge the Bureau to revise the text of proposed § 1026.43(i)(1)(ii) to read as follows:

> *(ii) If<u>, based on a review of the consumer's most recent escrow account statement and consideration of when the consumer's first property tax bill reflecting the PACE transaction will be due,</u> the timing for when the servicer is expected to ~~learn of~~ <u>conduct an escrow account analysis that includes</u> the PACE transaction is likely to result in a shortage or deficiency in the consumer's escrow account, the expected effect of any such shortage or deficiency on the monthly payment that the consumer will be required to pay into the consumer's escrow account.*

Incorporating a required review of the consumer's most recent escrow account statement and considering when the property tax bill reflecting the PACE assessment will be due are essential

[32] 88 Fed. Reg. 30411 (May 11, 2023).
[33] 88 Fed. Reg. 30411 (May 11, 2023).

to making an accurate determination about whether or not the consumer is likely to face an increased escrow payment due to a shortage or deficiency and about how much that increased payment is likely to be. Since PACE creditors rely on both tax collectors and mortgage servicers to collect payments for PACE assessments, it is appropriate and reasonable that they consider these matters when determining a consumer's ability to repay a PACE loan.

Second, we urge the Bureau to revise its comments in the section-by-section analysis stating that PACE creditors would not be required to calculate the amount considered under proposed § 1026.43(i)(1) "as part of the consumer's monthly payment amount for purposes of § 1026.43(c)(5) or to include th[at] amount in their DTI or residual income calculations required under § 1026.43(c)(2)(vii)" and to add PACE to the list of loan types subject to special rules in section § 1026.43(c)(5)(ii). It is unclear how an anticipated increase in the consumer's escrow payment due to a shortage or deficiency could be meaningfully considered if it is not included in the DTI or residual income calculations. And although the increases to escrow payments due to deficiencies and/or shortages may not persist for the entire duration of a PACE loan, as the Bureau has recognized, these increases will be part of the consumer's monthly financial obligation for at least 12 months. Moreover, these payment spikes will come at the very outset of the repayment period, so the consumer will not have time to improve their financial situation or make other arrangements before facing the PACE-driven payment shock.

The Bureau has recognized that consumers taking out loans with variable rates, balloon payments or interest-only or negative amortization features should have their ability to repay determined based on the *maximum* payments they may be required to make during the loan term even if they will be able to make lower payments at other times.[34] There is no reason that a payment spike resulting from an escrow account deficiency or shortage should be treated any differently.

Moreover, the proposed rule would not require PACE creditors to notify servicers of PACE transactions. Without a notification requirement, we do not believe PACE creditors will obtain the information required to properly evaluate and help address the payment shock risk on PACE consumers. We strongly urge the Bureau to require prompt notification for the reasons stated in Section D above.

d. Section 43(i)(2) - Qualified Mortgage Presumption

Due to the heightened risks associated with PACE, the Qualified Mortgage presumption is not appropriate for PACE lending. The Bureau's directive from Congress under EGRRCPA was to establish ATR requirements that take into account the unique nature of PACE. While in many

[34] *See* § 1026.43(c)(5) (requiring creditors to calculate payments using fully indexed rates and fully amortizing payments).

ways PACE is no different from other types of mortgage products, to the extent PACE loans are unique, it is because they are riskier. PACE is a relatively new product that so far has been fraught with widespread consumer abuses, often resulting in 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 unsafe and requires a higher ATR standard with no presumption of ATR compliance.

The Bureau is proposing to apply the ATR framework to PACE transactions without providing for a QM presumption of compliance. The Bureau has provided a detailed, robust analysis of the reasons why PACE loans should not have QM status. We strongly support the Bureau's proposal and analysis.

e. Section 43(i)(3) - Enforcement

The Bureau has proposed to apply the requirements of § 1026.43 to PACE companies, and to apply section 130 of TILA to PACE companies for violations of § 1026.43. Proposed § 1026.43(i)(3) provides:

> For a PACE transaction, the requirements of this section apply to both the creditor and any PACE company that is substantially involved in making the credit decision. A PACE company is substantially involved in making the credit decision if it, as to a particular consumer, makes the credit decision, makes a recommendation as to whether to extend credit, or applies criteria used in making the credit decision. In the case of any failure by any such PACE company to comply with any requirement imposed under this section, section 130 of the Truth in Lending Act, 15 U.S.C. 1640, shall be applied with respect to any such failure by substituting "PACE company" for "creditor" each place such term appears in each such subsection.

This change is critically important and we applaud the Bureau for taking this action. Section 1640 generally makes the "creditor" liable for TILA violations. Creditor is defined in TILA as the "person to whom the debt arising from the consumer credit transaction is initially payable." For PACE, this would mean the PACE government sponsor. However, PACE government sponsors delegate the origination and underwriting process for PACE financing to private PACE companies. For PACE consumers, it is the PACE company that they perceive to be the creditor, and it is therefore entirely appropriate for the PACE company to be treated as a creditor who is responsible for compliance with § 1026.43 and subject to the remedies under § 1640 for violations of those duties.

By defining “creditor” for purposes of § 1026.43, and enforcement under § 1640, to include PACE companies, the Bureau is carrying out the mandate from Congress for the Bureau to consider the unique characteristics of PACE. The Bureau has authority to make this adjustment under EGRRCPA and under TILA § 1604(a), which permits the Bureau to issue regulations containing such “such additional requirements, classifications, differentiations, or other provisions, … as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.”

In litigation involving PACE in which borrowers have asserted claims and counterclaims, various state law defenses are often asserted that relate to the PACE loan being structured as a tax assessment. These defenses include, for example, the failure to exhaust administrative procedures for seeking a tax refund or cancellation of the PACE assessment, failure to pay the disputed tax before seeking relief, and failure to pursue claims under a state government claims act. While these defenses ordinarily apply only to government entities, private PACE companies argue that their association with the PACE government sponsor cloaks them with the same defenses and insulates them from liability. These litigation arguments have often prevented consumers who have been the victims of predatory and abusive practices in the origination of PACE loans from pursuing any effective remedies. Thus, the Bureau’s application of § 1026.43 and § 1640 to PACE companies will ensure that state assessment laws do not preclude PACE consumers from getting relief for TILA violations against PACE companies.

Thank you for the opportunity to comment on this important rulemaking. PACE is an emerging product and the proposed rule’s application of TILA and its remedies will help rein in its known abuses and provide well-needed consumer protections for PACE borrowers.

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