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May 7, 2019

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Advance Notice of Proposed Rulemaking on Residential Property Assessed Clean Energy Financing; Docket No. CFPB-2019-0011

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their 115 million members. On behalf of our members, I am writing in response to the Advance Notice of Proposed Rulemaking (ANPR) on Residential Property Assessed Clean Energy (PACE) Financing. Credit unions remain concerned with the impact PACE financing programs could have on members that participate in these arrangements due to their lack of proper disclosures, transparency, and consumer protections. For that reason, CUNA respectfully recommends the Consumer Financial Protection Bureau (CFPB) act quickly to promulgate this essential implementing regulation and extend much-needed consumer protections to the PACE financing industry.

General Comments

As PACE financing programs have grown in number over the past decade, these unconventional loan programs have remained a serious concern for credit unions, consumer groups, and other entities participating in the housing market. While the general goal of increasing access to energy efficient housing modifications is admirable, the absence of conventional consumer protections and adequate safeguards have left homeowners vulnerable and could lead to undesirable effects on the housing market. Extending robust consumer protections to PACE programs, as mandated by the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA or S. 2155), is imperative and should be a high priority for the CFPB.

To that end, the Bureau should promulgate a PACE financing rule that subjects PACE programs to the entirety of the Truth in Lending Act (TILA) while also adding additional protections for consumers. In general, the CFPB's PACE Financing Rule should address:

- Proper underwriting requirements for PACE financing, including an "ability-to-repay" (ATR) analysis based on verified and documented information about the borrower;
- Clear, understandable disclosures of the key terms, repayment, and potential impacts of a PACE lien provided to the homeowner prior to the execution of the

contract (this could be accomplished by extending the TILA-Real Estate Settlement Procedures Act (RESPA) Integrated Disclosure (TRID) Rule to PACE);

- Debt-to-income (DTI) ratios, which should not exceed the ratio established for traditional mortgage loans;
- Its application to any type of residential PACE lending, regardless of brand name or how the program is marketed to the consumer; *and*
- Preemption of state laws, unless a state has established a higher standard of consumer protection.

In addition, CUNA recommends the Bureau work with other relevant regulators and industry stakeholders during the development of a PACE Financing Rule. And finally, although the Bureau is likely unable to address the issue of lien status, CUNA would like to reiterate our concern with PACE lending's first lien status under several state laws, and we oppose any type of lien priority that makes PACE loans preferable to other loan options.

Background

In general, PACE financing permits a property owner to finance the purchase of energy-related retrofitting or improvements and pay for those improvements through a special assessment on the property. PACE programs are authorized through the passage of state-level legislation and implemented on a local level. These state-approved programs typically allow the creation of special districts where a local municipality assesses levies on a property on which the owner has agreed to a PACE financing arrangement. While 21 states have authorized PACE programs, there are only active programs in California, Florida, and Missouri.

The current ANPR on residential PACE financing has been issued to assist the Bureau in implementing Section 307 of S. 2155. That regulatory relief legislation – which was passed with CUNA's active support – requires the CFPB to promulgate a rule extending the consumer protections in TILA to PACE financing. In the law, the Bureau's PACE Financing Rule must include TILA's ATR requirements, which are currently in place for traditional mortgage loans, with respect to PACE financing, and apply TILA's general civil liability provision for violations of these ATR requirements. S. 2155 also requires any regulation issued by the CFPB to “account for the unique nature” of PACE financing.

Prompt S. 2155 Implementation, including PACE Provisions

Throughout the legislative process, CUNA was a staunch supporter of S. 2155, which was the first major piece of bipartisan regulatory relief legislation benefiting credit unions that has been passed in nearly a decade. S. 2155 included several provisions to enhance the ability of credit unions to continue serving their members and, in the case of PACE financing, extended adequate consumer protections in specific areas lacking those protections. As with most legislation, those protections often do not occur until the statutory requirements are implemented by the Bureau and other federal financial regulators. For this reason, since the law's passage, CUNA has urged the federal financial regulators to allocate the resources necessary to quickly promulgate the regulatory changes under S. 2155.

In that spirit, CUNA again encourages the Bureau to expedite the process of promulgating any outstanding S. 2155 rulemakings, especially the PACE Financing Rule. The absence of a prescribed effective date should not place a much-needed regulation in “limbo” while PACE programs continue to expand. Although there have been positive consumer protection developments at the state-level, it is imperative that consumers in states with active PACE programs are protected to the full extent permitted by federal law.

Robust Protections for Consumers

Although some states have adopted legislation to bolster the consumer protections applied to PACE programs, there remains a need to expand the federal consumer protections that apply to this financing. The passage of Section 307 of S. 2155 was a necessary step to ensure that consumers across all states are not financially disadvantaged through their participation in an underregulated PACE financing regime in the state in which they own property.

Ability to Repay

As stated above, Section 307 of S. 2155 requires the Bureau to extend TILA’s ATR requirements to PACE financing. In general, these requirements exist to ensure a creditor makes a reasonable, good faith determination as to the borrower’s ability to repay the extension of credit, at the time the loan is extended. This determination is made based on verified and documented information. Prior to the federal law’s passage or a similar state law, PACE programs were not subject to these requirements and borrowers entered agreements without the program administrator verifying the borrowers’ capability to repay the loans. This practice of blind lending is not accepted in the traditional mortgage lending context and should not be acceptable merely because of a PACE loan’s unique structure.

CUNA recommends the CFPB issue a rule that requires PACE loan administrators to conduct a robust ATR analysis prior to the execution of the contract and approval of the loan. In order to determine whether the homeowner can afford the financing, the underwriting required pursuant to the Bureau’s rule must include:

- Income verification via tax returns or other reliable third-party records;
- An assessment of the borrower’s outstanding debt obligations;
- An assessment of the household’s monthly expenses;
- The borrower’s employment status; and
- An accurate consideration of the borrower’s credit history.

In addition, it is critical that the Bureau’s rulemaking require this determination to be conducted *prior to* the contract’s approval.

Disclosures

The initial purpose of PACE programs was to permit homeowners to use a property's equity to finance energy efficient upgrades and modifications and repay the loan through annual assessments on their property tax bills. While reducing a homeowner's barriers to access energy efficient retrofitting is a positive goal, the lack of disclosure that has developed around PACE financing has led many homeowners to misunderstand or be unaware of the potential impact these loans have on their personal finances and/or their property's value. In fact, many property owners are unaware of PACE financing's complexities and potential restrictions, including their repayment of the loan through a tax lien and the complications created should they choose to sell their property later. For example, recent federal regulations make properties encumbered by first priority PACE liens ineligible for some GSE programs.

Under current practices, consumers may receive incomplete or misleading information regarding PACE loans, and as a result, they may not fully understand that PACE loans often carry a higher interest rate than other financing options. CUNA recommends the Bureau's rule provide an effective disclosure regime to PACE financing programs, including a requirement to disclose:

- The total cost of the loan under the contract;
- A clear repayment schedule;
- The exact amount the homeowner's annual tax assessment will increase;
- The fact that the homeowner could lose their property if they are unable to make these increased payments; *and*
- The impact of a PACE-related lien on a property's value and salability.

The Bureau can ensure PACE loan recipients receive adequate disclosures related to the loan's obligations by requiring PACE agreements to comply with the TRID Rule. CUNA believes homeowners should be informed of all the relevant information necessary to understand their PACE financing agreement and, for that reason, extending TRID to these agreements would be appropriate.

Regulatory Coordination

As CUNA has recommended in several other contexts, during the rulemaking process the CFPB should aim to consult and coordinate with relevant state and federal regulators. In this area perhaps more than others, due to PACE financing's state-based nature, the state regulatory bodies in affected states have been actively developing or have already issued regulations affecting PACE financing.

In addition, the CFPB should coordinate with relevant federal agencies that have jurisdiction over aspects of the housing market, including the Federal Housing Finance Agency (FHFA), the Federal Housing Administration (FHA), and the U.S. Department of Veterans Affairs (VA). CUNA believes appropriate coordination must include consideration of the overall impact of PACE financing on the housing market and the

potentially negative effects PACE programs' first-lien priority could have on consumers and community-based lenders.

Conclusion

On behalf of America's credit unions and their 115 million members, thank you for the opportunity to share our thoughts on the CFPB's ANPR regarding PACE financing. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,



Alexander Monterrubio
Senior Director of Advocacy & Counsel