

BUREAU OF CONSUMER FINANCIAL PROTECTION

Docket No. CFPB-2019-0011

RIN 3170-AA84

**Advance Notice of Proposed Rulemaking on Residential Property Assessed Clean Energy
Financing**

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this Advance Notice of Proposed Rulemaking (ANPR) to solicit information relating to residential Property Assessed Clean Energy (PACE) financing. The Bureau will consider the information it receives in response to this ANPR in implementing section 307 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA). In relevant part, EGRRCPA section 307 amends the Truth in Lending Act (TILA) to mandate that the Bureau prescribe certain regulations relating to PACE financing. Specifically, the regulations must carry out the purposes of TILA’s ability-to-repay (ATR) requirements, currently in place for residential mortgage loans, with respect to PACE financing, and apply TILA’s general civil liability provision for violations of the ATR requirements the Bureau will prescribe for PACE financing. The regulations must “account for the unique nature” of PACE financing. This ANPR solicits information to better understand the PACE financing market and the unique nature of PACE financing.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF
PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit responsive information and other comments, identified by

Docket No. CFPB-2019-0011, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* PACEFinancingANPR@cfpb.gov. Include Docket No. CFPB-2019-0011 in the subject line of the message.
- *Mail:* Comment Intake, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.
- *Hand Delivery / Courier:* Comment Intake, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.

Instructions: When responding to a particular question, please note the question number at the top of the response. Also, where applicable, please note whether any information provided is relevant to a PACE financing program that is specific to a particular jurisdiction or administrator.

You are not required to answer all questions to receive consideration of your comments.

The Bureau encourages the early submission of comments. All submissions must include the document title and docket number.

Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10:00 a.m. and 5:00 p.m. eastern standard time. You can make an appointment to inspect the documents by telephoning 202-435-7275.

All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as

account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Rachel Ross, Attorney-Advisor; Joel Singerman, Counsel; or Nora Rigby, Senior Counsel; at (202)–435–7700. If you require this document in alternative electronic format, please contact *CFPB_Accessibility.cfpb.gov*.

SUPPLEMENTARY INFORMATION: The Bureau is issuing this ANPR to solicit information relating to residential PACE financing.¹ The Bureau will consider the information it receives in implementing EGRRCPA section 307, which was enacted by Congress on May 22, 2018, and signed into law on May 24, 2018.²

As defined in EGRRCPA, PACE financing is “financing to cover the costs of home improvements that results in a tax assessment on the real property of the consumer.”³ Section 307 amends TILA to direct regulatory action on PACE financing. It provides in relevant part that the Bureau shall prescribe regulations that (1) carry out the purposes of TILA section 129C(a), and (2) apply TILA section 130 with respect to violations under TILA section 129C(a) with respect to PACE financing, which shall account for the unique nature of PACE financing.⁴

This provision directs the Bureau to prescribe regulations that achieve two objectives and account for the unique nature of PACE financing. As to the first objective, the regulations must “carry out the purposes of” TILA’s existing ATR requirements. In general, the existing ATR

¹ Although some jurisdictions may make PACE financing available for commercial projects, this ANPR solicits information relating only to residential PACE financing, in accord with EGRRCPA section 307, which defines PACE financing as available for home improvements. The Bureau is not soliciting information about commercial PACE financing.

² Pub. L. No. 115–174, 132 Stat. 1296 (2018).

³ EGRRCPA section 307, amending TILA section 129C(b)(3)(C)(i), 15 U.S.C. 1639c(b)(3)(C)(i).

⁴ EGRRCPA section 307, amending TILA section 129C(b)(3)(C)(ii), 15 U.S.C. 1639c(b)(3)(C)(ii). EGRRCPA section 307 also includes amendments authorizing the Bureau to “collect such information and data that the Bureau determines is necessary” in prescribing the regulations and requiring the Bureau to “consult with State and local governments and bond-issuing authorities.”

requirements prohibit creditors from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan according to its terms, and all applicable taxes, insurance, and assessments.⁵ In making that determination, a creditor is required to consider specific factors about the consumer’s finances, including, for example, the consumer’s income, assets, and debt obligations, and to verify the income or asset amounts it relied upon to determine the consumer’s repayment ability.⁶ TILA states that the purpose of the ATR requirements is “to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive.”⁷

As to the second objective, the regulations implementing EGRRCPA section 307 must apply TILA’s general civil liability provision for violations of the ATR rules that will apply to PACE financing. That provision sets forth damages for TILA violations generally,⁸ as well as specific penalties for violations of the current ATR requirements.⁹

The Bureau is soliciting information through this ANPR that it believes will be helpful in developing a proposed rule that will meet these objectives and accounts for the unique nature of PACE financing. The Bureau is seeking five categories of information: (1) written materials associated with PACE financing transactions; (2) descriptions of current standards and practices

⁵ The ATR requirements are set forth in TILA section 129C(a), 15 U.S.C. 1639c(a). The Bureau has issued regulations implementing TILA’s ATR requirements. *See* 12 CFR 1026.43.

⁶ *See* TILA section 129C(a), 15 U.S.C. 1639c(a).

⁷ TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2).

⁸ *See generally* TILA section 130, 15 U.S.C. 1640.

⁹ *See* TILA section 130(a)(4), 15 U.S.C. 1640(a)(4) (providing liability for failure to comply with requirements in the ATR provisions in “an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.”); *see also* TILA section 130(k), 15 U.S.C. 1640(k) (generally providing that consumers facing foreclosure may assert a violation of the ATR provisions, among other provisions, as a defense by recoupment or setoff).

in the PACE financing origination process; (3) information relating to civil liability under TILA for violations of the ATR requirements in connection with PACE financing, as well as rescission and borrower delinquency and default; (4) information about what features of PACE financing make it unique and how the Bureau should address those unique features; and (5) views concerning the potential implications of regulating PACE financing under TILA. The Bureau anticipates that the information solicited will enable the Bureau to better understand the market and unique nature of PACE financing. This will help the Bureau formulate proposed regulations in a balanced manner, achieving the statutory objectives discussed above while avoiding the imposition of unnecessary or undue burden on industry.

The Bureau hopes to receive information reflecting the diversity of residential PACE financing transactions in the market. Where applicable, please specify whether any information provided applies to a PACE financing program that is specific to a particular jurisdiction or administrator. When responding to a particular question, please note the question number at the top of the response.

The Bureau invites comment on all aspects of the ANPR from all interested parties, including consumers, consumer advocacy groups, State and local governments, other PACE financing industry participants, or other members of the public. In the event that a respondent may have concerns about revealing proprietary or personal information, the Bureau welcomes comments from attorneys, consumer advocacy organizations, trade associations, or other representatives that do not identify their clients.

I. Written materials associated with PACE financing transactions.

To better understand PACE financing transactions and potential areas of consumer risk, the Bureau is interested in receiving samples of any written materials used in PACE financing

transactions. Please consider submitting samples of, for example, any contractual agreements, written materials provided to consumers before they sign a PACE financing agreement, and bills or statements that provide payment information to consumers. Please redact any personally identifiable information before submission.

II. Current standards and practices in the PACE financing origination process.

As described above, EGRRCPA section 307 requires the Bureau to prescribe regulations for PACE financing that carry out the purposes of TILA's existing ATR requirements while accounting for the unique nature of PACE financing. In general, TILA's existing ATR requirements prohibit creditors from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan according to its terms, and all applicable taxes, insurance, and assessments.¹⁰ Developing an ATR rule for PACE financing that takes into account its unique nature will require a thorough understanding of origination and underwriting processes, including the roles and responsibilities of participating parties. Questions in this category solicit information to that end.

1. Please provide information about the process of obtaining a consumer's application for PACE financing, including what documentation is required from consumers or third parties, what information is verified, and how any information is collected. What information gathered as part of the application process relates to the consumer's ability to repay? Which parties collect the application information? How are policies and procedures relevant to the application process established?

¹⁰ See TILA section 129C(a), 15 U.S.C. 1639c(a).

2. Please describe current underwriting standards and how they are established. Does underwriting commonly include a determination of consumers' ability to repay the financing? If so, which parties conduct that analysis, and what factors are considered in that determination?
3. Please provide information about the process for approving or denying PACE financing applications. For example, which parties determine consumer eligibility or make any offer to the consumer? Which parties are involved in determining the financing terms, and how do they do so for each consumer?
4. Please provide information about any written information provided to consumers before they sign a PACE financing agreement, including relevant contracts or written disclosures. Who delivers these materials, in what format, and when during the origination process?
5. Please describe any information provided to consumers orally before they sign a PACE financing agreement. Who provides the information and at what point during the origination process?
6. TILA's existing ATR requirements apply to "creditors," defined in part as the parties to whom debt obligations are "initially payable on the face" of the agreements.¹¹ In PACE financing transactions, to which parties may the obligations be made "initially payable on the face" of the financing agreements? Please describe any requirements in State or local law governing to which parties PACE financing obligations may be made initially payable on the face of the financing agreements.

¹¹ See 15 U.S.C. 1602(g).

7. To the extent not addressed above, please describe the role of State or local governments in the origination and underwriting of PACE financing.
8. Please describe any relationship between the PACE financing agreement and the home improvement agreement. For example, do they involve separate contracts? Do consumers sign them concurrently? If a consumer is denied for the PACE financing, what is the effect on the consumer's obligations under the home improvement contract?
9. To the extent not already addressed, please provide any information that may help the Bureau understand the origination process or any risks or benefits it produces for consumers.

III. Civil liability under TILA for violations of ATR requirements in connection with PACE financing, as well as rescission and borrower delinquency and default.

As noted above, EGRRCPA section 307 requires that the Bureau prescribe regulations that apply TILA section 130 to violations of the ATR rules that will apply to PACE financing, and that account for the unique nature of PACE financing. Section 130 sets forth TILA's general civil liability requirements; and, with respect to violations of the existing ATR requirements, it allows for recovery of an amount equal to the sum of all finance charges and fees paid by the consumer and provides borrowers a foreclosure defense. In conjunction with questions elsewhere in this ANPR, the information solicited in this category is intended to help the Bureau identify the parties in a PACE financing transaction to whom TILA section 130 might apply and which parties would in fact bear the risk of any such liability. Additionally, this category of questions solicits information about any rescission rights available to consumers and what occurs when a homeowner becomes delinquent on a PACE financing obligation.

10. Please provide any information about the assignment or sale, including securitization, of PACE financing agreements or the rights and obligations therein, and the circumstances surrounding any assignment or sale.
11. Please describe any indemnification agreements that are commonly part of PACE financing transactions, whether involving local governments, private parties administering PACE financing programs, secondary market participants, home improvement companies, or others.
12. Please describe any rescission rights available to consumers with respect to PACE financing agreements or home improvement contracts, whether by virtue of the agreements or applicable State or local law.
13. Please provide information about what happens to PACE financing obligations when a consumer becomes delinquent or defaults. For example, please provide information about any loss mitigation programs available to consumers, any pre-foreclosure collection attempts, or foreclosure processes when applicable. Which parties are involved, and what are their roles?

IV. Features of PACE financing that make it unique and how the Bureau should address those unique features.

As noted above, the regulations implementing EGRRCPA section 307 must account for the “unique nature” of PACE financing. Questions in this category solicit information that may be relevant to understanding the unique nature of PACE financing. They include questions about the structure, funding, and repayment of PACE financing transactions, and the relationship to local property tax systems.

14. EGRRCPA section 307 defines PACE financing as “financing to cover the costs of home improvements that results in a tax assessment on the real property of the consumer.” Please identify any public or private financing options that may satisfy this definition, whether or not commonly understood to be PACE financing.

15. Please provide information about the source of funding for PACE financing transactions. For example, are the transactions funded with public or private capital? Which parties supply the capital used to pay the contractors installing the home improvement projects?

16. Please describe the role of public bonds in PACE financing transactions. Please identify the bond-issuing authorities. What is the timing of bond issuance? Who purchases the bonds, and what effect does the purchase have? Where public bonds are not involved in PACE financing transactions, please describe the role of any other public financing mechanisms.

17. Please provide information about consumer repayment. For example:

- i. When does repayment begin after the financing agreement is signed?
- ii. How frequently are payments made?
- iii. Are payments roughly equal throughout a consumer’s full financing term, or can payments change? Are interest rates fixed or variable? Are balloon payments required? If so, in what circumstances? Do PACE financing agreements always provide for full amortization?
- iv. To which parties do consumers make payments? Does the party to which consumers make payments ever change over the life of the financing agreement? If so, in what circumstances does this occur and why?

- v. After a consumer remits a payment, how is the payment distributed, and by whom?
- vi. Please describe any changes to payments or payment processes when a consumer becomes delinquent or defaults.
- vii. Please describe any differences to payments or payment processes when a consumer has a mortgage loan with an escrow account for taxes.
18. Please describe how PACE financing is integrated with local property tax systems and how specific information about the PACE financing obligation is distinguished from other real property tax obligations in the tax system. Who monitors repayment of the PACE financing?
19. To the extent not addressed above, please describe the role of State and local governments in PACE financing programs or individual PACE financing transactions following origination. Please identify any State or local government entities with regulatory or oversight authority over PACE financing or industry participants.
20. Please describe any financial costs to consumers that may be associated with PACE financing transactions, including, for example, costs resulting from interest, points, fees, or penalties. How do costs for home improvement projects financed using PACE financing compare to costs for comparable projects financed through other means?
21. Please describe any cost savings associated with home improvement projects funded with PACE financing, including, for example, utility savings or tax credits authorized under State or Federal law for PACE-eligible projects. Are projected savings calculated before PACE financing contracts are executed? If so, how, and over what

- period of time? Are actual savings tracked, and, if so, how do they compare with the projections?
22. In general, does the addition of PACE financing affect consumers' ability to meet their financial obligations? Please describe any such effects and why they may occur.
23. Please provide information about the liens associated with PACE financing. How do they differ from liens securing other property tax obligations that may encumber residential real property? Do PACE financing liens arise by operation of law or contract?
24. Please provide information about the treatment of PACE financing obligations by servicers of mortgage loans responsible for servicing mortgages that were placed on the property before the PACE financing encumbrance. For example, do mortgage servicers typically administer PACE financing obligations through escrow accounts? Please describe the relevant processes and any effects on the mortgage servicer or the consumer. How quickly after PACE assessments are added do mortgage servicers learn about the increase to the consumer's property tax bill? How quickly do mortgage servicers adjust consumers' escrow payments, where applicable, to reflect the change?
25. To the extent not already addressed, please provide any additional information about the unique nature of PACE financing, how the Bureau's regulations should account for the unique nature, and any risks or benefits to consumers or industry participants attributable to the unique nature.

V. Potential implications of regulating PACE financing under TILA.

As described above, EGRRCPA section 307 requires the Bureau to issue regulations applying TILA's ATR and general civil liability provisions (as implemented through Regulation Z) to PACE financing, accounting for the unique nature of PACE financing. In this category of questions, the Bureau solicits information relating to how the existing TILA and Regulation Z provisions could be applied to PACE financing to implement EGRRCPA section 307. This information will assist the Bureau in developing a proposed rule adapting existing TILA and Regulation Z standards in light of potential impacts on consumers and industry and any implementation challenges specific to PACE financing.

26. If existing ATR requirements in TILA and Regulation Z were to apply to PACE financing transactions, please describe any likely effects on State and local governments or bond-issuing authorities.

27. Please describe any likely effects of such application on consumers or PACE financing industry participants.

28. If applied to PACE financing transactions, which specific ATR provisions under TILA and Regulation Z, if any, would conflict with existing State or local legal requirements, and how? What steps could the Bureau take to mitigate those conflicts?

29. Which specific ATR provisions under TILA and Regulation Z would be difficult for market participants to apply to current PACE financing origination practices, bond processes, or laws and practices implicating real property tax systems, and why would they be difficult to apply?

30. Which specific ATR provisions under TILA and Regulation Z, if any, would be beneficial for consumers, and how? Which, if any, would not provide consumer benefits, and why not?
31. How could TILA's existing ATR requirements be tailored to account for the unique nature of PACE financing? Are there unique aspects of PACE financing that are relevant to whether and how the existing ATR requirements should apply, including the documentation and verification requirements or the specific information required as part of the analysis?
32. As described above, EGRRCPA section 307 requires the Bureau to apply TILA section 130 to violations of the ATR requirements that the Bureau will prescribe for PACE financing. Please provide your views on any likely impacts on consumers or PACE financing market participants of applying TILA section 130. Please describe any other concerns associated with applying TILA liability to PACE financing, including but not limited to TILA section 130.
33. Please share your views on whether the Bureau should address the application of TILA and Regulation Z provisions other than the ATR requirements to PACE financing, including any potential impacts on consumers, industry, or other stakeholders that may result from any such application.
34. Please share any other comments or concerns about implementing EGRRCPA section 307 under TILA and Regulation Z.

[THIS SIGNATURE PAGE PERTAINS TO THE ADVANCE NOTICE OF PROPOSED RULEMAKING TITLED “ADVANCE NOTICE OF PROPOSED RULEMAKING ON RESIDENTIAL PROPERTY ASSESSED CLEAN ENERGY FINANCING”]

Dated: March 4, 2019.

Kathleen L. Kraninger

Kathleen L. Kraninger,

Director, Bureau of Consumer Financial Protection.