



July 24, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Rohit Chopra  
Director  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, D.C. 20552

Re: Residential Property Assessed Clean Energy Financing (Regulation Z); CFPB Docket-2023-0029; RIN 3170-AA84

Dear Director Chopra:

On May 11, 2023, the Consumer Financial Protection Bureau (CFPB) published a proposed rule titled Residential Property Assessed Clean Energy Financing (PACE).<sup>1</sup> This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule. The Office of Advocacy is concerned about the CFPB's failure to prepare a factual basis for its Regulatory Flexibility Act certification and the potential economic impact of the proposed rule on small entities.

## **I. Background**

### **A. The Office of Advocacy**

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the

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<sup>1</sup> 88 Fed. Reg. 30388 (May 11, 2023).

<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> The agency must include a response to these written comments in any explanation or discussion accompanying the final rule’s publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.<sup>5</sup>

Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”<sup>6</sup>

## **B. The Proposed Rule**

On May 11, 2023, the CFPB published a notice of proposed rulemaking in the *Federal Register* on Residential Property Assessed Clean Energy Financing (Regulation Z). Section 307 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) directs the CFPB to prescribe ability-to-repay rules for Property Assessed Clean Energy (PACE) financing and to apply the civil liability provisions of the Truth in Lending Act (TILA) for violations. PACE financing is financing to cover the costs of home improvements. It results in a tax assessment on the homeowner’s property. Borrowers pay the loans through increased property tax payments over time. Eligible upgrades can include energy and water efficiency projects or projects to prepare homes for natural disasters. The obligation of paying the loan back through higher property tax payments remains with the property even if the borrower sells the property. PACE lending is authorized by local governments. However, private companies typically administer the programs, which can include marketing of the loans, managing originations, and making the lending decisions.<sup>7</sup>

## **II. The CFPB’s Certification Lacks a Sufficient Factual Basis**

Pursuant to Section 605 of the RFA, the CFPB certified that the rule will not have a significant economic impact on a substantial number of small entities. Such a certification must be supported by a factual basis.<sup>8</sup> Advocacy asserts that the CFPB’s certification lacks a sufficient factual basis.

### **A. The CFPB’s Consideration of the Number of Small Entities that May Be Impacted by the Rulemaking is Inadequate**

As noted in Advocacy’s RFA guide, the Office of Advocacy believes that an adequate certification statement requires an agency to perform a threshold analysis. The threshold analysis

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<sup>4</sup> Small Business Jobs Act of 2010 (PL. 111-240) §1601.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Residential Property Assessed Clean Energy Financing (Regulation Z), 88 Fed. Reg. 30388 (May 11, 2023).

<sup>8</sup> 5 USC § 605(b).

should include a description of small entities affected. It should be a brief economic and technical statement on the regulated community, describing some of the following types of information:

- a) The diversity in size of regulated entities.
- b) Revenues in each size grouping.
- c) Profitability in each size grouping.<sup>9</sup>

The CFPB's certification primarily focuses on governmental agencies and PACE companies. Although the CFPB acknowledges that the rulemaking may impact home improvement contractors,<sup>10</sup> it does not provide a sufficient analysis of the potential economic impact on small home improvement contractors. In the proposal, the CFPB states:

In the most recent Economic Census there were more than 233,000 small entities in the relevant NAICS codes for home improvement contractors. By comparison, there are currently approximately 2,000 firms registered in California as PACE solicitors. Even if all of these entities are small and there were a similar number of small entities acting as PACE solicitors in Missouri and Florida, this would be less than three percent of all relevant small entities, and so not a substantial number.<sup>11</sup>

This analysis undermines the purpose of the RFA by mathematically discounting the percentage of home improvement contractors that may be impacted by this rulemaking. It is similar to the situation in *Southern Offshore Fishing Association v Daley*.<sup>12</sup> In that case, the court quoted an earlier order that stated:

Upon my preliminary review of the defendant's submission, I remain troubled by NMFS's economic impact analysis pursuant to the Magnuson Act and the RFA. NMFS continues to rely on the pool of 2,000-plus individuals who hold shark fishing permits to constitute the "universe" of fishermen potentially affected by the quotas. *See* Remand Submission at 13-4; *Southern Offshore Fishing Ass'n*, 995 F. Supp. at 1435. NMFS adheres to this view despite the undeniable fact that the clear majority (approximately three-fourths) of the permittees are not expected to land even one shark. Indeed, as NMFS found, only 352 total permit holders caught at least one shark in both 1995 and 1996. NMFS also conveniently overlooks the fact that in its "Pre-Draft HMS Fishery Management Plan" of August 22, 1998, the agency proposes to exclude the majority of current shark permittees through a limited access program that authorizes access only to the modest number of fishermen showing an historic dependence on shark stocks. Thus, while claiming that anyone who spends \$10 to buy a shark permit bears an intrinsic interest in the shark fishery (and is thus potentially affected by the

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<sup>9</sup> U.S. Small Bus. Admin., Off. of Advocacy, "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act," 12 (Aug. 2017), <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/06/21110349/How-to-Comply-with-the-RFA.pdf>.

<sup>10</sup> 88 Fed. Reg. at 30428.

<sup>11</sup> 88 Fed. Reg. at 30429.

<sup>12</sup> 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

quotas), NMFS simultaneously discounts as mere speculative investors a large percentage of the permit holders through its restricted access program. Of course, electing the 2,000-plus permit holders as the operative universe enables NMFS to disperse arithmetically the statistical impact of the quotas on shark fishermen.<sup>13</sup>

Here, by relying on all home improvement contractors, the CFPB has used the incorrect denominator to determine whether the rulemaking will impact a substantial number of small entities. Instead of using the 233,000 small home improvement contractors as the universe of potentially regulated small entities, the CFPB should have used the number of small home improvement contractors that participate in the PACE program. Since the home improvement contractors that are in the PACE program are registered with their respective states, this number should be available to the CFPB for an RFA analysis.

Although the CFPB states in footnote 334 of the proposed rule that limiting consideration to contractors operating in states with PACE legislation is not appropriate, the CFPB's rationale is not compelling. The CFPB states that it is not appropriate because home improvement contractors operate across state lines. Even if a home improvement contractor is from a different state, the state would have a record of that business participating in the PACE program. As such, it could still be included in the pool of small businesses that may be impacted by the proposal.

In terms of small governmental jurisdictions, the CFPB states that the proposal may have a direct economic impact on local jurisdictions that sponsor PACE programs. Section 601(5) of the RFA defines a small governmental jurisdiction as governmental jurisdictions with a population of less than 50,000. The CFPB provides information about the number of small governmental jurisdictions in the states that will be impacted by the proposed rulemaking. However, once again, the CFPB mathematically disperses the economic impact by analyzing all governmental jurisdictions rather than only those that sponsor PACE programs.<sup>14</sup>

Advocacy encourages the CFPB to obtain the information from the states about the number of small home improvement contractors and the number of small governmental jurisdictions that are in the PACE program. Advocacy recommends that the CFPB use that number as the universe of potentially regulated small entities to determine whether the proposed rulemaking will impact a substantial number of small entities.

#### **B. The CFPB Did Not Consider the Economic Impact of the Rulemaking on Small Entities**

In terms of economic impact, the CFPB provided no information about the potential economic impact of this rulemaking on small home improvement contractors. The new requirements could present significant costs. Such costs could include, but not be limited to, costs to update systems and processes to consider information related to the proposed ATR requirements, software and development requirements, training of staff and affiliates, and legal/compliance review fees. Those are the types of costs that must be considered.

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<sup>13</sup> 55 F. Supp. 2d 1336, 1339 (M.D. Fla, 1999).

<sup>14</sup> 88 Fed. Reg. at 30429.

The CFPB has promulgated rules in the past that required training, new software, disclosures, legal fees, etc. The CFPB may be able to use data from previous rulemakings to estimate what the costs for this rulemaking may be. Advocacy recommends that the CFPB perform an economic analysis to determine whether the economic impact of the proposed rulemaking on small entities is significant.

### **C. The CFPB Should Provide Clear Guidance to Assist Small Entities with Compliance**

Given the requirements of the proposed rulemaking, providing clear guidance for complying with the CFPB's rulemaking will be helpful to small entities and eliminate confusion. This proposal may impact small governmental jurisdictions and small home improvement contractors. The entities may lack resources to assist them in understanding regulatory requirements and performing the necessary actions to achieve compliance. Advocacy encourages the CFPB to provide guidance to assist small entities in complying with the requirements of the rulemaking.

## **II. Conclusion**

The CFPB circumvented the requirements of the RFA by not providing an adequate factual basis to support its certification. Advocacy recommends that the CFPB perform a threshold analysis to determine whether the proposal will have a significant economic impact on a substantial number of small entities. If it will not, the CFPB should use the information from its threshold analysis to provide a proper factual basis for its certification.

If the threshold analysis indicates that the proposal will have a significant economic impact on a substantial number of small entities, the CFPB will need to convene a SBREFA panel and perform an initial regulatory flexibility analysis, including less costly alternatives, prior to preparing a final regulatory flexibility analysis for the final rule.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Jennifer A. Smith at (202) 205-6943 or by email at [Jennifer.Smith@sba.gov](mailto:Jennifer.Smith@sba.gov).

Sincerely,

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