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Bet Tzedek is a nonprofit organization funded in part by the City and County of Los Angeles, the State Bar of California, the Equal Access Fund, and the City of West Hollywood.

June 8, 2018

VIA EMAIL AND U.S. MAIL
California Department of Business Oversight
Attn: Mark Dyer, Regulations Coordinator
1515 K Street, Suite 200
Sacramento, CA 94105
Regulations@dbo.ca.gov

Re: Comments on Proposed Draft Rules for Implementation of AB 1284
File No: PRO 02/17 (PACE)

Dear Commissioner et al:

Thank you for this second opportunity to comment on the Department of Business Oversight's proposed draft rules for implementation of AB 1284 (Chapter 475, 2017) (the "Draft Rules"). We do so in our capacity as one of California's leading public interest law firms, with over 40 years of experience providing comprehensive legal services for low-income individuals and families in Los Angeles County and City, including struggling homeowners harmed by the lack of consumer protections in the PACE loan program.

The use of PACE as a tool for taking advantage of vulnerable homeowners has resulted in devastating harm to low-income and elderly Los Angeles residents. The failure of program administrators to determine whether homeowners can afford a PACE assessment has trapped too many homeowners in financing that they never had a chance of paying timely. This has resulted in property tax defaults, late payment penalties, unaffordable increases in mortgage payments due to impounded property taxes, and imminent risk of foreclosure for far too many California homeowners.

Bet Tzedek has received calls from homeowners in their 80s and 90s, living on low or fixed incomes, and drowning in debt, who were signed up for six-figure PACE assessments, increasing their property tax payments tenfold or more. We have heard similar reports from other legal services agencies across the state about homeowners stuck in financing agreements disguised as "taxes" that they

did not understand, did not agree to, cannot afford, and which put them at risk of losing their homes. No clean energy initiative should come at so high a cost.

The California legislature passed AB 1284 and SB 242 (Chapter 484, 2017) last year in an attempt to address some consumer concerns related to PACE financing. Although this legislation does not go far enough to truly protect homeowners, Bet Tzedek and the other signatories are committed to working with the DBO to develop the best regulations possible under the legislation as enacted.

Bet Tzedek strongly encourages the DBO to review the recommendations made by the California Low-Income Consumer Coalition (“CLICC”) and the National Consumer Law Center and National Housing Law Project. The undersigned wish to further comment on several key areas where DBO’s proposed rulemaking falls short. These comments do not represent our final or complete position with respect to PACE financing overall or the legal obligations of those involved in the operation of PACE programs in California.

<u>Definitions - § 1620.02</u>

Section 22017 of the CFL defines “PACE solicitor” as a person “authorized by a program administrator” to solicit a property owner to enter into an assessment contract. The Draft Rules, § 1620.02(b) defines “authorized by a program administrator” to mean *either* (1) the PACE solicitor agent is “enrolled with the program administrator,” or (2) the program administrator “funds a home improvement contract of the PACE solicitor.” We believe this “or” language was intended to cast an appropriately wide net, but as written, may inadvertently allow for an end-run around the formal enrollment process whereby a program administrator can authorize a PACE solicitor simply by funding one of their home improvement contracts. The formal enrollment process for PACE solicitors set forth in the CFL §§ 22680-81 provides needed oversight, training, and accountability for PACE solicitors. Only PACE solicitors that have gone through the requisite training and licensing should be permitted to solicit homeowners.

We propose striking the second sentence of § 1620.02(b) which allows a program administrator to authorize a PACE solicitor simply by funding one of their home improvement contracts and limit those *authorized* to solicit PACE to those that have gone through the requisite enrollment process.

Further, the rules should make clear that PACE administrators should not be permitted to fund or record PACE liens solicited by unenrolled PACE solicitors.

<u>Obligations of Program Administrator - § 1620.03</u>

Section 1620.03(b) requires that program administrators implement procedures “intended to ensure” that its employees are familiar with the laws governing PACE. We think this “intention”

language should be stricken. It should simply be: "Every program administrator [shall] implement procedures that ensure…" If a procedure isn't working to protect homeowners, the procedure must be changed. The incentive to create policies that actually work is lost if the bare requirement on PACE administrators is merely to enact policies with the best of intentions.

Section 1620.03(d) should also clarify that the "key terms call" referred to is the confirmation call required by California Streets and Highways Code § 5913.

PACE Pricing - § 1620.04

Similar to the "intended to" problem above, the section on pricing only requires program administrators to "implement a process" to track price data within six months of licensure. Six months of lead time (plus another six months before the licensure deadline of January 2019), is ample time for PACE administrators to be actually tracking price data, not just getting started on a process to do so at some unknown future time. We also see no reason not to require price data tracking for *all* PACE eligible efficiency improvements, a finite list. We can think of no reason why it would be important to track only common PACE improvements. We therefore suggest changing § 1620.04 to state: "a program administrator shall track price data for [all] PACE eligible efficiency improvements and products…"

The provision of pricing data to the DBO should be required, rather than discretionary. We also believe that price tracking data should be updated at least annually, to keep up with market rates.

Thus, the requirement that each Program Administrator provide pricing data to the Commissioner "upon request" should be expanded to: "The data shall be provided to the Commissioner once per year on the anniversary of the program administrator's licensure." This change would allow the Commissioner to review and monitor pricing data on a regular basis, benefitting consumers by allowing DBO to catch price gouging or other violations or irregularities. For this reason, we also suggest that pricing data be made available to the public, at least on an average, aggregate basis.

It is also unclear from the Draft Rules whether the prices being tracked are general market prices (based on third-party sources), equivalent cash prices, or the actual prices that PACE solicitors are charging homeowners. We believe it is intended to be and should be actual prices charged, but this should be made explicit. The DBO should also have a process for comparing actual prices charged to the cash price of equivalent improvements, to ensure that PACE solicitors are not overcharging in violation of Streets and Highways Code § 5926.

In the vast majority of PACE-financed home improvement contracts we've reviewed, homeowners are not receiving any break-down of cost in their home improvement contracts, making it unclear what each individual improvement costs, or what they are being charged for the product vs. labor vs profit. It would benefit homeowners tremendously if PACE solicitors were required to provide a break-down of "installation costs, labor time, and profit, based on the

square foot of residential property....” directly to the homeowner. If not required to be provided directly to the consumer at the time of solicitation, a pricing break down should be made part of the homeowner’s file, available to that homeowner upon request.

Mandatory Brochure - § 1620.06

The mandatory brochure should be created by the DBO, not the program administrator, after input and suggestions from stakeholders, including consumer advocates, regarding the language to include in the brochure. The regulations should require that program administrators use the brochure that is created by the DBO. This will ensure the information being provided to homeowners in the brochure is uniform, accurate, and written in language that even the most vulnerable homeowners can understand.

Books and Records - § 1620.07

We believe the Draft Rules are asking the PACE administrators to maintain appropriate data about each individual PACE transaction and the program as a whole. However, a few tweaks are needed to clarify this section and maintain consistency across the sources of law governing PACE.

In § 1620.07(b)(18) the reference to advertising should be clarified to ensure that program administrators are preserving records of any advertising they used for direct marketing or provided to PACE solicitors for marketing during the reporting period.

In §§ 1620.07(d), (e), (f) and (h) the preservation period should be extended to five years to adequately capture all relevant statute of limitations periods and be consistent with Streets and Highway Code § 5913(a)(1)(N)(3), which requires the recording of the key terms of the oral confirmation call with the property owner(s) to be retained for a period of at least five years from the time of the recording.

Likewise, § 1620.07(f) should be changed so that program administrators maintain records regarding solicitors and solicitor agents for [five] years after the recording date of the last assessment contract that PACE solicitor or PACE solicitor agent was involved with (rather than from the date of de-enrollment).

Preserving documents an additional 1-2 years should not pose a significant burden to program administrators who are already required to collect and store this information anyway.

Complaint Processes and Procedures - § 1620.08

Key components of an effective complaint process are missing from the DBO’s Draft Rules for § 1620.08, including: (1) uniformity of complaint procedures, (2) the opportunity to appeal program administrator decisions, and (3) guidance for program administrators on appropriate resolutions of complaints.

To address any lack of uniformity in the complaint procedures, the Commissioner should develop a complaint form and set forth a complaint procedure that must be followed by all program administrators. The Commissioner should also establish an appeal procedure where the complainant may request that the program administrator's decision may be reviewed by the DBO. All communication from the program administrator regarding resolution of complaints must include information about the availability of review by the DBO and/or the availability of further review in the courts or other forum.

The resolution of complaints by program administrators must provide meaningful relief to homeowners harmed by participation in a PACE program. Section 1620.08(a)(2)'s definition of "resolution" is inadequate. "Resolution" should require a result where the program administrator and the property owner agree that the complaint has been satisfactorily resolved. Further, the DBO should provide guidance for program administrators on what constitutes an appropriate resolution. For instance, if it is found that the execution of the PACE assessment is the product of fraud or forgery, the program administrator shall ensure that all appropriate relief is provided, including, for example, that the PACE assessment is fully and permanently cancelled, removed from the property tax rolls, and that any previously paid amounts under the forged or fraudulent assessment are returned to the property owner. Also, program administrator review of complaints about incomplete or shoddy work should not be limited to verifying items they are already required to have verified before paying the contractor. Section 1620.08(l)(3) should make it clear that program administrators should verify that the improvements have been completed "in a satisfactory and workmanlike manner," and that the contractor did not charge more for PACE financed improvements than they would if homeowner was paying cash pursuant to Streets and Highways Code § 5926.

Resolution of complaints must be provided in a timely manner so homeowners don't remain trapped in financing they can't afford, or left in a damaged home. Thus, the response time for complaints should be shortened to 30 calendar days, and complaints requiring expedited review should be completed in 7 calendar days.

The complaint process must also be easily accessible for all homeowners, and in particular for those who are most vulnerable. Given that so many of the homeowners participating in the program are seniors, there must be an option to file a complaint over the telephone, and to have that complaint written down and a copy sent to the homeowner. It does not make any sense for the regulations to require PACE solicitors to take complaints by telephone in section 1620.11(b)(4)(A), but not require the same basic service of program administrators.

Finally, it must be made explicitly clear in this section that these regulations are not intended to impose any requirements of administrative exhaustion on homeowners before they are allowed to access their legal rights, but are instead intended to provide an additional avenue for addressing complaints. It is crucial that it is clear a consumer may pursue rights and remedies in court at any time, regardless of whether they file a complaint, in accordance with CFL § 22697.

Completion of Work - § 1620.09

Section 1620.09(b) should be changed so that a program administrator must obtain evidence of building permits before "any" payment on a home improvement contract for property secured by a PACE assessment is made, not just the final payment. If program administrators are permitted to make partial payments to contractors for unpermitted work, this could lead to a situation where a contractor has been paid for work that ultimately is not authorized, creating a liability issue for the homeowner (who now has an unpermitted home improvement), and the program administrator (who has paid for this illegal work). Contractors are not supposed to begin work on a home before obtaining proper permits in the first place, and under the PACE program, are not supposed to be paid until a Certificate of Completion has been submitted. Changing the language to "before any payment" will make this provision consistent with existing law and practice.

Likewise, for § 1620.09(c), the program administrator should be required to confirm that the property owner "has obtained" the necessary permission to operate from a utility company (often called Power Turn On, or PTO), before providing "any" payment on the home improvement contract to the PACE solicitor. We have many clients who have had solar panels physically installed, but they are not given accurate information or adequate help to access PTO and connect their panels to the local grid. It can take them weeks or months of back and forth with the local utility, waiting for them to send someone out, and then at times being informed it is an issue they need the contractor to address. If the contractor has already been paid for their work – in part or in full – they are far less likely to address ongoing issues with PTO.

This section is also missing a mandate that program administrators independently verify that all efficiency improvements financed by the assessment contract have been completed in a "satisfactory and workmanlike manner" before any payment is made. Currently, program administrators rely on a document called a Certificate of Completion that is supposed to be signed by the homeowner and the home improvement contractor stating that work has been completed. In almost all of our clients' cases, there are questions about the veracity and authenticity of the Certificate of Completion. Many clients state they never saw this document, and would not have agreed to sign such a document if it has been presented to them. Certificates of Completion are often e-signed, even for clients who have no computer literacy. In many cases, the Certificates are worded vaguely and it is unclear what work was supposed to have been performed. Putting the burden on program administrators to ensure their agents have executed their home improvement contracts as written should be a requirement under § 1620.09.

Solicitor Enrollment Standards or Processes - § 1620.11

Section 1620.11(b)(4) of the Draft Rules require that a PACE solicitor maintain a complaint process for complaints "related to an assessment contract" that meets certain requirements and notify program administrators of such complaints. The definition of complaints "related to an

assessment contract" provided in § 1620.11(b)(4)(B) is too limited and relies on a PACE solicitor to make a determination of whether a complaint relates to an assessment contract or not. This will incentivize PACE solicitors to find reasons the complaint does not "relate to" an assessment contract, and not report the complaint or provide an adequate resolution to the homeowner. All complaints received by a PACE solicitor related to a project funded through PACE should be covered by this complaint procedure and be reported to program administrators.

The Draft Rules require the written resolution provided by the PACE solicitor to notify the property owner of the ability to appeal the resolution to the program administrator. The written resolution should also inform the homeowner that they may file a complaint with the DBO and Contractor's State License Board ("CSLB"), and that they may pursue rights and remedies in court at any time, regardless of whether they appeal to the program administrator or file an agency complaint.

Section 1620.11(b)(4) requires a program administrator to intervene and investigate if the complaint resolution is unreasonably delayed, based on the facts of the complaint. DBO should provide clearer guidance on what "unreasonably delayed" means. 30 days is a sufficient amount of time for a PACE solicitor to resolve standard complaints, and 7 days in urgent cases. And a program administrator shouldn't be able to make a determination of whether and when to intervene based on what they think of the "facts of the complaint." They should be required to intervene if the deadlines laid out above are not met.

<u>Annual Report Data - § 1620.19</u>

CFL § 22693(a) allows the commissioner to require a program administrator to use a real-time registry for tracking PACE assessments, whether recorded or not. We believe that, in addition to the data being required by § 1620.19, a registry of this kind would be a valuable tool to support enforcement of AB 1284. About one in three clients come to us with multiple assessments on their property, sometimes multiple assessments from the same administrator and in other cases competing administrators. In one case, the client ended up with a PACE assessment from every administrator licensed to operate in their zip code. However, the PACE solicitor had led the client to believe that each of the home improvement contractors the client worked with were all part of the same "government program for seniors" that they thought they were being enrolled in – they had no idea how they ended up with multiple assessment contracts and tax liens. The multiple assessments together totaled $118,000 for a home valued at $500,000 – over 20% of the home's value – and included overpriced and overlapping work (every contract included "insulation" of some kind). This client's mortgage increased by over $2,000 per month – more than their monthly income. A real-time registry could have limited this client's exposure, and could have led to discovery of the misrepresentations made to the client by the PACE solicitor and solicitor agent much sooner.

Early documentation of a new PACE assessment is critical to an effective assessment database. We suggest that PACE administrators enter a customer into the database as soon as they make an application for PACE financing (or re-financing). At a minimum, the PACE assessment should be entered into the database as of the date of funding (i.e., when the Completion Certificate is signed and funds remitted to the contractor).

PACE administrators should be required to check the database before extending funding to a new customer. If a PACE administrator discovers that a potential customer already has a PACE lien reported from another administrator, the administrator should have to perform a due diligence review of the assessment, determine if the second assessment is for unique work, and incorporate the pre-existing (or pending) PACE loan debt into the ability to pay analysis.

Thank you for your attention to these comments. We look forward to continuing to work with DBO to ensure a sound model of regulation for PACE financing.

Sincerely,

/s/
Nicholas Levenhagen, Esq.
Jennifer H. Sperling, Esq.
Bet Tzedek Legal Services

Concurrence by:
East Bay Community Law Center
Elder Law & Advocacy
Law Foundation of Silicon Valley
Legal Aid Society of San Diego
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