ENERGY EFFICIENT EQUITY INC.

June 8, 2018

sent via electronic mail

Department of Business Oversight, Legal Division

Attn: Mark Dyer, Regulations Coordinator

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RE: Comments of Energy Efficient Equity on Draft Rules Implementing AB 1284 and Licensure of PACE Program Administrators under the California Financing Law (PRO 02/17 (PACE))

Dear Mr. Dyer:

Energy Efficient Equity, Inc. ("E3") appreciates the Department of Business Oversight's ("Department") second invitation for comments and this opportunity to provide feedback on the Department's draft rules implementing AB 1284 ("Draft Rules"). E3 is an administrator of the California Municipal Finance Authority's ("CMFA") Property Assessed Clean Energy ("PACE") program. E3's PACE program provides financing for solar, energy efficiency and water efficiency improvements to property owner's in 127 cities and counties in California.

PACE is an innovative financing mechanism that enables local governments to facilitate property owners to make energy efficiency, water efficiency and clean energy improvements to their property. Because PACE spurs demand for local contractor services, it's estimated that PACE has also created more than 40,000 good-paying local jobs in communities across California. PACE-financed improvements are also projected to save homeowners billions of dollars on their utility bills while reducing greenhouse-gas emissions by millions of tons. Importantly, because PACE financing relies on private capital, these economic and environmental benefits are achieved at no cost to local government budgets. Moreover,

according to analysis by DBRS, delinquency rates on PACE assessments are lower than general aggregate property tax and single-family residential only property tax delinquency levels.[1]

AB 1284 was an important bill that strengthened underwriting criteria for PACE assessments, clarified customer data privacy protection requirements, required licensure by the Department of PACE program administrators ("Program Administrators"), and required oversight, training and background checks for PACE solicitors by PACE program administrators ("Program Administrators"). Its companion bill in the California Senate, SB 242, added important new protections for residential property owners as well. E3 fully supports these legislative requirements and the Department's diligent efforts to implement this statute.

E3 is extremely concerned, however, regarding numerous requirements contained in the Draft Rules which are inconsistent with the statutory requirements, overbroad, vague and extremely burdensome. We have detailed each of these concerns below. These comments are organized as follows: Section I (Summary of E3 Suggested Revisions to Draft Rules, which provides a snapshot of our recommended revisions to the Draft Rules); Section II (Highest Priority Concerns with Draft Rules, including detailed explanation of our recommended revisions); Section III (Additional Significant Concerns with Draft Rules, including detailed explanation of our recommended revisions); Section IV (Additional Statutory Ambiguity that Should be Clarified in the Rules). Within each of these categories, our comments are organized numerically according to the California Code of Regulations or Financial Code section numbers, and we have suggested revisions aimed to carry out the important regulatory goals the Department seeks to address, while creating greater clarity for PACE Program Administrators, PACE solicitors and PACE solicitor agents consistent with AB 1284, SB 242 and other provisions of California law.

I. Summary of E3 Suggested Revisions to Draft Rules

Deletions in ~~strikethrough~~

Additions in *italics*

The rationale for and explanation of these suggested revisions are provided in Sections II, III and IV below.

Draft Rules Section	Topic	E3's Suggested Revision

[1] DBRS Publishes Commentary on Residential PACE Delinquency Trends (February 22, 2018), available at: https://www.dbrs.com/research/323286/dbrs-publishes-commentary-on-residential-pace-delinquency-trends.

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§1620.02(a)	Definition of "Ability to pay" excludes assets	"'Ability to pay' means the ability of a property owner to pay every PACE assessment on or before the final date to pay the assessment as scheduled, from the property owner's income *or assets*, without relying on the equity in a residential property owner's home."
§1620.02(c)	Exclusions from definition of Program Administrator are too narrow	"A program administrator does not include ~~bond~~ counsel, financial advisors, assessment engineers or administrators, trustees or other paying agents, investors, *accountants, trainers or other professionals providing services to Program Administrators* or staff of a public agency, unless, in addition to their role as ~~bond counsel, financial advisor, assessment engineer or administrator, trustee or other paying agent, investor, or staff of a public agency~~, *as a service provider to such Program Administrator*, they also contract with a public agency for the administration of a PACE program."
§1620.02(d)(3)	Definition of "To solicit a property owner" is overly broad	"An individual who identifies a PACE program as a form of financing of an efficiency improvement *in the context of soliciting, advertising or selling a PACE assessment or home improvement from a property owner*, and who does not identify any other form of financing, is soliciting a property owner for a PACE assessment, and must be enrolled with a program administrator as a PACE solicitor agent."
§1620.03(a)	Requires Program Administrators to maintain procedures to ensure vague "sufficient sources of capital"	Recommend deleting this provision.
§1620.03(b)	Requires familiarity with all governing law by all employees.	"Every program administrator implement procedures intended to ensure that each employee who performs a function on behalf of the program administrator under division 7 of the Streets and Highways Code or division 9 of the Financial Code is familiar with the laws, rules, and regulations governing the administration of a PACE program *applicable to that employee's job description*."
§1620.03(c)	Requires provision of physical copy of assessment contract.	"A program administrator shall implement a procedure intended to ensure that a property owner has a physical *or electronic* copy of the assessment contract, in the language the assessment contract was negotiated if such language is Spanish, Chinese, Tagalog, Vietnamese, or Korean, before the property owner signs the contract."
§1620.03(d)	Requires procedure to ensure PACE	"A program administrator shall implement a procedure *that makes commercially reasonable best efforts* intended to ~~ensure~~ *require* that the confirmation of key terms call occurs

	solicitor or agent is not present during confirmation of terms call	during a time when the property owner is not physically present with the PACE solicitor or PACE solicitor agent."
§1620.04	Requires data on pricing of common efficiency improvements be provided to Commissioner upon request.	Recommend deleting.
§1620.05(a)(1) Advertising Standards	Prohibits advertising that PACE provides a tax benefit	"(a) When advertising a PACE program, a program administrator shall not do any of the following, and a program administrator shall develop and implement policies and procedures intended to ensure that a PACE solicitor and PACE solicitor agent do not do any of the following: (1) Advertise the program provides a tax benefit *unless the advertisement is consistent with representations, statements, or opinions of the Internal Revenue Service or applicable state tax agency with regard to the tax treatment of PACE assessments*."
§1620.05(a)(2)	Prohibits representation that "the state is financing the efficiency improvement."	Recommend deleting.
§1620.05(a)(3)	Prohibits representing that PACE is a "means-based government program"	"(3) Make statements, representations or omissions likely to lead a property owner to believe that the program is a means-based government program *that provides a subsidy or benefit to property owners who are not otherwise able to afford the efficiency improvement or who cannot afford to repay the PACE assessment*."
§1620.05(a)(5)	Prohibits advertising improvements eligible for PACE in the same advertisement as improvements that are ineligible	"(5) Advertise property improvements that are not efficiency improvements in the same advertisement *without clearly designating which advertised improvements may be eligible for PACE financing and which are not*."
§1620.05(a)(7)	Prohibits representing that an efficiency improvement will offset the cost of	"(7) Suggest an efficiency improvement will result in an economic savings, suggest the savings will offset cost of the improvement, or otherwise lead a property owner to believe that efficiency improvement will pay for the PACE assessment *if such claims, representations or*

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	the PACE assessment	*advertisements are false, misleading or are not based upon reasonable evidence.*"
§1620.05(b)	Prohibits representing that PACE solicitor or agent has been certified to provide efficiency improvements	Recommend deleting.
§ 1620.06	Mandatory brochure	Recommend deleting as this is largely duplicative of the mandatory disclosure under AB 2693 (Streets & Highways Code); Alternatively, recommend revising to require an addendum to the § 5898.17 disclosure to include only those items that are not already covered in the statutorily-required disclosure form.
§1620.06(c)(10)(C)	Provides that the homeowner may choose "any licensed contractor or retailer to provide the property improvement and products."	Recommend deleting as inconsistent with the definition of "PACE solicitor" under section 1620.02(l) of the Draft Rules.
§1620.07(b)(9)	Requires Program Administrators to maintain records of evidence of actual energy savings	Recommend deleting.
§1620.08(k)	Requires that the complaint process meet the "linguistic and cultural needs of property owners"	"(k)(1) The complaint process shall *be conducted in the language used in the confirmation of terms call pursuant to Financial Code §5913(d) and shall be conducted in plain language to address the needs of* ~~meet the linguistic and cultural needs of property owners. (1) The process shall be designed with the intent of ensuring property owners have access to, and can fully participate in, the complaint process by providing assistance for those with limited English proficiency or with communication impairments, and~~ those who may have difficulty understanding the terms of an assessment contract. (2) ~~Such assistance shall include, but is not limited to, translations of forms and correspondence, access to interpreters, and~~ *The complaint process shall offer the use of* telephone relay systems and other devices that help *hearing impaired* ~~disabled~~ individuals communicate."

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1620.09(c)	Property Owner must be able to receive Permission to Operate ("PTO") on the interconnection of a solar facility before the Program Administrator may provide final payment.	"If the financing is for a solar project that requires permission to operate from a utility company, the program administrator shall *obtain an attestation from the PACE solicitor that all utility requirements* ~~confirm that the property owner is able~~ to obtain the necessary permission *have been satisfied* before providing final payment on the home improvement contract to the PACE solicitor."
§1620.10(a)	Unfair Business Practices	The reference to Financial Code section 22061 is misplaced/incorrect, as that section refers to nonprofit church extension funds.
§1620.10(a)(3)	Prohibits payment to a PACE solicitor for an "uninstalled product"	"Paying a PACE solicitor for an uninstalled product. For purposes of this paragraph, *contract terms and services including, but not limited to,* a warranty, *operations, maintenance, repairs, customer service* shall not constitute an uninstalled product. *A solar system or battery which has been affixed to a customer's real property but not interconnected to the utility grid is not an uninstalled product.*"
§1620.10(a)(4)	Prohibits "Paying a PACE solicitor for a product that materially differs in price from the product installed on the property, where the installed product costs less."	"Paying a PACE solicitor for a product that materially differs in price from the product installed on the property *and provided to the customer*, where the installed *and provided* product costs less."
§1620.10(a)(6)	Prohibits "Delaying the consummation of an assessment contract to postpone the property owner's obligation to pay the PACE assessments."	We recommend deleting this provision or, at the very least, providing greater specificity so that Program Administrators can understand and comply with this rule.
§1620.10(b)(1)	Prohibits representing "to a property owner that a PACE	"(b) A program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent does any of the following: (1) Represents to a property owner that a PACE assessment may

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	assessment may be repaid in any manner other than through the payment of property taxes."	be repaid in any manner other than through the payment of *an assessment or special tax as part of the owner's* property taxes."
§1620.10(b)(5)	Requires a scientific evidentiary standard for representations that an improvement is energy efficient	Option 1: "(5) Represents to a property owner that a home improvement is energy efficient *if such representations are fraudulent, misleading, inaccurate or not based on reasonable evidence*." ~~unless scientific evidence generally accepted in the scientific community establishes the improvement is energy efficient.~~ Option 2: "(5) Represents to a property owner that a home improvement is energy efficient unless such home improvement is Energy Star rated or included within the California Energy Commission's Title 20 or Title 24 rules ~~scientific evidence generally accepted in the scientific community establishes the improvement is energy efficient~~."
§1620.10(b)(6)	Prohibits representations that PACE provides a tax benefit	"(6) Represents to a property owner that a PACE assessment will result in a tax credit or tax benefit *unless the representation is consistent with representations, statements, or opinions of the Internal Revenue Service or applicable state tax agency with regard to the tax treatment of PACE assessments*."
§1620.10(b)(9)	Prohibits informing property owner that assessment lien will remain on the property if the property is sold	"(10) Fails to inform ~~Represents to~~ the property owner that *he or she may be required by a buyer or mortgage lender to pay off the remaining balance under the assessment contract if the home is sold or refinanced*. ~~the assessment contract will transfer to the buyer upon the sale of the property~~."
§1620.10(b)(12)	Bars a PACE solicitor or PACE solicitor agent from participating "in the evaluation of a property owner's ability to pay an assessment contract."	We recommend deleting this provision.
§1620.10(b)(18)	Prohibits the PACE solicitor or agent from charging higher prices than the regional market	Recommend deleting.

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	without economic justification	
§1620.10(b)(20)	Bars PACE solicitor or agent from "initiating" assessment contracts with more than one Program Administrator on the same property for the same improvements.	"~~Initiates~~ *Causes the property owner to execute* assessment contracts with more than one pace administrator on the same property for the same efficiency improvements. This paragraph does not prevent a PACE solicitor or PACE solicitor agent from obtaining financing offers from more than one program administrator on behalf of a property owner, provided that the property owner only enters into one assessment contract to finance the efficiency improvements."
§ 1620.16(b)(2)(C)	If enrollment of a PACE solicitor or agent is cancelled, the Program Administrator must notify the Department using one of several categories, which state that the "Commissioner" has taken an action	Since the Program Administrator is the entity that enrolls, trains, monitors and cancels the enrollment of PACE solicitors and their agents, these categories should reflect why the Program Administrator (rather than the Commissioner) determined that the enrollment should be canceled.
§1620.17(g)(3)	Required ethics training	Recommend narrowing to what is relevant to PACE and what is required by statute.
§1620.17(g)(4)	Required training on misrepresentation and omissions	Recommend narrowing to reference specific prohibitions and requirements under specific sections of the Department's PACE regulations and governing statutes. "Bait and switch tactics" needs to be deleted or significantly revised.
§1620.17(g)(5)	Required training on consumer protection	"Consumer protection. This module must provide information on ~~the following topics. (A) Fair trade practices (B) Areas of liability (i) Regulatory (ii) Private actions (C)Prohibited activities~~ *unfair trade practices and prohibited activities under the California Financing Law and the regulations thereunder*."
§1620.17(g)(6)	Required training on nondiscrimination	Recommend narrowing to address specific legal requirements in the PACE solicitation context.
§1620.19(a)(3)(A)	Requires that the annual report include the "number of	"(A) The number of foreclosure actions on PACE property *initiated by the public agency as a result of the nonpayment of PACE assessments that were* reported to the program administrator during the prior calendar year. Include the

	foreclosure actions on PACE property reported to the program administrator during the prior year."	year of the assessment contract, the original amount of the assessment contract, the zip code, the amount owed upon foreclosure, and the amount recovered through foreclosure."
§1620.19(a)(3)(l)	Requires disclosure of interest rates on assessment contracts in two percentage point bands.	Recommend deleting.
§1620.19(a)(3)(N)	Annual report to include "Updates of information on officers, directors, managing members, or other key personnel…"	"(N) Updates of information *required to be disclosed pursuant to Article 1, section 1409 of this subchapter* on officers, directors, managing members, or other key personnel, and information on the gross income of the program administrator for purposes of the annual assessment under Financial Code section 22107."
§1620.21(a)	Requires the Program Administrator to disclose to the property owner "the market value determination" with the Streets & Highways Code §5898.17 disclosure.	This language should be clarified to specify which market value determination to which it refers. If this is meant to refer to the 97% determination under Financial Code §22684(i), then this should be specified as follows: "(a) A program administrator shall disclose to a property owner the market value determination *made pursuant to sections 22684(i) and 22685 of the Financial Code* at the time of the disclosure of the Financing Estimate and Disclosure in Streets and Highways Code section 5898.17."
§1620.21(b)	Requires a "firewall" between the persons making the ability to pay determination and the persons making the funding approval and information on application status, etc.	We urge the Department to delete this provision, or at the very least clearly define "firewall" and delete the following language in this section: "Information on the status of any other part of the assessment contract application or the home improvement contract."
§1620.22(c)(2), 3(A)	Requires that a property owner has	Recommend deleting.

	"a stable and reliable flow of income" as part of ability to pay determination.	
§1620.22(c)(4)	Prohibits use of income expected to end within three years as part of ability to pay determination.	Recommend deleting.
§1620.22(c)(5)	Bars consideration of rental income in ability to pay determination.	"(5) Rental income may be included in determining income ~~if the property is other than the residence of the property owner, and records establish that the property has been continuously rented for two or more years~~."
§1620.23(a)	Restricts consideration of assets to the payment of a "nonroutine, nonrecurring, or atypical obligation"	Recommend deleting.
§1620.24	Gathering property owner private data on child care payments, medical expenses and caregiving expenses	Recommend deleting.
§1620.25(a)	Seasonally restricts the application of the emergency exemption from the ability to pay determination for HVAC, boiler, etc.	"(a) The financing of a heating, ventilation, and air conditioning (HVAC) system, boiler, or other system whose primary function is temperature regulation in a home is an emergency or immediate necessity only if the efficiency improvement is installed during *or within two months of* a season and in a climate where heating or air conditioning is necessary."
§1620.25(b)	Restricts use of the emergency exception to the ability to pay determination to temperature regulation.	"(b) A program administrator may not fund the installation of a product whose primary function is not temperature regulation *or ventilation* under the provisions for cases of emergency or immediate necessity in Financial Code section 22687, subdivision (e)."

§1620.28(a)	Requires Program Administrators to maintain documentation of the useful life of all efficiency improvements in their books and records.	"(a) A program administrator shall maintain documentation of the useful life of the efficiency improvement in its books and records in accordance with section 1620.07 of these rules, *based on the equipment manufacturer or installer's specifications*."
§1620.29	Specifies the sources of information the Program Administrator can rely on in approving an Assessment Contract.	"The verification of criteria for submitting, presenting, or otherwise approving for recordation an assessment contract *under Financial Code § 22684(l)* is "commercially reasonable and available" in the following circumstances."
N/A: suggested addition to Draft Rules	Financial Code § 22105 provides that the Commissioner shall investigate "any person responsible for...administering PACE programs for the applicant in this state."	The Rules should include clarifying language to make clear that not every employee of a Program Administrator must be investigated, but rather those in senior management roles with responsibility for the PACE program administration.

II. Highest Priority Concerns with Draft Rules

California Code of Regulations Title 10, Chapter 3, Subchapter 6, Article 15

§1620.2 Definitions

(a) "Ability to pay" definition refers to income only, and excludes assets.

- This definition is inconsistent with California Financial Code §22687(a), (a)(4) and (b)(1), which provide that the ATP determination is based on "income, assets and current debt obligations." The statute expressly permits Program Administrators to consider assets in the context of its reasonable good faith determination that a property owner has a reasonable ability to pay the annual PACE assessment obligations. See also Financial Code §22687(b)(1)(E), which permits Program Administrators to review bank statements or investment account statements "reflecting the value of particular assets." The Department's Rules should be consistent with statute and should not narrow the definition of ability to pay in a manner that excludes consideration of assets.
- Furthermore, by excluding assets from the ability to pay determination, and deviating from the same underwriting standards currently accepted in the consumer finance industry, there will be a significant impact to the homeowner's ability to make the necessary improvements to their property. The ripple effect this unnecessary exclusion will have on the PACE industry will be a significant decline in approvals, which will force the rates to rise in order to maintain viability.
- Accordingly, this definition should be revised as follows: "'Ability to pay' means the ability of a property owner to pay every PACE assessment on or before the final date to pay the assessment as scheduled, from the property owner's income *or assets*, without relying on the equity in a residential property owner's home."

(c) Provides that a Program Administrator does not include bond counsel, financial advisors, assessment engineers or administrators, trustees or other paying agents, investors, or staff of a public agency (unless such entities contract with the public agency for administration of the PACE program).

- This definition should be broadened to include "counsel" or "attorneys" generally who represent Program Administrators, not just bond counsel. Tax counsel, consumer law counsel, regulatory counsel and corporate attorneys all represent Program Administrators, and it should be clarified that these professionals and other service providers are not Program Administrators (unless they also contract with a public agency to administer a PACE program).
- This definition should also be broadened to include other professionals who provide services to Program Administrators, including accountants, third party PACE solicitor education trainers or others.
- By enumerating certain professionals and not others, the Draft Rules create a risk that professionals providing services to Program Administrators would be swept under the Department's regulatory jurisdiction, and could cause such professionals to refuse to provide services to Program Administrators. Such an outcome could reduce Program Administrators'

ability to comply with the Rules and other applicable law, raise funds for the financing of efficiency improvements or for general corporate purposes.

- Accordingly, §1620.2(c) should be revised as follows "A program administrator does not include ~~bond~~ counsel, financial advisors, assessment engineers or administrators, trustees or other paying agents, investors, *accountants, trainers or other professionals providing services to Program Administrators* or staff of a public agency, unless, in addition to their role as ~~bond counsel, financial advisor, assessment engineer or administrator, trustee or other paying agent, investor, or staff of a public agency~~, *as a service provider to such Program Administrator*, they also contract with a public agency for the administration of a PACE program.

(d)(3) provides that "An individual who identifies a PACE program as a form of financing of an efficiency improvement, and who does not identify any other form of financing, is soliciting a property owner for a PACE assessment, and must be enrolled with a program administrator as a PACE solicitor agent."

- This definition is unreasonably overbroad. The definition is not limited to the activities of a PACE solicitor (i.e. in the context of a solicitor authorized by a Program Administrator, or in the context of soliciting PACE assessments for remuneration). For example, this language could mean that *anyone* who talks about PACE as a form of financing *in any context* could be defined as a PACE Solicitor (other than the limited exceptions carved out for the media or a search engine in §1620.02(d)(5) and (6)). Examples of individuals who could be swept up in the Department's regulations, should this draft language be approved, would include academics, teachers, public speakers, environmental advocacy organizations, investors, tax advisors, neighbors, and many other individuals. Clearly, the Legislature did not intend to regulate every individual that discusses PACE, but rather solicitations of PACE contracts with the intent of protecting consumers.
- To correct this, this subsections should be revised as follows "An individual who identifies a PACE program as a form of financing of an efficiency improvement *in the context of soliciting, advertising or selling a PACE assessment or home improvement from a property owner*, and who does not identify any other form of financing, is soliciting a property owner for a PACE assessment, and must be enrolled with a program administrator as a PACE solicitor agent."

§1620.03 Obligations of the Program Administrator

(a) Provides that "Every program administrator shall maintain procedures established to ensure sufficient sources of capital to finance the efficiency improvements that it has obligated to finance."

- This is a significant and undefined new burden on Program Administrators that is not required anywhere in statute.
- Moreover, this language is extremely vague. It is unclear how a Program Administrator would determine the threshold for "sufficient."
- This requirement would place an undefined risk on Program Administrators. Without guidance as to what is considered "sufficient," Program Administrators would run the risk of violating the Rules, incurring fines, losing their license, or legal or disciplinary action. This will only serve to raise the cost of capital, which means homeowners will unnecessarily be paying higher rates than the market will likely support.

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- Instead, such a determination should be left to public agencies hiring Program Administrators and the Program Administrators themselves. Accordingly, we recommend deleting Draft Rule §1620.03(a).

(f) Provides that a Program Administrator must maintain evidence supporting any claims regarding energy savings made by a PACE solicitor or PACE solicitor agent and documentation of any energy savings actually achieved in the books and records related to the property owner's assessment contract for 3 years after the assessment contract is satisfied and extinguished.

- This requirement has no basis in statute and is extremely burdensome to Program Administrators and property owners.
- Documentation of "actual energy savings" achieved through the implementation of the efficiency improvement would be extremely difficult, as the Program Administrator would need to control for new loads in the home (e.g. larger television, use of an electric vehicle, switching from a gas to electric dryer, or any other of the myriad potential changes in home energy use that can occur after a PACE-financed improvement is made), or an increase in energy consumption by the property owner (i.e. customer determination to utilize more home heating or air conditioning as a result of savings achieved through improvements).
- In addition to being extremely difficult for Program Administrators to obtain and maintain evidence of "actual energy savings," such a requirement would be burdensome to customers and invasive of customer privacy.
- By contrast, Streets & Highways Code §5954(a)(8) provides that Program Administrators must include in their annual report "*estimated* total amount of energy saved, and the *estimated* total dollar amount of those savings by property owners by the efficiency improvements installed…." (emphasis added).
- Accordingly, this provision should be revised in one of the two ways:
  - Option A: "A program administrator shall implement a procedure intended to ensure that if a PACE solicitor or PACE solicitor agent represents that a property owner will achieve any energy savings from an efficiency improvement, then evidence supporting the energy savings representation, ~~and documentation of any actual energy savings, if any,~~ is maintained in the books and records related to the property owner's assessment contract for the period of time set forth in section 1620.07 of these rules."
  - Option B: "A program administrator shall implement a procedure intended to ensure that if a PACE solicitor or PACE solicitor agent represents that a property owner will achieve any energy savings from an efficiency improvement, then evidence supporting the energy savings representation, and documentation of ~~any actual~~ *estimated* energy savings, ~~if any~~, is maintained in the books and records related to the property owner's assessment contract for the period of time set forth in section 1620.07 of these rules."

§1620.05 Advertising Standards

(a)(1) prohibits the Program Administrator, PACE Solicitor and PACE Solicitor agent from advertising that the program provides a tax benefit.

- This prohibition by the Department is inconsistent with the Legislature's requirements in SB 242, which provides that "A program administrator, contractor, or a third party shall not make any representation as to the tax deductibility of an assessment contract unless that representation is consistent with representations, statements, or opinions of the Internal

Revenue Service or applicable state tax agency with regard to the tax treatment of PACE assessments." Rather than tracking the requirements of statute, which requires representations that are consistent with tax law, the Draft Rule would impose a complete gag order on advertising any tax benefits associated with PACE.

- A Program Administrator, PACE solicitor or PACE solicitor agent should be permitted to discuss or advertise tax benefits of PACE to the extent that such advertisements or representations are accurate and consistent with current tax law, tax agency guidance, tax agency opinions or the like. For example, in 2016 the IRS issued guidance on the deductibility of PACE assessments from income tax, concluding that while the principal amount of such assessments are not deductible, the interest portion may be deductible as home mortgage interest.[2] Program Administrators, PACE solicitors or PACE solicitor agents should be permitted to advertise tax benefits to the extent that they are correct.
- To address this inconsistency, this section of the Draft Rules should be revised as follows: "(a) When advertising a PACE program, a program administrator shall not do any of the following, and a program administrator shall develop and implement policies and procedures intended to ensure that a PACE solicitor and PACE solicitor agent do not do any of the following: (1) Advertise the program provides a tax benefit *unless the advertisement is consistent with representations, statements, or opinions of the Internal Revenue Service or applicable state tax agency with regard to the tax treatment of PACE assessments.*"

(a)(5) prohibits Program Administrator, PACE Solicitor and PACE Solicitor agent from advertising improvements that are not efficiency improvements in the same advertisement as an advertisement for a PACE program.

- We are extremely concerned about this provision and its impact on the ability of property owners in California to obtain PACE financing. This prohibition goes well beyond the requirements of AB 1284 and is very burdensome to Program Administrators, PACE solicitors and PACE solicitor agents. Most contractors or home improvement salespersons sell or advertise numerous forms of home improvements. Some of these improvements may be eligible for PACE financing (e.g. efficiency improvements), while others may not (granite countertops). It is unreasonably burdensome and will impose significantly increased costs on PACE solicitors and PACE solicitor agents to require such advertisements to be separate. This is likely to dissuade PACE solicitors and agents who sell other types of improvements from advertising PACE-financed improvements. This could also increase the cost of PACE-financed improvements by increase the advertising costs of PACE solicitors and their agents.
- This provision should be narrowed to allow a contractor to advertise PACE-financed improvements at the same time it advertises other improvements, but to designate which ones are eligible for PACE financing. For example, one page of a mailer could include PACE-eligible improvements and a header that states that they may be eligible for PACE, whereas another page would not include such a header, asterisk or other demarcation.
- Suggested revised language is as follows: "(5) Advertise property improvements that are not efficiency improvements in the same advertisement *without clearly designating which advertised improvements may be eligible for PACE financing and which are not*."

[2] *See* Internal Revenue Service Topic Number 503 – Deductible Taxes, *available at*: https://www.irs.gov/taxtopics/tc503.

(a)(7) prohibits Program Administrator, PACE Solicitor and PACE Solicitor agent from suggesting "an efficiency improvement will result in an economic savings, suggest the savings will offset cost of the improvement, or otherwise lead a property owner to believe that efficiency improvement will pay for the PACE assessment."

- This prohibition has no basis in statute and is contrary to one of the primary reasons most property owners choose to install rooftop solar or make energy or water efficiency improvements to their homes. Clearly, many PACE-financed improvements will result in economic savings (e.g., energy-saving insulation, double or triple-paned windows, more efficient HVAC systems or myriad other efficiency improvements). While property owners who undertake such improvements are often motivated by the desire to mitigate climate change and achieve energy independence, most would not or could not afford to make such improvements unless they "pencil out" by resulting in reduced energy or water costs over the lifetime of the improvement.
- False, misleading or fraudulent advertising is already prohibited under California law.[3]
- If adopted, this section of the Draft Rules would have a significantly adverse impact on the PACE industry. Contractors and home improvement salespersons would be permitted to advertise the truthful benefits of solar, energy efficiency or water efficiency home improvements when such improvements are not financed via PACE, but would not be able to make such claims – even where fully accurate – where they are. This would certainly dissuade contractors and home improvement salespersons from advertising the availability of PACE financing, causing substantial harm to the industry. This would frustrate the Legislature's purposes in enacting PACE enabling legislation in California, including
- If the Department feels that additional rules are required to prevent false or fraudulent advertising regarding economic savings associated with PACE-financed improvements, the language should be revised as follows: "(7) Suggest an efficiency improvement will result in an economic savings, suggest the savings will offset cost of the improvement, or otherwise lead a property owner to believe that efficiency improvement will pay for the PACE assessment *if such claims, representations or advertisements are false, misleading or are not based upon reasonable evidence.*"

(b) Requires Program Administrators to develop policies to "to ensure that a PACE solicitor or PACE solicitor agent does not lead a property owner to believe that that the PACE solicitor or PACE solicitor agent has been certified to provide efficiency improvements under any PACE program."

- This provision is very confusing and inconsistent with AB 1284, which expressly requires PACE solicitors and PACE solicitor agents to be enrolled by Program Administrators and for such Program Administrators to inform the Department of such enrollments.[4] The very definition of "PACE solicitor" is "a person authorized by a program administrator to solicit a property owner to enter into an assessment contract."[5]
- This provision is also inconsistent with sections 1620.11 and 1620.12 of the Draft Rules, which require enrollment of PACE solicitors and PACE solicitor agents by Program Administrators.
- The distinctions between "enrollment" or "authorization" and "certification" is far from clear, and will be confusing to Program Administrators, PACE solicitors and PACE

[3] *See, e.g.*, California Business & Professions Code §§17200, 17500.
[4] Financial Code §§22680, 22682.
[5] Financial Code §22017(a).

solicitor agents. Should such entities not be permitted to designate whether PACE solicitors or their agents are officially enrolled by a Program Administrator or authorized to solicit property owners? If not, this would lead to a hazard of un-enrolled, unregulated solicitations of PACE assessments in violation of California statute.

- Accordingly, this provision should be deleted.

§1620.07 Books and Records

(b)(9) requires Program Administrators to maintain records of evidence of actual energy savings.

- As discussed above in reference to §1620.03(f) of the Draft Rules, this requirement has no basis in AB 1284 or other statute, would be nearly impossible to carry out. Obtaining and maintaining documentation of energy savings actually achieved would be extremely difficult (if not impossible), as the Program Administrator would need to control for new loads in the home. This would be burdensome and invasive to property owners.
- This requirement is unreasonable and constitutes regulatory overreach, and accordingly, should be deleted.

§1620.08 Complaint Process and Procedures

(k) requires that the complaint process meet the "linguistic and cultural needs of property owners"

- This draft provision is unreasonably and extremely broad and vague. "Linguistic and cultural needs" of property owners could include a very broad spectrum of things, including tone of voice, beliefs, customs, world views, lifestyles, musical tastes, religion and many, many other variables. It would be absolutely impossible for Program Administrators to address all of the many "cultural needs" of property owners across the state of California.
- Instead, this subsection should be narrowed to be consistent with the requirements the Legislature has imposed with respect to PACE. In SB 242, the Legislature required that, with respect to the confirmation of terms call, if the language chosen by the property owner is supported by the Program Administrator, the call would take place in that language, "except where the property owner on the call chooses to communicate through his or her own interpreter. If the preferred language is not supported and an interpreter is not chosen by the property owner on the call, the PACE assessment transaction shall not proceed."[6]
- SB 242 further provides that, where the confirmation of terms call occurred in Spanish, Chinese, Tagalog, Vietnamese, or Korean, the Program Administrator must provide the required disclosures and documentation translated into such language.[7]
- Thus, unless the property owner's chosen language is supported by the Program Administrator, the Program Administrator should not be required to conduct the complaint process in the property owner's chosen language. It is unreasonable for Program Administrators to be required to meet the linguistic needs of any possible language the property owner prefers to use.
- Section 1620.08(k) of the Draft Rules should be overhauled to delete all references to "cultural needs", and to track the requirements of SB 242: "(k)*(1)* The complaint process shall *be conducted in the language used in the confirmation of terms call pursuant to Financial Code*

[6] Financial Code §5913(d).
[7] Financial Code §5913(e).

ENERGY EFFICIENT EQUITY INC.

§5913(d) and shall be conducted in plain language to address the needs of ~~meet the linguistic and cultural needs of property owners. (1) The process shall be designed with the intent of ensuring property owners have access to, and can fully participate in, the complaint process by providing assistance for those with limited English proficiency or with communication impairments, and~~ those who may have difficulty understanding the terms of an assessment contract. (2) ~~Such assistance shall include, but is not limited to, translations of forms and correspondence, access to interpreters, and~~ *The complaint process shall offer the use of* telephone relay systems and other devices that help *hearing impaired* ~~disabled~~ individuals communicate."

§1620.10 Unfair Business Practices

(b)(5) requires Program Administrator to implement policies to prevent a PACE solicitor or PACE solicitor agent from representing to a property owner that "a home improvement is energy efficient unless scientific evidence generally accepted in the scientific community establishes the improvement is energy efficient."

- This draft provision has no basis in either AB 1284 or SB 242. While fraudulent, misleading or false claims in advertising are prohibited under California law, the Legislature never set a standard of scientific evidence for representations regarding PACE-financed improvements.
- This provision could lead to much dispute and potential litigation.
- This provision is unreasonable and extremely burdensome. Setting a scientific evidentiary standard via regulations will dissuade contractors and home improvement salespersons from promoting and advertising PACE as a financing mechanism, as they would be able to advertise energy efficient home improvements that are financed through other means (based on truthful, non-fraudulent, non-misleading claims as required under the law), but without the risk of disciplinary action should there be some disagreement in the scientific literature about the energy savings of a particular measure. This will harm the PACE industry, PACE Program Administrators and property owners who would otherwise be able to benefit from PACE. It will also frustrate the Legislature's purposes in enabling PACE.
- This subsection should either be deleted or substantially revised. For example, the Rules could explicitly bar the PACE solicitor or PACE solicitor agent from making representations that are inaccurate, fraudulent, misleading or not based on reasonable evidence. Alternatively, this rule could refer to energy efficiency improvements already vetted and endorsed by the California Energy Commission. Sample revised language:
  - Option 1: "(5) Represents to a property owner that a home improvement is energy efficient *if such representations are fraudulent, misleading, inaccurate or not based on reasonable evidence*." ~~unless scientific evidence generally accepted in the scientific community establishes the improvement is energy efficient~~.
  - Option 2: "(5) Represents to a property owner that a home improvement is energy efficient unless such home improvement is Energy Star rated or included within the California Energy Commission's Title 20 or Title 24 rules ~~scientific evidence generally accepted in the scientific community establishes the improvement is energy efficient~~."

(b)(6) requires Program Administrator to implement policies to prevent a PACE solicitor or PACE solicitor agent from representing to a property owner that a PACE assessment will result in a tax credit or benefit.

- See discussion above regarding §1620.05 of the Draft Rules. This requirement is also inconsistent with the Legislature's requirements in SB 242, which requires representations that are consistent with tax law, rather than a complete gag order on advertising any tax benefits associated with PACE.
- To address this inconsistency, this section of the Draft Rules should be revised as follows: "(6) Represents to a property owner that a PACE assessment will result in a tax credit or tax benefit *unless the representation is consistent with representations, statements, or opinions of the Internal Revenue Service or applicable state tax agency with regard to the tax treatment of PACE assessments*."

(b)(9) requires Program Administrator to implement policies to prevent a PACE solicitor or PACE solicitor agent from representing to a property owner that an assessment contact will transfer to the buyer upon a sale of the property.

- This provision amounts to a prohibition on representing the truth regarding how liens associated with PACE assessment contracts actually work. In the event of a sale of the property, the lien would remain as it runs with the land.[8]
- It is true, however, that a mortgage lender backed by Fannie Mae may not finance the purchase of a property and FHA may not insure the mortgage if the lien remains on the property. Thus, a buyer who intends to use Fannie-backed conforming loan, or FHA-backed mortgage insurance may insist that the seller pay off the remaining assessments under the assessment contract prior to sale. This issue is already required to be disclosed by the Program Administrator, however, under the Streets & Highways Code § 5898.17 disclosure document.
- This rule could carry out its apparent purpose – to disclose to the property owner that he or she may need to pay off the remaining assessments under the assessment contract prior to sale or refinancing of the property – using more accurate language, as follows: "(10) Fails to inform ~~Represents to~~ the property owner that *he or she may be required by a buyer or mortgage lender to pay off the remaining balance under the assessment contract if the home is sold or refinanced*. ~~the assessment contract will transfer to the buyer upon the sale of the property~~."

(b)(18) bars the PACE solicitor or PACE solicitor agent from charging higher prices than the regional market without economic justification.

- This provision of the Draft Rules goes well beyond anything required in statute and seems extremely problematic from a free market perspective. Home improvement contractors should be free to set their prices, and customers should be permitted to shop around and choose the contractor with whom they wish to work. If a contractor is superior or more desirable based on references, referrals from neighbors and/or "Yelp" or "Angie's List" reviews, they should be permitted to charge higher prices, so long as property owners are

[8] *See, e.g.*, Streets & Highways Code §5898.30.

willing to pay those prices and the terms and conditions of the assessment contract are otherwise clearly disclosed. If a project will use higher quality equipment, equipment made in the U.S.A. or other factors that increase prices, this should be permitted in the California free marketplace.

- We therefore strongly urge the Department to delete this provision from the Draft Rules as it constitutes regulatory overreach and is not grounded in the Legislative requirements or purposes of AB 1284 or SB 242.

§ 1620.17 Education Program

(g)(3) requires that the required six hours of PACE solicitor agent education include "ethics", with the following topics:

(A) Conflicts of interest

(B) Transparency

(C) Prohibition on incentives

(D) Cash vs. PACE pricing

(E) Vulnerable populations

(F) Liability

- This provision of the Draft Rules is overly broad and extremely vague. Trainers and Program Administrators will have no idea what the training should include on these topics. This will lead to regulatory uncertainty, risk and potentially resulting increases in the cost of administrative fees under PACE to insure against such uncertainty.
- This section should be significantly narrowed to what is relevant to PACE and what is required by statute.

(g)(4) requires that the six hours of PACE solicitor agent education include the following potential areas of misrepresentation or omissions:

(A) Government sponsorship

(B) Tax benefits

(C) Subsidies

(D) Energy savings

(E) Repayment obligation

(F) Bait and switch tactics

(G) Refinancing

(H) Home sales

- As above, this provision is overly broad and extremely vague. This language provides Program Administrators with no guidance regarding what to include in such training programs.
- This language should be narrowed to reference specific prohibitions and requirements under specific sections of the Department's PACE regulations and governing statutes. "Bait and switch tactics" needs to be deleted or significantly revised to explain what is referenced here.

(g)(5) requires that the six hours of PACE solicitor agent education include consumer protection, including

(A) Fair trade practices

(B) Areas of liability

(i) Regulatory

(ii) Private actions

(C) Prohibited activities

- This provision is overly broad and unreasonably vague. Again, it provides zero guidance to Program Administrators in establishing their training programs.
- This language should be revised as follows: "Consumer protection. This module must provide information on ~~the following topics. (A) Fair trade practices (B) Areas of liability (i) Regulatory (ii) Private actions (C)Prohibited activities~~ *unfair trade practices and prohibited activities under the California Financing Law and the regulations thereunder*."

(g)(6) requires that the six hours of PACE solicitor agent education include nondiscrimination, including

(A) Vulnerable populations

(B) Protected classes

(C) Unruh Civil Rights Act

- This language is also overly broad and vague.
- This provision should be narrowed to address specific legal requirements in the PACE solicitation context applicable to these topics.

§1620.19 Annual Report Data

(a)(3)(l) requires disclosure of the interest rates on the assessment contracts in two percentage point bands.

- This requirement has no basis in statute and in unreasonably invasive to Program Administrators.
- We recommend deleting this provision.

(a)(3)(N) requires that the annual report of the Program Administrator to the Department include "Updates of information on officers, directors, managing members, or other key personnel…"

- This language is extremely and unreasonably broad and vague as drafted. It is completely unclear what kind of "information" is being requested. Information could include everything from the standard information required for an application for a California Finance Lender license application, or it could include anything from an officer's marital or childbearing status. Such breadth could constitute an invasion of privacy and could case worthy candidates to refuse to serve as officers, directors, managing members or key personnel of Program Administrators, reducing the quality of the management of such organizations or their ability to exist and carry out the duties of administering California's PACE programs on behalf of public agencies. This would harm potential customers of energy and water saving improvements and would frustrate the Legislature's purpose in enacting PACE.
- In order to avoid litigation and violations of the privacy rights of such officers and executives, it is essential that this language be narrowed, made specific and brought within the boundaries of statutory requirements.
- We urge the Department to revise this language as follows: "(N) Updates of information *required to be disclosed pursuant to Article 1, section 1409 of this subchapter* on officers, directors, managing members, or other key personnel, and information on the gross income of the program administrator for purposes of the annual assessment under Financial Code section 22107."

§1620.22 Property Owner Income

(c)(2) Provides that "A program administrator shall determine that a property owner has a stable and reliable flow of income."

- This provision of the draft rules is unreasonably vague and highly problematic. It is unclear how "stable" and "reliable" should be defined. What thresholds should Program Administrators use to make these determinations? How can any underwriter ever determine this for any job or income source? Even a person with a clear track record of W2 income from a large institution could face layoffs in the event of economic change.
- Program Administrators would be required to request 2 years of income history pursuant to subsection (c)(3) of this section. So long as a property owner ability to pay determinations are based on this two-year data and reasonable, evidence-based estimates based on more recent job changes, this should be sufficient.
- This provision should be deleted.

(c)(3)(A) also refers to "stable and reliable flow of income"

- See above re subsection (c)(2).
- Recommend deleting.

(c)(4) Provides that "Temporary sources of income are sources that are expected to end within three years, and should not be included in determining income."

- This provision is unreasonably restrictive. How often can any property owner represent with certainty that their income sources will continue beyond three years? How would the Program Administrator make this determination? Even if a property owner had a 1-year contract, they may have extremely strong ability to pay based on their employment track record, assets and other sources of income.
- We recommend deleting this provision.

(c)(5) bars consideration of rental income in the ability to pay determination if the property is the residence of the property owner.

- This provision has no basis in AB 1284 or other statute.
- This provision is unreasonable, as many property owners rent a portion of their home and should be permitted to use PACE even when this is the case. For example, if a property owner rents a room or in-law unit of their primary residence, but wants to install rooftop solar, there is nothing in California law that does or should prevent this.
- It is also unclear why the two-year requirement should apply to rental income. For example, if a property owner rented a room or unit as part of its primary residence and entered into a 2-year lease, but had not rented this room or unit continuously for the prior two years.
- This provision should be revised as follows: "(5) Rental income may be included in determining income ~~if the property is other than the residence of the property owner, and records establish that the property has been continuously rented for two or more years~~."

§1620.23 Other Assets

(a) provides that a Program Administrator may rely on a property owner's assets for the payment of a "nonroutine, nonrecurring, or atypical obligation," and lists certain examples.

- This language could be problematic because it could be interpreted to restrict the usage of property owner's assets in the ability to pay determination to payment of "nonroutine, nonrecurring, or atypical obligation." Instead, as discussed in our comments on §1620.2(a) of the Draft Rules above, AB 1284 permits a Program Administrator to take a property owner's assets into account when determining whether a property owner has the ability to pay the annual payment obligations of a PACE assessment contract.[9]
- For example, this language could be read to disqualify retired property owners who take an annual distribution from an IRA or annuity. Such an IRA account is an asset, but it could reasonably be used to pay for annual PACE assessments.
- To eliminate this ambiguity, we recommend deleting this provision.

1620.24 Basic Household Living Expenses

Requires Program Administrators to obtain information from property owners on child care payments, medical expenses and caregiving expenses as part of the determination of basic living expenses for the ability to pay determination.

- We are deeply concerned that this requirement would violate property owner privacy rights. It is unreasonably invasive to ask property owners sensitive and deeply personal questions about child care costs or medical expenses that would then, pursuant Draft Rule §1620.07(b)(5), become a part of the Program Administrator's official books and records and which are subject to examination by the Commissioner . This requirement could deter participation by property owners in useful PACE programs throughout the state. This would frustrate the Legislature's purposes in enacting PACE programs in California.
- We recommend deleting this provision. Alternatively, this provision could be revised to permit Program Administrators to ask about this expenses (if this is otherwise consistent with federal and state privacy law), but not require the property owner to provide this information as a condition of financing.

[9] *See, e.g.*, Financial Code §22687(a).

III. Additional Significant Concerns with Draft Rules

California Code of Regulations Title 10, Chapter 3, Subchapter 6, Article 15

§1620.03 Obligations of the Program Administrator

(b) Provides that "Every program administrator implement procedures intended to ensure that each employee who performs a function on behalf of the program administrator under division 7 of the Streets and Highways Code or division 9 of the Financial Code is familiar with the laws, rules, and regulations governing the administration of a PACE program."

- This is extremely broad and would require education regarding all requirements applicable to Program Administrators of employees across the spectrum of job functions, from administrative assistant or bookkeeper to senior executives. This requirement should be narrowed to apply to statutory requirements applicable to the job description of each employee.
- We recommend the following modest revision to this language: "Every program administrator implement procedures intended to ensure that each employee who performs a function on behalf of the program administrator under division 7 of the Streets and Highways Code or division 9 of the Financial Code is familiar with the laws, rules, and regulations governing the administration of a PACE program *applicable to that employee's job description*."

(c) Provides that the property owner must have a physical copy of the assessment contract

- This would prevent fully electronic contracting. Electronic contracting is the new standard in business, and has been endorsed on the federal level by laws such as the E-SIGN Act. The requirement of paper copies imposes costs and requires the use of paper products, which many customers and businesses seek to avoid for sustainability reasons.
- Accordingly, we recommend that this language be revised as follows "A program administrator shall implement a procedure intended to ensure that a property owner has a physical *or electronic* copy of the assessment contract, in the language the assessment contract was negotiated if such language is Spanish, Chinese, Tagalog, Vietnamese, or Korean, before the property owner signs the contract."

(d) Provides that "A program administrator shall implement a procedure intended to ensure that the confirmation of key terms call occurs during a time when the property owner is not physically present with the PACE solicitor or PACE solicitor agent."

- While Program Administrators can certainly design procedures in which, at the beginning of the confirmation of key terms call, they ask the property owner whether the PACE solicitor or PACE solicitor agent is present, Program Administrators will have no way of verifying whether or not the PACE solicitor or PACE solicitor agent is actually present.
- In light of the challenges of "ensuring" this, the language should be revised as follows "A program administrator shall implement a procedure *that makes commercially reasonable best*

efforts intended to ~~ensure~~ *require* that the confirmation of key terms call occurs during a time when the property owner is not physically present with the PACE solicitor or PACE solicitor agent."

§1620.04 PACE Pricing

Requires that data on the pricing of "common PACE eligible efficiency improvements and products, including installation costs, labor time, and profit" be provided to the Commissioner upon request.

- This requirement goes well beyond AB 1284 and is not required under California statute.
- There are far too many variables in the installation process to make the collection and analysis of this data useful or to make this provision reasonable. For example, there is a huge number of variables that challenges the utility of pricing comparisons, including customer choice of materials, appliances, solar panels, contractors and many other factors.
  This requirement is invasive and burdensome to Program Administrators. The homeowner will ultimately pay higher prices if this provision is adopted because it will force Program Administrators to reconcile and verify the cost of every phase of the installation process for each unique job.
  We recommend deleting this provision.

§1620.05 Advertising Standards

(a)(2) prohibits Program Administrator, PACE Solicitor and PACE Solicitor agent from saying that "the state is financing the efficiency improvement."

- Such a prohibition is inconsistent with how PACE financing actually works. Technically, the public agency *is* providing the upfront capital for the improvements, and the public agency holds the lien on the property. While the public agency generally issues bonds that are purchased by private investors in order to raise the capital to finance these improvements, that is not always the case. For example, the Sonoma County Energy Independence Program uses public, county funds to finance the improvements.
- We recommend deleting this provision.

(a)(3) prohibits Program Administrator, PACE Solicitor and PACE Solicitor agent from "leading a property owner to believe that the program is a means-based government program."

- Technically, PACE is a "means-based government program" because it is a government program and has strict underwriting requirements, including demonstration of income and assets that the property owner has the ability to repay the assessment. Although it appears that the intention in the Draft Rules is to prevent Program Administrators, PACE solicitors or PACE solicitor agents from representing that PACE is a subsidy provided to property owners *below* a certain income or asset threshold, the language could be interpreted to prohibit Program Administrators, PACE solicitors or PACE solicitors from providing important information

about the ability to pay and underwriting requirements that *are* required under AB 1284. This could lead to confusion and lack of education of property owners about the important underwriting requirements of PACE in California.

- Accordingly, the language in this subsection of the Draft Rules should be clarified as follows "(3) Make statements, representations or omissions likely to lead a property owner to believe that the program is a means-based government program *that provides a subsidy or benefit to property owners who are not otherwise able to afford the efficiency improvement or who cannot afford to repay the PACE assessment*."

§ 1620.06 Mandatory Brochure

Requires Program Administrators to provide a brochure to all property owners prior to entering into the assessment contract. Permits the Department to draft the brochure and require all Program Administrators to use it.

- This requirement is largely duplicative of the disclosure to property owners already required under AB 2693 (Streets & Highways Code § 5898.17).
- This disclosure, the terms of the Assessment Contract, and our website contain all of the pertinent information necessary to satisfy this requirement.
- We recommend that this requirement be deleted or revised to require an addendum to the Streets & Highways Code § 5898.17 disclosure to include only those items that are not already covered in the statutorily-required disclosure form.

(c)(10)(C) provides that the homeowner may choose "any licensed contractor or retailer to provide the property improvement and products."

- This provision is inconsistent with the definition of "PACE solicitor" under section 1620.02(l) of the Draft Rules, which includes a "contractor" under chapter 29.1 of part 3 of division 7 of the Streets and Highways Code (beginning with section 5900)
(i.e. SB 242). This would mean that a contractor must be enrolled by the applicable Program Administrator, which would restrict the homeowner's choice of contractors.
- We recommend deleting this subsection.

1620.09 Completion of Work

(c) Provides that Program Administrator must confirm that property owner is able to receive Permission to Operate ("PTO") on the interconnection of a solar facility before providing final payment on the project.

- This provisions could dissuade contractors from using PACE financing if they are used to getting paid in full prior to PTO in cash sales or third-party financing arrangements. Such a result could negatively impact Program Administrators and California property owners, by disadvantaging the use of this important financing mechanism and public program.

- Instead, the language should be revised to provide that final payment may be made if the contractor attests that all of the utility's requirements have been satisfied in order for PTO to be obtained. We recommend the following revision: "If the financing is for a solar project that requires permission to operate from a utility company, the program administrator shall *obtain an attestation from the PACE solicitor that all utility requirements* ~~confirm that the property owner is able~~ to obtain the necessary permission *have been satisfied* before providing final payment on the home improvement contract to the PACE solicitor."

§1620.10 Unfair Business Practices

(a) Lists activities that constitute an unfair business practice.

- The reference to Financial Code section 22061 is misplaced/incorrect, as that section refers to nonprofit church extension funds.

(a)(3) prohibits payment to a PACE solicitor for an "uninstalled product," and provides that a warranty is not an uninstalled product.

- This subsection should be revised to clarify that operations & maintenance or other contractual services often included in the installation of efficiency improvements are also not an uninstalled product. For example, if PACE financing of a rooftop solar system includes operations & maintenance services, this should not be considered an "uninstalled product."
- This subsection should also distinguish between "uninstalled" and "not interconnected." For example, a solar system may be installed on a property owner's rooftop, but, due to interconnection queues or utility delays, permission to operate may not have been granted and the system may not be grid-interconnected.
- We recommend the following language: "Paying a PACE solicitor for an uninstalled product. For purposes of this paragraph, *contract terms and services including, but not limited to,* a warranty, *operations, maintenance, repairs, customer service* shall not constitute an uninstalled product. *A solar system or battery which has been affixed to a customer's real property but not interconnected to the utility grid is not an uninstalled product.*"

(a)(4) prohibits "Paying a PACE solicitor for a product that materially differs in price from the product installed on the property, where the installed product costs less."

- While it appears that this subsection is intended to prevent PACE solicitors from fraudulently charging customers for different products than what they actually install, the language is not entirely clear and could lead to confusion. For example, similar to the comment above, this language should clarify that operations & maintenance services can be financed via PACE.
- We suggest the following revision: "Paying a PACE solicitor for a product that materially differs in price from the product installed on the property *and provided to the customer*, where the installed *and provided* product costs less."

(a)(6) prohibits "Delaying the consummation of an assessment contract to postpone the property owner's obligation to pay the PACE assessments."

- It is unclear to what the delay referenced in this section is relative. Assumedly, contractors will want to know that the assessment contract has been executed to ensure that they will receive payment for the work performed and thus would not begin work in the absence of such contract. Also, it appears that if the payment timeline is acceptable to the contractor, it shouldn't be an issue.
- We recommend deleting this provision or, at the very least, providing greater specificity so that Program Administrators can understand and comply with this rule.

(b)(1) requires Program Administrator to implement policies to prevent a PACE solicitor or PACE solicitor agent from representing "to a property owner that a PACE assessment may be repaid in any manner other than through the payment of property taxes."

- This is not technically correct. The assessment is repaid via the property tax bill, but it is a contractual assessment or special tax, not a property tax.
- We recommend the following clarifying revision: "(b) A program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent does any of the following: (1) Represents to a property owner that a PACE assessment may be repaid in any manner other than through the payment of *an assessment or special tax as part of the owner's* property taxes."

(b)(12) bars a PACE solicitor or PACE solicitor agent from participating "in the evaluation of a property owner's ability to pay an assessment contract."

- This prohibition is not required anywhere in statute, and could be problematic in terms of prequalification determinations being made by PACE solicitors. For example, if PACE solicitors are searching publicly-available databases to determine whether property owners are likely to be able to pay efficiency improvements financed via PACE prior to soliciting such PACE assessments, this could be construed as participating in the evaluation of a property owner's ability to pay.
- Such a prohibition would create legal uncertainty and potentially chill the promotion of PACE by contractors, thereby preventing property owners from taking advantage of this useful financing mechanism and frustrating the Legislature's purposes in enabling PACE.
- We recommend deleting this provision.

(b)(20) bars PACE solicitor or agent from "initiating" assessment contracts with more than one Program Administrator on the same property for the same improvements.

- While we agree that PACE solicitors or their agents should not cause a property owner to execute assessment contracts with more than one Program Administrator for the same project, the current language is imprecise. It does seem reasonable for PACE solicitors or their agents to "shop around" and compare the interest rates and other terms of more than

one Program Administrator. This competition will lead to better prices, and presumably better financing rates, for California consumers.

- Thus, we agree with the following language in this subsection of the Draft Rules: "This paragraph does not prevent a PACE solicitor or PACE solicitor agent from obtaining financing offers from more than one program administrator on behalf of a property owner, provided that the property owner only enters into one assessment contract to finance the efficiency improvements."
- To eliminate the ambiguity in this provision, we recommend the following revision: "~~Initiates~~ *Causes the property owner to execute* assessment contracts with more than one pace administrator on the same property for the same efficiency improvements. This paragraph does not prevent a PACE solicitor or PACE solicitor agent from obtaining financing offers from more than one program administrator on behalf of a property owner, provided that the property owner only enters into one assessment contract to finance the efficiency improvements."

§ 1620.16 Canceling Enrollment

(b)(2)(C) if enrollment of a PACE solicitor or PACE solicitor agent is cancelled, the Program Administrator must notify the Department using one of several categories. Many of the categories, however, state that the "Commissioner" has taken an action (e.g. demanded that the solicitor discontinue solicitation or stop violating the law).

- This provision seems to inaccurately reflect AB 1284's mechanism for regulating PACE solicitors and their agents. Since the *Program Administrator* is the entity that enrolls, trains, monitors and cancels the enrollment of PACE solicitors and their agents, these categories should reflect why the *Program Administrator* determined that the enrollment should be canceled.

§1620.19 Annual Report Data

(a)(3)(A) requires that the annual report of the Program Administrator to the Department include the "number of foreclosure actions on PACE property reported to the program administrator during the prior year."

- This language should be narrowed to include foreclosure actions initiated by the sponsoring public agency as a result of a default on the PACE assessment (rather than including foreclosures by mortgage lenders or the county tax collector resulting from nonpayment of a mortgage or other taxes or assessments).
- We recommend the following revision: "(A) The number of foreclosure actions on PACE property *initiated by the public agency as a result of the nonpayment of PACE assessments that were* reported to the program administrator during the prior calendar year. Include the year of the assessment contract, the original amount of the assessment contract, the zip code, the amount owed upon foreclosure, and the amount recovered through foreclosure."

§1620.21 Property Owner Protections

(a) Requires the Program Administrator to disclose to the property owner "the market value determination" at the time it makes the Financing Estimate and Disclosure required under Streets & Highways Code §5898.17.

- This language should be clarified to specify which market value determination to which it refers. If this is meant to refer to the 97% determination under Financial Code §22684(i), then this should be specified as follows: "(a) A program administrator shall disclose to a property owner the market value determination *made pursuant to sections 22684(i) and 22685 of the Financial Code* at the time of the disclosure of the Financing Estimate and Disclosure in Streets and Highways Code section 5898.17."

(b) requires a Program Administrator to establish a "firewall" between the persons making the ability to pay determination and the persons making the determination whether to approve funding, the PACE solicitor agent, and "Information on the status of any other part of the assessment contract application or the home improvement contract."

- "Firewall" should be defined.
- Establishing a "firewall" between the persons making the ability to pay determination and "information on the status of any other part of the assessment contract application" could be administratively and operationally problematic for Program Administrators. For example, other parts of the underwriting process (e.g., the required Financial Code §22684(d) and (e) underwriting regarding property owner bankruptcies and defaults and delinquencies on mortgage debt) interrelate with the ability to pay information. It is reasonable for Program Administrators to hire underwriters that handle all of the underwriting required under the Streets & Highways Code, subdivision (b) of Section 10091 of Title 4 of the California Code of Regulations, Financial Code §22684 as well as the ability to pay determination under Financial Code §§ 22686 and 22687. Requiring this to be handled by separate persons is unreasonable and will result in increased costs to Program Administrators. Such increased costs could be passed on to California consumers via increased program administration fees for PACE programs, which would frustrate the Legislative purposes in enacting PACE enabling legislation.
- We urge the Department to delete this provision, or at the very least clearly define "firewall" and delete the following language in this section "Information on the status of any other part of the assessment contract application or the home improvement contract."

§1620.25 Emergency

(a) Restricts the application of the emergency exemption from the ability to pay determination for HVAC, boiler or other system whose primary function is temperature regulation under Financial Code § 22687(e) to the season when that system is necessary.

- This goes beyond the Legislature's requirements in AB 1284.

- This provision could easily create logistical problems and prevent the urgent need for temperature regulation where property owners want to get an improvement installed 1-2 months before it is technically within a season. For example, if a property owner located in El Centro, California is urgently seeking to install an air conditioning system during a heatwave in May, he or she should be permitted to use PACE financing, even though it is not technically "Summer."
- We recommend the following revision to prevent harm to property owners who could greatly benefit from PACE financing and do not possess the up front capital to install such improvements: "(a) The financing of a heating, ventilation, and air conditioning (HVAC) system, boiler, or other system whose primary function is temperature regulation in a home is an emergency or immediate necessity only if the efficiency improvement is installed during *or within two months of* a season and in a climate where heating or air conditioning is necessary."

(b) Prohibits use of the emergency exception to the ability to pay determination under Financial Code § 22687(e) to an improvement needed for temperature regulation.

- To be consistent with Financial Code §22687(e), this provision should include ventilation.
- We suggest the following revision: "(b) A program administrator may not fund the installation of a product whose primary function is not temperature regulation *or ventilation* under the provisions for cases of emergency or immediate necessity in Financial Code section 22687, subdivision (e)."

§1620.28 Useful Life of Improvement

(a) Requires Program Administrators to maintain documentation of the useful life of all efficiency improvements in their books and records.

- Program Administrators should not be required to make a determination regarding the useful life of an improvement.
- Instead, this provision should be revised as follows: "(a) A program administrator shall maintain documentation of the useful life of the efficiency improvement in its books and records in accordance with section 1620.07 of these rules, *based on the equipment manufacturer or installer's specifications*."

§1620.29 Commercially Reasonable

Specifies the sources of information the Program Administrator can rely on in approving an Assessment Contract.

- This provision should specify that this standard applies to the Program Administrator's determination under Financial Code § 22684(l).
- We recommend the following revision: "The verification of criteria for submitting, presenting, or otherwise approving for recordation an assessment contract *under Financial Code § 22684(l)* is "commercially reasonable and available" in the following circumstances."

IV. Additional Statutory Ambiguity that Should be Addressed in the Rules

Financial Code § 22105

- provides that the Commissioner shall investigate the Program Administrator applicant, its principal officers, directors, managing members, and persons owning or controlling, directly or indirectly, 10% or more of the outstanding equity securities or "any person responsible for...administering PACE programs for the applicant in this state."
- The Rules should include clarifying language to make clear that not every employee of a Program Administrator must be investigated, but rather those in senior management roles with responsibility for the PACE program administration.

ENERGY EFFICIENT EQUITY INC.

V. Conclusion

E3 greatly appreciates the Department's attention to drafting these regulations and this invitation for comments. Overall, we believe numerous critical changes to the Draft Rules are necessary to prevent confusion and severe harm to the ability of California property owners to take advantage of this helpful means of financing energy and water saving improvements. We have suggested revisions herein to hone in on the important regulatory and consumer protection goals the Department seeks to address, while clearing up ambiguities and creating greater clarity for PACE Program Administrators, PACE solicitors and PACE solicitor agents.

E3 welcomes the opportunity to discuss the Draft Rules and these comments with the Department and other stakeholders. We look forward to working constructively with the Department to refine these rules to protect California consumers in a manner that is consistent with Legislative intent and enacted statute.

Sincerely,

DocuSigned by:
Brad Knyal
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Brad Knyal

Chief Executive O