



January 5, 2018

To: California Department of Business Oversight

From: California Low-Income Consumer Coalition
California Bankers Association
California Mortgage Bankers Association
California Credit Union League
California Land Title Association
California Association of Realtors
California Escrow Association
California Mortgage Association
Consumers Union
United Trustees Association
Peggy Moak, Butte County Treasurer-Tax Collector

Re: Comments on Proposed PACE-related Rulemaking

The undersigned organizations appreciate the Department of Business Oversight's invitation to provide input into regulations that the Department has been tasked with developing to govern the Property Assessed Clean Energy (PACE) program. We note from the outset that the signatories to this letter represent an unusually broad and diverse array of organizations, ranging from consumer advocates to industry trade groups to public officials.

The fact that all of these groups have joined a single letter signals the urgency of the work that needs to be done to bring the PACE program into compliance with norms of consumer protection and financial soundness. California's energy efficiency and water conservation goals can be met without leaving consumers vulnerable to adverse financial consequences. The safeguards proposed here will help limit any abuses stemming from the fact that, in many cases, PACE administrators rely on the same agents to solicit both home improvements and the financing for those improvements.

All references herein are to the California Code as amended by AB 1284 (Dababneh, 2017) and SB 242 (Skinner, 2017).

Property Value Determination

1. Fin. Code § 22685(a) - property value determination using AVMs
 - a. Automated valuation models should be based on industry-standard models, not internally-developed models.
 - i. Acceptable AVMs should account for challenges of valuation (i) in low-income areas that are closely proximate to wealthy areas and (ii) in rural areas where recent comparable sales are scarce.
 - b. Given the potential inaccuracy of AVMs, there should be a cap on the amount of financing available if AVMs are being utilized, so that the property owner is not placed at risk of owing more than the property is worth (e.g., AVMs can't be used if a PACE assessment and existing secured debt would exceed 80% of the property value).
 - c. All AVMs must be generated no more than 30 days prior to the date on which the PACE assessment contract is fully-executed.
 - d. The PACE administrator must keep on file for the duration of the assessment the AVMs used to derive market value for each PACE assessment.

Ability to repay

2. Fin. Code § 22687(a) – ability to repay determination
 - a. The PACE administrator must determine that the property owner can afford repayment of PACE financing based on the property owner's current monthly income, expenses, and debt obligations *before* any home improvement contract and related PACE assessment is signed and before any home improvement work begins.
 - b. Because § 22687(g) requires the PACE administrator to cover the difference between the property owner's ability to repay and the property owner's contractual obligation except "in the case of an intentional misrepresentation" by the property owner, any forms to be completed by the property owner in making the ability to repay determination should be in simple, easily-understandable language with a readable typeface in order to minimize the likelihood that an unsophisticated or vulnerable homeowner will make an error that the PACE administrator may construe as an intentional misrepresentation.

3. Fin. Code § 22687(b)(1) – verification of income
 - a. Program administrators must use multiple (i.e., at least two types of) records to verify income, e.g., 60 days of paystubs and a copy of the most recent tax return or W-2.
 - b. Property owner’s income should be determined by projected next 30 days of income, using the prior 60 days as a guide, unless the property owner is self-employed, in which case the prior year’s tax return may be used.
4. Fin. Code § 22687(c)(1) – “all secured and unsecured debt”
 - a. Term should include non-PACE financing for home improvements and/or PACE-related financing entered into in conjunction with PACE (e.g., Benji loans)
5. Fin. Code § 22687(c)(4) – “monthly housing expenses”
 - a. Regulation is needed to account for reverse mortgages and any other situation where property taxes and insurance are not paid via a lender’s escrow account.
6. Fin. Code § 22687(d) – “ability to pay”
 - a. The ability-to-pay analysis should address whether the property owner can pay the annual PACE obligation on the date the analysis is completed (i.e., not based on projected savings or potential to save through participating in PACE).
7. Fin. Code § 22687(d)(1) – defining “PACE payment”
 - a. “PACE payment” should include all costs associated with the PACE program
 - i. These include loan repayment, fees, interest, and any other expenses associated with the program.
 - ii. These should be broken down into a monthly amount, an annual amount, and an amount that will be due in April and December, so that property owners can understand how the increased expense will impact them on a monthly, annual, and semiannual basis.
8. Fin. Code § 22687(d)(2) – “mortgage payments”
 - a. “Mortgage payments” should include any expected increased escrow payments due to the forthcoming jump in property taxes.
9. Fin. Code § 22687(d)(4) – “basic household living expenses”
 - a. Clear standards are needed for determining household living expenses, such as the VA standards provided in 38 CFR 36.4340(e) or the IRS living standards for Chapter 7/13 eligibility, available at https://www.irs.gov/pub/irs-utl/national_standards.pdf (Indeed, these models are lower than what is probably needed in California.)
 - i. Medical expenses and caregiving expenses should be included, especially for seniors or disabled individuals who require paid caregivers to remain at home.
 - ii. Child care payments should be included as monthly expenses.

- b. PACE administrators should be barred from using a “reasonable estimation” where the actual expenses, e.g., records of property taxes, are publicly available (which the PACE administrator bears burden of discovering) or are documented by the property owner.
- 10. Fin. Code § 22687(g) – repayment for difference between ability to pay & amount financed
 - a. Repayment should be within 10 days of the determination.
 - b. Homeowner should have an immediate right of administrative appeal of a determination that there was an intentional misrepresentation, with the right to pursue remedies in court once administrative remedies are exhausted (i.e., after one administrative appeal).
 - c. If the PACE administrator is unwilling or unable to pay in a timely fashion, the property owner can pursue litigation.
 - d. PACE administrators should be required to post a substantial bond.

Emergency exception

- 11. Fin. Code § 22687(e)(4) – “emergency or immediate necessity”
 - a. A strict definition of “other system whose primary function is temperature regulation” is needed, or this provision could end up becoming a gaping loophole in the ability-to-repay requirement (for example, cool coat paint and insulation are arguably temperature regulation improvements – and should not be exempt from ability-to-pay determinations).
 - i. “System” must be something that will impact the property owner’s health and safety.
 - ii. A reasonableness standard is needed. The provision can’t be used to install a heater in the summer in Los Angeles. It also can’t be used to install A/C during a (normal) winter.
 - iii. Price caps are needed.
 - iv. Restrictions are needed on offering unsecured financing in conjunction with this exception.
- 12. Fin. Code § 22687(e)(6) – limit on amount of the assessment contract
 - a. The \$15,000 cap / \$125 monthly estimate should include all associated fees, interest, and other costs. (See section 7 of this letter regarding ‘PACE payment.’)

Annual reporting

- 13. Fin. Code § 22159 - annual reports filed by PACE administrators should be required to include the following information:
 - a. All complaints re assessments, lenders, and licensees.
 - b. The number and names of contractors disciplined or removed from the program.
 - c. The interest rates charged.
 - d. The debt-to-income ratio of PACE borrowers.
 - e. The time interval separating the signing of an improvement contracts from the signing of an assessment contract.

- f. Compensation structures for PACE contractors.
- g. Any property that has had a title change since the PACE lien was assessed (as a way to track bank foreclosures vs. tax defaults).
- h. A list of properties with PACE assessments where the taxpayer is in delinquent and/or default status.
- i. The number of property owners solicited, the number who applied, the number rejected, and the number who contracted for a PACE assessment.
- j. The zip codes and/or census tracts of properties by which PACE funding is secured.
- k. The range of incomes of homeowners receiving PACE funding, including quantity, mean, median, and standard deviation of distribution, preferably broken down by region.
- l. The range of prices for different project items funded, including quantity, mean, median, and standard deviation of distribution, preferably broken down by region.
- m. The numbers of project items funded (to track solar power v. cool coat paint v. windows, etc.)
- n. The number of PACE-driven foreclosure proceedings.
- o. The amount of money paid out by PACE administrators in settlement of complaints.
- p. All items prescribed by SB 242, including default rates and zip codes (Streets & Highways Code § 5954)
- q. The number and value of monetary settlements entered into with property owners.
- r. The number of PACE assessments transferred at time of sale.
- s. The number of PACE assessments paid off at, or within 60 days prior to, time of sale.
- t. For each PACE assessment paid off early: the amount of all costs charged to the property owner at pay-off, and the interest rate at pay-off.

Definition of “PACE solicitor”

14. Fin. Code § 22017 – definition of “PACE solicitor”

- a. The definition must encompass *all* PACE home improvement contractors, including every contractor who is listed on a PACE administrator’s website or is in the administrator’s network.
 - i. Otherwise, some contractors will seek to evade responsibilities under the PACE legal and regulatory framework by claiming, for example, that they only perform home improvement work and do not solicit homeowners or, if they go door-to-door, that they are offering home improvement services and only mention PACE once it gets to how to pay for those improvements.
 - ii. Otherwise, some PACE administrators could try to avoid liability by arguing that a given contractor/entity doesn’t fit into the “PACE solicitor” definition (i.e., arguing that the contractor just had materials to refer to someone else in case the homeowner was interested/qualified).

- b. The definition must also encompass call centers and similar businesses that solicit property owners by phone, email, or other medium, and then send participating home improvement contractors to the home.

Regulation of non-PACE financing

15. Several PACE administrators facilitate unsecured financial products in conjunction with PACE loans. The ostensible purpose of these unsecured products is to provide financing for home improvements other than the energy- and water-conserving improvements that are supposed to be funded through PACE or for homeowners who don't qualify for PACE (perhaps because of insufficient equity). See <http://www.benjifinancing.com>.
 - a. These products should be subject to the provisions of Financial Code secs. 22252, 22552, 22753, 22758, and 22780, as well as licensure under the California Financing Law.
 - b. Sections 22252, 22552 and 22758 should be interpreted to provide that program administrators and PACE solicitors are only exempt when working with PACE assessments.

Note that homeowners who have paid off their mortgages and own their homes in full are particularly vulnerable to predatory unsecured financing. It would be relatively simple for a lender to sue a homeowner for the amount owing on an unsecured loan, obtain a judgment for the debt, and then place a lien on the home to collect on the judgment. While this lien would be junior to any lien obtained through the associated PACE assessment, it would provide a vehicle for stripping remaining equity from the home after the PACE lien is foreclosed on.

Financial disclosures to homeowners

16. Fin. Code § 22163 – “rates of charge”
 - a. Should include TILA-level disclosure of finance charges.
 - b. Should be in plain English.
 - c. Should include a visual timeline of payments, e.g., a chronological depiction like the following:

			[same every		
Aug 2018	Nov. 2018	Feb. 2019	Nov. and Feb.]	Nov. '32	Feb. '33
Sign contract	Prop tax	Prop tax		Prop tax	Prop tax
	\$8000	\$8000		\$8000	\$4500

(A second, alternative timeline would show the impact of a PACE assessment on an impound account; many homeowners are now reporting unanticipated increases in their monthly mortgage bills as a result of PACE-funded improvements.)

- d. Should include the potential for reassessment under Proposition 13.

17. Fin. Code § 22685(b) – timing disclosure of market valuation to property owner
 - a. Should include a mandatory 3-day interval after receiving market value to determine whether to sign the assessment.

Term of repayment

18. Fin. Code § 22684(j)
 - a. Should require an item-by-item disclosure of the expected life of each product financed through a PACE assessment.
 - b. Should include an accepted definition of “expected life,” one that includes a reasonableness standard. (The Contractors State Licensing Board may be a useful resource for such a definition.)

Timelines for response to findings of rules violations

19. Fin. Code § 22690 – “reasonable period” to respond to Commissioner’s reports of rule violations.
 - a. PACE administrators should have 30 days to respond, and should be able to request one 30-day extension on a showing of good cause.

Penalties for rules violations

20. Fin. Code § 22690(c)(1)(C), Fin. Code § 22716
 - a. To the extent statutorily permissible, restitution should be required, whether that means voiding the lien, reimbursing the property owner so the lien can be paid off, completing shoddy or unfinished work, and/or repaying any reasonable out-of-pocket costs the property owner incurred in order to make the home habitable.
 - i. Completion of shoddy or unfinished work should be by the contractor of the property owner’s choosing.
 - b. There should be a prohibition on mechanic’s liens for disputed unpaid work.

Prohibition against fraud

21. Fin. Code § 22161
 - a. DBO should provide a specific, non-exclusive list of activities that will be considered a violation of this provision, including:
 - i. Representing that a PACE assessment can be repaid once taxes are filed.
 - ii. Representing that the program is a “free” government program.
 - iii. Representing that PACE is a special program for seniors.
 - iv. Representing that the homeowner “prequalifies” for anything prior to an evaluation.
 - v. Representing that an improvement is “energy efficient” when there is no evidence to prove that the improvement actually affects a person’s energy bill (e.g., cool coat paint).
 - vi. Representing that tax credits or tax deductions might apply or be available.
 - vii. Requiring someone to sign an electronic contract without offering to provide the paper version prior to signing.
 - viii. Failing to complete work in a competent manner.

- ix. Failing to complete the work for which the property owner contracted.
 - x. Representing that non-qualifying products can be financed with PACE financing or included with any PACE financed transaction (e.g. customer will get a “free” bathroom remodel if they agree to a PACE lien for a new roof).
 - xi. Leaving the property in worse shape than it was before the home improvement work commenced.
 - xii. Making any representation that would lead the property owner to believe that s/he will be liable for paying an amount less than the full assessment contract amount plus interest and fees .
 - xiii. Making any representation about the financing other than “Someone else is handling the financing; you should talk to them for more information; here is their telephone number.”
 - xiv. Representing that obligations will transfer to the buyer in the event of a sale of the property.
- b. On the day of the initial reference to PACE financing (so as to cover both the emergency exception situation and pressure situations accompanying contract signing), home improvement contractors and PACE solicitors must provide a DBO-approved standard brochure to property owners that discloses the following, and must have each property owner sign an acknowledgement that s/he has read and understands the information in the brochure. That information should include at least the following, presented concisely (i.e., in summary form) and in a manner likely to be read and understood by a reasonable homeowner:
- i. The impact on the homeowner’s property taxes, including the inability to pay monthly at the tax collector’s office in most counties.
 - ii. The potential requirement to pay off the PACE assessment if selling or refinancing the subject property.
 - iii. A statement that the property owner should consult a tax advisor to determine whether the energy-related improvement provides any tax benefits.
 - iv. The potential eligibility standards necessary to qualify for a PACE loan, in list form, including (among others) ability to pay, available equity, and the maximum % of property value allowed for financing a PACE project).
 - v. Other potentially available methods of covering the cost of the PACE project that consumers can look into, including savings, a home equity line of credit, or refinance of an existing home loan.
 - vi. A prominent statement in at least 20-point font: “This is not a government-funded program. Any improvements made will be paid by the consumer on the property tax bill.”
 - vii. A statement that it is up to the consumer to compare contractor pricing and services for the PACE project; that there are many companies that are offering similar services and prices may vary.
 - viii. A recommendation to verify that the contractor has a current license from the Contractors’ Licensing Board.

- ix. A reference to the DBO consumer complaint process that property owners can access if they have issues with the PACE solicitor, the home improvement contractor, or the PACE administrator.

Database Requirements

- 22. Fin. Code § 22693(a) – “real-time registry or database system”
 - a. DBO should require program administrators to use such a database.
 - b. Entries should be made in this database in real time immediately after a PACE financing contract is signed, rather than when the project is funded or when a lien is recorded. (This is in order to mitigate the possibility that a vulnerable homeowner may be approved by multiple PACE administrators for multiple PACE assessments.)
 - c. DBO should prohibit use of the database as a sales/marketing list or for any purpose other than those enumerated by DBO, and should explicitly state that property owners’ information on the list may not be shared.
 - d. Database should include both initial PACE financing and refinancings.

Additional Suggestions

- 23. Establish a directory on the DBO website of each PACE program administrator that identifies the license number, name of the entity, name of a primary contact (officer name), address and phone number. This directory shall serve as a resource for property owners wishing to contact their PACE program administrator for purposes of obtaining information, financial or otherwise, about their PACE obligation.
- 24. Require monthly reported tracking of complaints by PACE administrator and contractor on the DBO website so the information can be readily obtained by consumers and counties/cities.
- 25. End the practice of allowing capitalized interest past 18 months. Some PACE administrators and contractors are offering “no payments for 24 or even 36 months.” Specifically require that program administrators prohibit the use of “subordination agreements” that are misleading to borrowers, purchase money lenders, title and escrow companies, real estate professionals, and other interested parties. “Subordination agreements” typically subordinate all debt associated with the junior lien. Current “subordination agreements” associated with PACE loans subordinate only a small portion of the debt. Therefore, we would suggest including a regulatory provision that states “PACE lenders shall not misrepresent temporary agreements to delay outstanding assessments as an actual subordination of the lien or ongoing debt to potential buyers, conventional lenders, real estate professionals, title companies, or other interested parties.”
- 26. Prohibit PACE administrators and contractors from using or appearing to use government phone numbers or otherwise suggesting that they are affiliated with or part of the county or city government.

The undersigned organizations appreciate the opportunity to provide input at this initial stage of these regulatory proceedings. This set of comments is necessarily incomplete, as a result both of

the narrow time window for the first round of comments and of the size and breadth of the Coalition submitting them. We look forward to providing further, and more detailed, comments in the future as the Department continues to formulate rules to address this critical issue.

Sincerely,

California Low-Income Consumer Coalition
California Bankers Association
California Mortgage Bankers Association
California Credit Union League
California Land Title Association
California Association of Realtors
California Escrow Association
California Mortgage Association
Consumers Union
United Trustees Association
Peggy Moak, Butte County Treasurer-Tax Collector

Coalition Notification List

California Low-Income Consumer Coalition

Ted Mermin

ted@lowincomeconsumers.org

Ronald Coleman

ron@lowincomeconsumers.org

California Land Title Association

Craig Page

cp@clta.org

Anthony Helton

aj@clta.org

California Escrow Association

California Mortgage Association

United Trustees Association

Lexi Howard

lhoward@caladvocates.com

Mike Belote

mbelote@caladvocates.com

Peggy Moak, Butte County

Treasurer-Tax Collector

pmoak@buttecounty.net

California Association of Realtors

Tessa Nevarez

tessan@car.org

Sanjay Wagle

sanjayw@car.org

Consumers Union

Suzanne Martindale

smartindale@consumer.org

California Bankers Association

Kevin Gould

KGould@CalBankers.com

California Mortgage Bankers Association

Pat Zenzola

pzenzola@ka-pow.com

California Credit Union League

Courtney Jensen

courtneyj@ccul.org